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* Died February 10, 1908.

* Appointed January 1, 1908.

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* Assigned to Appellate Division,
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First Department.¹² Term expired.¹³ Elected November, 1907.

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Leary's Estate, In re.....	105 N. Y. Supp.	1126
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Lingke v. Sammis.....	100 N. Y. Supp.	1126
Judgment affirmed. 82 N. E. 1123, 189 N. Y. Memoranda, 71.		
Lockhart v. Hamlin.....	101 N. Y. Supp.	1129
Judgment reversed. 82 N. E. 1004, 190 N. Y. 123.		
Lomas v. New York City R. Co.....	97 N. Y. Supp.	658
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Long Island R. Co., In re.....	160 N. Y. Supp.	1126
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82 N. E. 443, 189 N. Y. 423.		
Lynch v. Shanley Co.....	98 N. Y. Supp.	406
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MacArdell v. Olcott.....	98 N. Y. Supp.	799
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McGuire, In re.....	102 N. Y. Supp.	856
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McNabb v. Meryash.....	98 N. Y. Supp.	1107
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Judgment reversed. 83 N. E. 533, 191 N. Y. 21.		
Markham v. David Stevenson Brewing Co.....	97 N. Y. Supp.	604
Judgment affirmed. 81 N. E. 1169, 188 N. Y. 533.		
Mathers v. Interurban St. R. Co.....	98 N. Y. Supp.	433
Judgment affirmed. 81 N. E. 1169, 188 N. Y. 610.		
Mawhinney v. Converse.....	102 N. Y. Supp.	279
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Meeker v. Smith.....	98 N. Y. Supp.	1108
Judgment affirmed. 82 N. E. 1129, 189 N. Y. Memoranda, 79.		
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Mercantile Nat. Bank of City of New York v. Sire....	96 N. Y. Supp.	1136
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Metz v. Maddox.....	105 N. Y. Supp.	702
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Mishkind-Feinberg Realty Co. v. Sidoraky.....	98 N. Y. Supp.	496
Judgment affirmed. 82 N. E. 443, 189 N. Y. 402.		
Mitchell, In re.....	101 N. Y. Supp.	1135
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Monroe v. Mather-Lovelace.....	100 N. Y. Supp.	27
Judgment affirmed. 82 N. E. 1129, 189 N. Y. Memoranda, 67.		
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Judgment affirmed. 82 N. E. 1129, 189 N. Y. Memoranda, 31.		
Morgan v. City of New York.....	101 N. Y. Supp.	1135
Judgment reversed. 82 N. E. 1099, 190 N. Y. 237.		
Morgan v. Mutual Benefit Life Ins. Co.....	104 N. Y. Supp.	185
Order affirmed. 83 N. E. 433, 189 N. Y. 447.		
Morton v. Horton.....	91 N. Y. Supp.	950
Judgment reversed. 82 N. E. 429, 189 N. Y. 393.		
Mulvey v. City of New York.....	99 N. Y. Supp.	1114
Judgment affirmed. 82 N. E. 1129, 189 N. Y. Memoranda, 68.		
Munn v. Masonic Life Ass'n of Western New York.....	101 N. Y. Supp.	91
Judgment affirmed. 82 N. E. 724, 189 N. Y. 436.		
Murdock v. Gould.....	105 N. Y. Supp.	1132
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Judgment affirmed. 81 N. E. 1170, 189 N. Y. Memoranda, 2.	
Naylor's Estate, In re.....	105 N. Y. Supp. 667
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New York Life Insurance & Trust Co. v. Cary.....	105 N. Y. Supp. 125
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New York Mortgage & Security Co. v. Concourse Park Hotel Co.....	100 N. Y. Supp. 1132
Judgment affirmed. 82 N. E. 1129, 189 N. Y. Memoranda, 80.	
New York Mut. Savings & Loan Ass'n v. Westchester Fire Ins. Co.....	97 N. Y. Supp. 436
Order affirmed. 82 N. E. 1129, 189 N. Y. Memoranda, 29.	
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Judgment affirmed. 81 N. E. 1170, 188 N. Y. 599.	
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O'Brien, In re.....	102 N. Y. Supp. 845
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O'Brien's Estate, In re.....	101 N. Y. Supp. 1136
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Oil Well Supply Co. v. Phoenix Iron Works Co.....	97 N. Y. Supp. 1142
Judgment affirmed. 82 N. E. 1130, 189 N. Y. Memoranda, 34.	
Oishei v. Pennsylvania R. Co.....	102 N. Y. Supp. 368
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Ontario Bank v. Loomis.....	100 N. Y. Supp. 1133
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Judgment affirmed. 81 N. E. 1170, 188 N. Y. 592.	
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Judgment affirmed. 81 N. E. 1171, 188 N. Y. 607.	
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Judgment affirmed. 81 N. E. 1171, 188 N. Y. 565.	
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Judgment affirmed. 82 N. E. 1130, 189 N. Y. Memoranda, 65.		
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Judgment reversed. 82 N. E. 431, 189 N. Y. 355.	95 N. Y. Supp.	1151
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People ex rel. Barney v. Whalen.....	104 N. Y. Supp.	555
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People ex rel. Board of Health of Village of Friend- ship v. Fries.....	96 N. Y. Supp.	327
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People ex rel. Bridgeport Sav. Bank v. Feitner.....	105 N. Y. Supp.	993
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People ex rel. Browne v. Metz.....	104 N. Y. Supp.	649
Order affirmed. 82 N. E. 1131, 189 N. Y. Memoranda, 54.		
People ex rel. Buffalo Burial Park Ass'n v. Stillwell.....	104 N. Y. Supp.	1137
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People ex rel. Burnham v. Flynn.....	100 N. Y. Supp.	31
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People ex rel. Cassidy v. Whalen.....	105 N. Y. Supp.	1136
Order affirmed. 81 N. E. 1172, 189 N. Y. Memoranda, 33.		
People ex rel. Cooper Union For Advancement of Science & Art v. Gass.....	104 N. Y. Supp.	643
Order reversed. 82 N. E. 64, 190 N. Y. 323.		
People ex rel. Empire City Trotting Club v. State Racing Com.	105 N. Y. Supp.	528
Judgment affirmed. 82 N. E. 723, 190 N. Y. 31.	103 N. Y. Supp.	955
People ex rel. Flatbush Gas Co. v. Coler.....	103 N. Y. Supp.	590
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People ex rel. Lodes v. Department of Health of City of New York.....	102 N. Y. Supp.	1145
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People ex rel. McGinley v. Cahill.....	102 N. Y. Supp.	827
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People ex rel. Meagher v. Voorhis.....	101 N. Y. Supp.	1139
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People ex rel. Morrell v. Dold.....	105 N. Y. Supp.	1187
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People ex rel. Nassau Electric R. Co. v. Grout.....	103 N. Y. Supp.	976
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People ex rel. O'Donnell v. McClellan.....	103 N. Y. Supp.	1188
Order affirmed. 83 N. E. 1181, 189 N. Y. Memoranda, 63.		
People ex rel. Robesch v. President of Borough of Queens	105 N. Y. Supp.	637
Order reversed. 83 N. E. 597, 189 N. Y. 497.		
People ex rel. Shepard v. Ellison.....	100 N. Y. Supp.	1137
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People ex rel. Sugden v. McAdoo.....	103 N. Y. Supp.	1138
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Order affirmed. 81 N. E. 1173, 189 N. Y. Memoranda, 13.		
People ex rel. Union & Advertiser Co. v. Stallknecht....	105 N. Y. Supp.	1138
Order reversed. 83 N. E. 1131, 189 N. Y. Memoranda, 25.		
People ex rel. Westminster Heights Co. v. Coler.....	105 N. Y. Supp.	887
Order reversed. 83 N. E. 1132, 189 N. Y. Memoranda, 53.		
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Judgment affirmed. 81 N. E. 1173, 188 N. Y. 606.		
Pirong v. Solvay Process Co.....	100 N. Y. Supp.	1138
Judgment affirmed. 82 N. E. 1132, 189 N. Y. Memoranda, 35.		
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Motion to dismiss appeal denied. 83 N. E. 1132, 189 N. Y. Memoranda, 41.		
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Judgment affirmed. 81 N. E. 1173, 188 N. Y. 590.		
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Judgment affirmed. 82 N. E. 1132, 189 N. Y. Memoranda, 27.		
Poland v. United Traction Co.....	97 N. Y. Supp.	1145
Judgment affirmed. 81 N. E. 1173, 188 N. Y. 598.		
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Judgment affirmed. 82 N. E. 1132, 189 N. Y. Memoranda, 33.		
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Reed v. Delaware, L. & W. R. Co.....	101 N. Y. Supp.	1140
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Robins, In re.....	105 N. Y. Supp.	1140
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Rochester, C., E. Traction Co., In re.....	102 N. Y. Supp.	1112
Motion to dismiss appeal granted. 81 N. E. 1174, 189 N. Y. Memoranda, 28.		
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Rogers v. Village of Attica.....	96 N. Y. Supp.	935
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Rosenberg v. Haggerty.....	100 N. Y. Supp. 1140
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Rosenberg v. Wilson.....	104 N. Y. Supp. 1087
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Judgment affirmed. 31 N. E. 1176, 188 N. Y. 639.	
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Judgment affirmed. 31 N. E. 1176, 188 N. Y. 625.	
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Judgment affirmed. 32 N. E. 1132, 189 N. Y. Memoranda, 27.	
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Seeley v. Franchot.....	104 N. Y. Supp. 1145
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Judgment affirmed. 31 N. E. 1176, 189 N. Y. Memoranda, 22.	
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Judgment affirmed. 32 N. E. 1133, 189 N. Y. Memoranda, 66.	
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Judgment affirmed. 31 N. E. 1176, 188 N. Y. 633.	
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Judgment affirmed. 32 N. E. 1133, 189 N. Y. Memoranda, 73.	
Sloan v. National Surety Co.....	97 N. Y. Supp. 561
Order affirmed. 31 N. E. 1176, 189 N. Y. 596.	
Smith, In re.....	101 N. Y. Supp. 992
Order affirmed. 31 N. E. 1176, 188 N. Y. 549.	
Smith v. Long Island R. Co.....	100 N. Y. Supp. 1143
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Stanton v. International R. Co.....	95 N. Y. Supp. 1161
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Stevens, In re.....	99 N. Y. Supp. 1070
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Judgment affirmed. 81 N. E. 1176, 188 N. Y. 608.		
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Tiernan v. Mack.....	101 N. Y. Supp.	1146
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Tiffany's Estate, In re.....	100 N. Y. Supp.	1146
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Titus, In re.....	102 N. Y. Supp.	851
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Town of Livingston, In re.....	105 N. Y. Supp.	1145
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Judgment affirmed. 82 N. E. 505, 190 N. Y. 51.		
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University Magazine Co., In re.....	82 N. Y. Supp.	74
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Vanderbilt Ave. in City of New York, In re.....	104 N. Y. Supp.	1133
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Order affirmed. 82 N. E. 1133, 189 N. Y. Memoranda, 59.		
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Motion to dismiss appeal granted. 82 N. E. 1133, 189 N. Y. Memoranda, 44.		
Volosko v. Interurban St. R. Co.....	99 N. Y. Supp.	484
Judgment reversed. 83 N. E. 1090, 190 N. Y. 206.		
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Order affirmed. 81 N. E. 1178, 188 N. Y. 596.		
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Judgment reversed. 83 N. E. 571, 191 N. Y. 1.		
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Weltzman v. A. L. Barber Asphalt Co.....	105 N. Y. Supp.
Judgment reversed. 83 N. E. 477, 190 N. Y. 452.	
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Judgment affirmed. 81 N. E. 1178, 188 N. Y. 637.	
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Judgment affirmed. 83 N. E. 1134, 189 N. Y. Memoranda, 31.	
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THE
New York Supplement
VOLUME 107,
AND
New York State Reporter,
VOLUME 141.

(56 Misc. Rep. 437.)

HILL et al. v. MULLER et al.

(Supreme Court, Appellate Term. November 29, 1907.)

MOTIONS—VACATION OF ORDERS—PROCEDURE.

Where, on granting a motion to vacate a judgment against defendant, defendant's attorney presented to the justice an order vacating the same, which order was entered and filed, and plaintiff's attorney, without knowledge that an order had already been signed, also presented an order, which was entered and filed, the correct course was to move to vacate the order entered by mistake, and not for the justice to destroy one of the orders, though he believed that both parties were represented and that tacit consent was given to his act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Motions, § 73.]

Appeal from City Court of New York, Special Term.

Action by Hugh Hill and another, copartners, against Charles Muller and another. From an order denying defendant Muller's motion for leave to file with the clerk of the City Court the copy of an order in place of the original which was destroyed, defendant appeals. Reversed, and motion granted.

See 103 N. Y. Supp. 96; 105 N. Y. Supp. 1120.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

John Oscar Ball (A. P. Bachman, of counsel), for appellant.

ERLANGER, J. Judgment having been entered by plaintiff against the defendant Charles Muller without right so to do, a motion was promptly made to obtain a vacatur thereof, which motion was granted,

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and thereupon his attorney presented to the justice an order vacating such judgment and directing the clerk of the court to cancel the same of record. This order was entered and filed on December 27, 1906. On the same day the attorney for the plaintiff, without knowledge that an order had already been signed, presented an order prepared by him, and this second order was entered and filed. On the following day the attorney for the defendant caused a copy of his order to be made, and when this was done, he also caused a copy, with notice of entry thereof, to be served in the usual way on plaintiff's attorney. The latter then for the first time discovered that two orders had been signed, and he at once informed the justice of the condition of affairs, whereupon said justice sent for both orders, and, after an examination of each, selected the one which in his view accorded with his decision, and then and there, in the presence of the representatives of both sides, destroyed the other and caused the clerk of the court to be informed of his act. Counsel for defendant claims that the clerk present at the destruction of the order had no authority to represent him, and he at once moved the court for an order for leave to file a copy in place of the original which had been so destroyed. From the order denying such leave, defendant appeals.

The affidavits are conflicting as to what occurred at the time; but there is no doubt that when the justice destroyed the order he believed, and had good reason to believe, that both sides were represented and that tacit consent was given to his act. This practice, however, was not the usual one to pursue. The correct course was to apply to the court on motion to vacate the one which had been entered by mistake. An order, once signed and entered, becomes a record of the court in which it is filed, and, until vacated, forms part of the history of the case.

Order reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs. All concur.

ROTHMAN v. KOSOWER.

(Supreme Court, Appellate Term. November 29, 1907.)

LANDLORD AND TENANT—LEASES—LIABILITY OF LESSOR FOR BREACH OF CONTRACT.

In an action to recover for the failure of a lessor to put a lessee in possession of certain premises, expert evidence as to the market rental value of the premises for the purpose for which they were to be used by plaintiff, in the absence of a showing that defendant leased the premises to plaintiff for such purpose, or that the value thereof for such purpose was contemplated by the parties was inadmissible, since plaintiff was entitled only to the difference between the actual rental value and the rent reserved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 453.]

Appeal from City Court of New York, Trial Term.

Action by Jacob Rothman against Abraham Kosower. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered. See 96 N. Y. Supp. 268.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Feltenstein & Rosenstein (Moses Feltenstein, of counsel), for appellant.

Benjamin F. Spellman, for respondent.

LEVENTRITT, J. In an action brought to recover damages for the failure of the defendant (lessor) to put the plaintiff (lessee) in possession of certain premises, the latter testified that he was in the pickle business and that he had intended to use the demised premises for that business. In order to prove rental value, the plaintiff introduced the testimony of an expert, upon whose evidence the court based its finding that the plaintiff was entitled to recover \$1,180 as the difference between the rent agreed upon and the actual rental value. Upon his direct examination this witness was asked: "What is the rental value in the open market of these premises in suit for the purposes for which they were to be used, the pickle business, for three years, commencing May 1, 1905?" This question was objected to as incompetent, immaterial, irrelevant, speculative, and hypothetical. The objection was overruled, and the witness answered: "\$70 per month; about \$840 per year."

We think the exception to the court's ruling commands the reversal of the judgment. The plaintiff was entitled to the difference between the actual rental value and the rent reserved; but he could not recover on the basis of the speculative value of the premises to him for his particular business. It was not shown that the premises were leased to the plaintiff for a special purpose known to the lessor, nor is there any evidence which would justify the conclusion that the value thereof to the plaintiff for his individual business entered into the contemplation of the parties.

Judgment reversed, and new trial ordered, with costs to appellant to abide event. All concur.

AMERICAN STRUCTURAL STEEL CO. V. RUSH.

(Supreme Court, Appellate Term. November 29, 1907.)

1. **APPEAL—REVIEW—HARMLESS ERROR.**

That plaintiff recovers on a mistaken view of the character of the agreement upon which the suit is based is not ground for reversal, where he is entitled to recover in any event.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4034.]

2. **SAME—ESTOPPEL TO ALLEGE ERROR—EXCLUSION OF EVIDENCE.**

Defendant owed plaintiff \$500, and they agreed that defendant should sue to recover \$1,000 due him from another, plaintiff to receive one-half of the amount recovered less expenses of suit, and in case of failure to recover they were to share the costs and defendant was to be released from his debt. Upon defendant's failure to carry out the agreement, plaintiff sued him for the debt. *Held* that, evidence as to what would have been the expenses of the action defendant was to bring having been excluded as immaterial on his objection, he was estopped to complain that a find-

ing for the full amount of the debt was unauthorized, on the ground that the expenses of the other action were to have been deducted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3591, 3600.]

Appeal from City Court of New York, Trial Term.

Action by the American Structural Steel Company against Myron C. Rush. From a judgment for plaintiff, defendant appeals. Affirmed.

See 100 N. Y. Supp. 1019.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

James W. Ridgway (Thomas Kelby, of counsel), for appellant.

Merrill & Rogers (Alfred H. Holbrook, of counsel), for respondent.

ERLANGER, J. On the 6th day of November, 1905, the defendant being at the time indebted to the plaintiff for material furnished as subcontractor in constructing a school building in Queens, entered into an agreement in writing whereby he admitted that he was indebted to the plaintiff in the sum of \$500, balance due, on account of materials furnished and work done. It was further provided in the agreement that there was due to the defendant from the city of New York the sum of \$1,000, which was retained by said city from him. To recover this last-named amount the defendant agreed that he would within 60 days from the date of said agreement institute suit in his behalf against the city, and out of any moneys received by him by or through said suit, or as the result of any settlement thereof or compromise of said claim, he would, upon the receipt of said moneys, forthwith pay to the plaintiff one-half thereof, less the cost and expenses of said suit, including the attorney's fees, all which were to be deducted from the amount recovered. It was mutually agreed that, if the action against the city should be unsuccessful, the plaintiff would share equally with the defendant in the payment of the cost and expenses thereof, including the attorney's fees. The one-half agreed to be accepted by the plaintiff, less the expenses mentioned, was to be in full satisfaction of all his claim against the defendant. In the event of the defendant being defeated by the city, the defendant was not required to pay the \$500, but was to be wholly released from all liability to the plaintiff by reason of said claim. This agreement was clearly for the benefit of the defendant. By its performance he had nothing to lose. If he succeeded against the city, and obtained judgment against it, he was to pay one-half, and if he was defeated in the action he was to be discharged from his liability to the plaintiff, who obligated itself, in the event of the action being lost, to share half of the expense incurred in prosecuting the action. The defendant neglected to bring an action against the city within the time limited, and thereupon this action was brought to recover the \$500 concededly owing from him. The plaintiff recovered upon the theory that the damages were stipulated by the agreement. While this was a mistaken view of the writing, it affords no reason for a reversal, if no injustice was done. We are of the opinion that the verdict was right.

It is urged that the contract is not founded upon a sufficient consideration, and hence unenforceable; but that question was decided adversely to the defendant upon the former appeal. And so it is contended that a finding of \$500 was unauthorized, because the costs and expenses of the action, if it had been brought, would have been deductible from that amount; but when plaintiff attempted to prove what the reasonable cost and expense would be, if such action had been commenced, he was met by defendant's objection that such evidence was immaterial and irrelevant, and he succeeded in excluding the same. The defendant has thus estopped himself from assailing the record in that regard. Had the defendant proceeded against the city, as he agreed to do, presumably he would have recovered the amount asserted by him to be due. After refusing to sue, it does not lie in his mouth to urge that it was incumbent upon plaintiff to establish in this action that the \$1,000 was due from the city and could have been recovered.

The judgment should be affirmed, with costs. All concur.

ROBERT GAIR CO. V. ARMSTRONG.

(Supreme Court, Appellate Term. November 29, 1907.)

SALES—CONTRACT—PERFORMANCE—TIME.

Defendant on April 28, 1903, ordered by letter from plaintiff a certain number of frames to be delivered within six weeks. This order was accepted, and on May 8th defendant ordered another lot of frames, writing on the foot of his letter of April 28th: "Note. Increase the above order to 5 M. of each." *Held*, that the second order should be construed as made on the same terms as the first, and that plaintiff was bound to deliver all the goods within six weeks.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 217-223.]

Appeal from Municipal Court, Borough of Manhattan, Fourteenth District.

Action by the Robert Gair Company against Paul Armstrong. From a Municipal Court judgment in favor of plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Simon Sultan, for appellant.

Richard B. Aldcroft, Jr., for respondent.

PER CURIAM. The action is for breach of contract. On April 28, 1903, defendant wrote to plaintiff, ordering a certain number of frames to be delivered within six weeks. On April 29th plaintiff wrote in reply, guaranteeing delivery of the frames within six weeks. These frames were so delivered, and as to them no dispute arises. On May 8th defendant went to plaintiff's factory and ordered another lot of frames, writing on the foot of defendant's letter of April 28th these words:

"Note. Increase the above order to 5 M. of each, and to be made paneled with pictures supplied."

These goods were not delivered in six weeks, and defendant refused to pay for them, or accept them, and canceled the contract, claiming that the failure to deliver them in six weeks prevented him from filling a contract with the American Tobacco Company, for which he counterclaims damages. The court found for plaintiff. Defendant appeals.

It seems to us that the second order must be construed as being made on the same terms as the first, and that the goods were to be delivered within six weeks, and that plaintiff accepted the order with this understanding.

The judgment must be reversed, and a new trial ordered, with costs to appellant to abide the event.

(56 Misc. Rep. 442.)

JULIUS JOHNSON'S SONS v. BUELLESBACH et al.

(Supreme Court, Appellate Term. November 29, 1907.)

JUDGMENT—DEFAULT—SETTING ASIDE—GROUNDS.

A cause appeared on the day calendar on June 18th, 19th, and 20th, and one of the defendants was in court with witnesses each day ready for trial. On June 19th plaintiffs obtained an order to show cause why the action should not be severed. The motion was denied on June 27th. Plaintiffs entered an *ex parte* order restoring the case to the day calendar, at the head thereof, for the following day. Defendants had no knowledge of the entry of the order until it was served on them on that day. On the following day they applied for a continuance for inability to procure material witnesses. The court granted the motion on defendants' giving an undertaking. On defendants' failure to give the undertaking, a default judgment was entered. Each defendant relied on the other to procure the undertaking. *Held* to require a setting aside of the default on payment of costs and filing undertaking.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 269-286.]

Appeal from City Court of New York, Trial Term.

Action by Julius Johnson's Sons against Joseph Buellesbach and another. From an order denying a motion to set aside a default judgment, defendants appeal. Reversed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Bennett E. Siegelstein, for appellant Caspar Buellesbach.

R. A. McDuffie, for appellant Jos. Buellesbach.

Theodore Prince (Henry S. Dottenheim, of counsel), for respondent.

PER CURIAM. The appeals from two orders and the judgment having been dismissed at the opening of the term, the only appeal remaining is the one from the order of July 18, 1907, denying the motion of the defendants to set aside the judgment entered against them by default. An examination of the record convinces us that the entry of judgment was the result of a "mistake or excusable neglect" on the part of the attorneys for the defendants, and that the motion should have been granted. The case appeared on the day calendar on the 18th, 19th and 20th days of June, 1907, and one of

the defendants was in court with six witnesses each day ready for trial. On June 20th the case was the eighth on the day calendar. On June 19th plaintiffs obtained an order to show cause why the action should not be severed, staying all proceedings on the defendants' part meantime, and all witnesses were dismissed. But for that application and stay the action would have been tried. The motion to sever the action was denied, and on June 27th the memorandum first appeared in the Law Journal. Immediately on that day plaintiffs entered an order ex parte denying the motion and restoring the case to the day calendar, at the head thereof, for the following day. The first intimation defendants had of the entry of that order was when it was served upon them on June 27th. They appeared in court on the 28th of June, with affidavits showing these facts, and the efforts made by them in the short time allowed to procure their witnesses and their inability to secure the presence of "two necessary and material witnesses" in time for the trial, and requested an adjournment until October. But a few days of the June term before final adjournment for the summer vacation remained. The court directed the defendants to give an undertaking by July 2d to pay any judgment that might be entered against them, and the case was thereupon adjourned until October. An order was entered to that effect, reciting defendants' consent, and directing the entry of judgment against them if the undertaking was not filed within the time fixed. They dispute the fact that such consent was given by them, but they did not move to resettle the order.

The two defendants were represented by different attorneys, and each relied upon the other to procure and file the undertaking. The result was that neither filed it, and judgment was entered on the order just referred to. Immediately they moved to vacate it, and the reasons of the neglect were set forth by affidavit. On that motion an undertaking was offered, executed by a surety company, binding itself, "that if the judgment was vacated, and if upon a trial thereafter the plaintiffs prevailed, said surety company would pay said judgment, or cause the same to be paid, not exceeding the amount claimed in the complaint, with interest and costs, to wit, \$845.23, and such further costs as may be added thereto." No Trial Term was then in session, and plaintiffs were amply protected by the undertaking which defendants were ready and willing to give. The motion was denied. We think it should have been granted. The fault originally rested with plaintiffs. But for their stay, which resulted in a delay of eight days before their motion to sever was disposed of, the action could, and probably would, have been disposed of. Meantime the witnesses for the defendants without fault on their part separated, and two of them could not be procured in the short time within which it was necessary to act.

We think, in view of the summary manner in which the action was restored to the calendar, that justice would be better served by giving the defendants their day in court, to the end that their defense may be heard and disposed of on the merits. The defendants, however, should pay as a condition of the favor a trial fee of \$30, a term fee of \$10, for opposing the motion \$10, and all plaintiffs' disbursements

in taking the inquest and entering judgment (*Marchesini v. Scaccianoce*, 110 App. Div. 130, 96 N. Y. Supp. 1095); the undertaking to be served and filed, or if, upon examination, it shall be found that it does not fully protect the plaintiffs, a new one must be executed by a surety company within 10 days.

The order should be reversed, and the motion granted, upon complying with the terms indicated within 10 days after service of a copy of the order. If terms are not complied with, motion denied, with \$10 costs. No costs of appeal.

WILKE v. NEW YORK CITY RY. CO. (two cases).

(Supreme Court, Appellate Term. November 29, 1907.)

APPEAL—RECORD—CORRECTION—REMITTING TO LOWER COURT.

Where, on appeal from two judgments of the Municipal Court, the minutes are transposed, so that the minutes in one case form part of the record in the other, and vice versa, the returns must be sent back to the files of the Municipal Court for correction; the Appellate Term having no power to change them.

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Two actions by William Wilke against the New York City Railway Company. From judgments for defendant in each case, plaintiff appeals. Returns sent back to the files of the Municipal Court, to await such action for their correction as counsel might decide.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Henry F. Gannon, for appellant.

Walter L. Bunnell, for respondent.

PER CURIAM. It is conceded by counsel that the minutes in these cases have been transposed; that is, the minutes in No. 80 should form part of the record in No. 81, and vice versa. This court has no power to change the returns herein, and the cases cannot be properly decided with the returns in their present shape.

They must be returned to the files of the court, to await such action for their correction as counsel may decide.

(56 Misc. Rep. 457.)

ALPERN et al. v. HIRSCH et al.

(Supreme Court, Appellate Term. November 29, 1907.)

APPEAL—REVERSAL—DEFECTS IN RECORD—NECESSITY OF NEW TRIAL.

Where the record on appeal is so unintelligible that the judgment cannot be said to be consistent with any aspect of the evidence, the judgment will be reversed for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 4600-4603.]

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Morris Alpern and another against Samuel Hirsch and another. From a judgment in their favor, plaintiffs appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Marcuson Bros., for appellants.

Joseph Wilkenfeld, for respondents.

PER CURIAM. The record is so unintelligible that we cannot say that the judgment rendered is consistent with any aspect of the evidence. The rights of the parties cannot satisfactorily be determined without a new trial.

Judgment reversed, and new trial ordered, with costs to appellants to abide event.

LEMON v. MECHANICS' & TRADERS' BANK.

(Supreme Court, Appellate Term. November 29, 1907.)

BANKS AND BANKING—DEPOSITS—ACTION BY DEPOSITOR—EVIDENCE.

In an action by a bank depositor to recover an alleged deposit, evidence held insufficient to authorize a verdict finding that plaintiff made the deposit sued for.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 526.]

Appeal from City Court of New York, Trial Term.

Action by E. Forest Lemon against the Mechanics' & Traders' Bank. From the City Court judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Charles Strauss, for appellant.

Warner & Williams, for respondent.

GILDERSLEEVE, P. J. The plaintiff, alleging that he, on or about January 13, 1906, deposited with a branch bank of the defendant the sum of \$350, which the defendant refused to pay over upon demand, brought this action to recover the same, and judgment was rendered in his favor after a trial by a jury. The defendant denied the making of the said deposit, and upon this appeal from the judgment urges that the verdict is against the weight of evidence.

The plaintiff was the only witness sworn in his own behalf. He testified that he made a deposit of \$350 in cash at the window of the receiving teller of the bank; that he saw the latter take the money and enter the amount of the deposit and the date, "January 13, \$350," in plaintiff's pass book, which he handed to the teller for that purpose; and that he then left his pass book to be balanced. It is undisputed that on January 17, 1906, the pass book was balanced, and that included in

the balance is the item of \$350 aforesaid. Subsequently the plaintiff made several small deposits from time to time, for some two or three months, when his book was again written up, and he was advised that an error had been made in crediting him with the sum of \$350 on January 13, 1906, and payment of that amount was refused.

In contradiction of the plaintiff's claim the bank showed, without dispute, that it had a depositor by the name of Lennon, whose name occupied a part of the same page as the plaintiff's name on the defendant's ledger, one account immediately following the other; that Lennon, who was an out of town resident, made a deposit on January 13, 1906, of \$350, without his pass book, and in the form of a check; that this deposit was, at the time it was made, entered to Lennon's credit on the bank's daily alphabetical list of deposits, but was not entered to Lennon's credit on the ledger. This mistake was not discovered until Lennon left his pass book to be balanced on February 20th, and, the sum of \$350 not appearing in the ledger nor in his pass book, that sum was omitted in the balance, which Lennon discovered upon receiving his book. It was further shown that on January 13, 1906, the day that the plaintiff claims to have made his deposit, one Meehan, an assistant bookkeeper, was working on the defendant's ledger, and that he entered upon the ledger the credit to the plaintiff, evidently from Lennon's deposit slip. His testimony to this effect is supported by the fact, also shown, that there was a deposit slip from Lennon for that amount on that date and in Lennon's handwriting, that his name was subsequently found to have been entered in the aforesaid alphabetical list of credits on that day and for that amount, that there was no deposit slip on that date from the plaintiff, or any other deposit slip for that amount from any one on that day other than Lennon. One Szilgye, a clerk in the bank, made up the balance on the plaintiff's pass book, and he testifies that in so doing he found the entry on the ledger to plaintiff's credit of \$350 under date of January 13, 1906, and that he thereupon wrote into plaintiff's pass book the entry therein appearing, "January 13, \$350," and included it in his computation of plaintiff's balance.

That such entry was in the handwriting of this clerk, and not that of the receiving teller, was shown by the vice president of the bank and by the receiving teller, and therefore strongly tends to disprove the statement of the plaintiff that he personally made the deposit at the receiving teller's window. The pass book was received in evidence, and shows that the entry of January 13, 1906, was not initialed, all the others having the initials of the receiving teller thereon, and it appears that said entry was made on a line in said book below an entry of "January 16, 1906, \$30." This deposit of \$30 January 16, 1906, was admittedly made by the plaintiff, and noted in his pass book on that date by the receiving teller, and initialed by him, and the entry on the line below, "January 13, \$350," is potent evidence of the truth of Szilgye's statement that such entry was made by him at the time he was writing up the plaintiff's pass book, that it was taken from the ledger, and that plaintiff was mistaken when he testified that he left the pass book on January 13, 1906, to be balanced, because, if the book had been left on January 13th, and was in possession of the bank

until January 17th, the plaintiff could not have made a deposit at the teller's window with his book on January 16th, and the entry of January 16th is in the handwriting of the receiving teller and initialed by him.

When asked to explain this situation, the plaintiff admitted that he did not know when he left the book to be balanced, and he offers no explanation as to how the entry of "January 13, \$350" succeeds a deposit of a later date, if the deposits were made by him in their consecutive order as to dates. Further, it is clear that, if the plaintiff actually made a deposit on January 13th, the entry thereof would not follow one of January 16th, unless the receiving teller deliberately skipped a line in making the entry. The amount claimed by him to have been deposited on January 13th is conceded by him to have been an unusually large deposit, and although he states when, where, and how he got this money, and that he carried it around with him for several weeks, he nevertheless is unable to state the exact date when he made the deposit, the hour when made, the denomination of any of the bills, whether he wrote a deposit slip in the bank or not, or explain the peculiar position of the entry in his pass book, which he says he looked at after it was made by the receiving teller.

As another circumstance tending to disprove plaintiff's claim and to substantiate the defendant's position, it is shown that January 13, 1906, fell on a Saturday, that the bank was open for the receipt of deposits only from 10 a. m. to 12 m., that the regular receiving teller was at the window all the morning of that day, and that the teller knew nothing whatever about the receipt of any money from the plaintiff. A man named Herlihy was the receiving teller at the time. The plaintiff admits that he did not give the money in question to this man, and it is in proof that Herlihy did not make the entry of January 13th. It can hardly be presumed that Herlihy would enter in plaintiff's pass book the entry, "January 16, \$30," before one of "January 13, \$350," without ascertaining why and how the latter entry got into the book. The plaintiff is the only witness in his behalf. He is strongly interested in the outcome of this action. The defendant, on the other hand, was supported by Lennon, who was disinterested; Herlihy, a former receiving teller, but no longer in its employ; Meehan, the bookkeeper by whom the mistaken ledger entry was made; and Szilgye, the clerk by whom it was transferred to the plaintiff's pass book. The documentary evidence and all the probabilities surrounding the transaction in question are contradictory of the plaintiff's, and confirmatory of the defendant's, story.

The verdict so strongly preponderates against the plaintiff as to indicate bias and prejudice on the part of the jury, and the judgment must be reversed.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

BEHRMANN v. MARCUS.

(Supreme Court, Appellate Term. November 29, 1907.)

1. **BROKERS—COMPENSATION—WHEN EARNED.**

Where a purchaser procured by a real estate broker refuses to accept the contract proposed, and no contract of purchase is executed, the broker cannot recover commissions, whether defendant, who employed him, had an option on the property or a mere authorization to sell it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 55.]

2. **SAME—EVIDENCE—ADMISSIBILITY.**

Where, in an action by a real estate broker for commissions for procuring a purchaser of real estate, it appeared that the terms of sale were not given by defendant at the time the broker was employed, evidence of occurrences at the meeting of the parties resulting in the purchaser refusing to accept the contract proposed was admissible, whether defendant had an option on the property, or had mere authority to sell it.

Appeal from Municipal Court, Borough of the Bronx, First District.

Action by John J. Behrmann against Samuel Marcus. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

See 102 N. Y. Supp. 467.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Abraham J. Herrick, for appellant.

Willoughby B. Dobbs, for respondent.

GILDERSLEEVE, P. J. The plaintiff and the defendant are real estate brokers. Messrs. Friedman & Raff owned property at 228th street and the White Plains Road, in the borough of the Bronx, which they desired to sell. The action was brought to recover the sum of \$150 as commissions for procuring for the defendant a purchaser of said property. The pleadings are oral. The plaintiff alleges "commissions," and the defendant "denies every allegation contained in the complaint." The judgment is for \$150 and costs. Defendant appeals.

It is undisputed that on December 13, 1905, the defendant called at plaintiff's office and told him that, if plaintiff would sell the property in question that day for \$9,200, he would give him a commission. The parties disagree as to the amount of the commission promised by the defendant. The conclusion we have reached renders the issue on that point unimportant. It appears from an exhibit introduced by defendant that he was authorized by the owners to offer the property for sale at \$9,200, good until December 13, 1905, for which he was to have a commission of \$200 when the sale was effected. The plaintiff testifies that defendant stated that he had an "option" on the property. The defendant swore that he told the plaintiff that he had an "authorization" to sell the property. Whatever the truth may be as to what was said, by reason of the conversation that took place plaintiff procured one Houlihan as a prospective purchaser and gave defendant a check for \$50 or \$100 (the amount does not clearly

appear) to bind the trade, and made an appointment to meet that afternoon at 3 o'clock for the purpose of executing a formal contract of purchase and sale. The parties met, pursuant to appointment, at the office of Mr. Stone, a lawyer representing the owners. There were present the plaintiff and defendant, Mr. Houlihan, his lawyer, Mr. O'Hara, Mr. Stone, and the owners, Friedman & Raff. Mr. O'Hara, on behalf of Mr. Houlihan, would not accept the contract that was proposed to be given, and no contract was executed. Mr. O'Hara, when called by plaintiff in rebuttal, so testified. It appears that Mr. Houlihan was a man of means, ready, able, and willing to make the purchase; but the testimony is fatally defective in failing to show his willingness to buy upon the terms proposed.

As nearly as can be gathered from the record, the learned trial justice concluded that the defendant represented to the plaintiff that he had an "option" on the property, and did not credit the defendant's testimony, in which he said he had "an authorization." Having assumed this fact, the court evidently further concluded that the defendant was acting in the capacity of principal, and the plaintiff, in producing Mr. Houlihan, brought forward a purchaser ready, able, and willing to enter into a contract, and therefore defendant was liable upon his promise to pay the plaintiff a commission. This state of facts, if established, did not make the defendant liable. The trial court seems to have overlooked an essential element to the creation of a liability for a commission under the circumstances, viz., an agreement between the purchaser and vendor upon the terms of sale. Unless their minds met on this point, no sale was effected and no commission earned. This is true, whether the defendant did or did not hold an option. The trial court excluded substantially all that occurred at Mr. Stone's office when the meeting took place for the purpose of executing the contract. The record contains the following statements by the court:

"It is in the testimony that the party was willing, ready, and able, and it has not been denied by your people. It is admitted on both sides."

And again:

"Mr. Behrmann testified, correctly or not, that he was there. They came down with a certified check, and it is not denied that he went there with the certified check, and Mr. Marcus employed him to sell this property—not Mr. Raff or somebody else. Mr. Marcus either employed him, or did not employ him. That is the position."

And again:

"I will exclude all testimony as to any proposed contract being entered into at that office, on the ground that Mr. Marcus told Mr. Behrmann to sell this property."

And again:

"I will not allow anything to go into the record that took place down there in reference to selling this property. * * * I do not care anything about it"

This ruling was error. The occurrences at Mr. Stone's office bearing upon the question of the meeting of the minds of Houlihan and

Friedman & Raff were competent and material. Complete terms of sale were not stated by defendant at either of the interviews between plaintiff and defendant. They had to be fixed, even if defendant held an option and was acting in his own behalf. Mr. Stone's office was the place named for settling the business. The plaintiff's testimony in reference to the amount of cash to be paid is that the defendant said: "I guess \$500 is sufficient." He had already paid a deposit of \$50 or \$100, and yet told Houlihan to bring down a certified check for \$500. This would make a payment of \$550 or \$600. There is no evidence of any definite statement by the plaintiff of the amount of cash required to close the transaction. Considering the testimony in the most favorable light for the plaintiff, it cannot be truthfully said that the minds of the parties had met on all the terms of the sale. No agreement had been reached by which Houlihan had assented to the amount of mortgages, the character of the deed, or the time for closing the title. This court said, in reversing a judgment in this case on a former appeal (102 N. Y. Supp. 467):

"Thus the transaction dropped, upon the failure of the plaintiff to produce a purchaser ready and able to buy the property upon the terms laid down by the sellers."

It may be repeated in disposing of the present appeal. For the reasons above stated, the judgment must be reversed, and a new trial ordered, with costs to appellant to abide the event.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

(56 Misc. Rep. 496.)

LEWYT v. DRY DOCK, E. B. & B. R. CO.

(Supreme Court, Appellate Term. November 29, 1907.)

CARRIERS—PASSENGERS—WHO ARE PASSENGERS—PAYMENT OF FARE.

Where a person boarded a street car and tendered the conductor a transfer in payment of his fare, he was a passenger, although the conductor refused to accept the transfer, and the carrier was liable for an assault upon him by the conductor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 974.]

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Arthur Lewyt against the Dry Dock, East Broadway & Battery Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Jacob Gordon, for appellant.

William E. Weaver, for respondent.

PER CURIAM. The plaintiff testified that he boarded a Second Avenue car at Eighty-Sixth street and asked the conductor for a transfer to Grand street, which was given him and which was admitted in evidence; that he rode to Grand street and boarded a Grand Street

horse car operated by the defendant, and when his fare was demanded offered the transfer to the conductor, who said:

"This transfer is no good." That I would have to pay another fare or get off, and I told him that I would get off when the car stopped, and with his foot then he kicked the bundle off in the street, and he gave me a punch in the eye, and I fell down from the car, and the goods were ruined."

The defendant made no attempt to controvert this proof. Judgment was rendered for the defendant, and the plaintiff appeals.

It is urged by the respondent that the plaintiff could not recover, as he was not a passenger for hire. This position cannot be upheld. The plaintiff had boarded the car as a passenger, he had tendered in payment of his fare a transfer, and, upon being told that the transfer was of no value, he expressed a willingness to leave the car as soon as it could be stopped. He was entitled to as much consideration from the servants and employes of the defendant as though he had actually handed the conductor the fare demanded. The defendant owed him the duty of either carrying him safely to his destination or affording him a reasonable opportunity to alight. Even if he had refused to pay his fare and had persisted in riding, his ejectionment for nonpayment could only be accomplished by resorting to no more force than was actually necessary. Under the facts disclosed the plaintiff proved a cause of action, and the judgment rendered has absolutely no foundation.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

(56 Misc. Rep. 557.)

JOSIAS v. NIVOIS.

(Supreme Court, Appellate Term. November 29, 1907.)

WITNESSES—TESTIFYING FROM MEMORANDUM.

In an action to recover commissions under a contract of employment by which plaintiff was to receive 5 per cent. on all sales of defendant's patent chronographs, evidence by the president of three corporations which were manufacturing and selling the chronographs that a memorandum in his possession shows that such corporations disposed of 16,409 chronographs was inadmissible, where the memorandum was not made by the president at the time of the sales, and he did not make the sales, or have any personal knowledge regarding them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 877, 878.]

Appeal from City Court of New York.

Action by Herman Josias against Victor Nivois. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Harry L. Herzog (Moses Cowen, of counsel), for appellant.

Herbert R. Limburg, for respondent.

ERLANGER, J. The plaintiff was awarded a verdict in an action brought to recover commissions claimed to have been due his assignor

for services rendered under a contract of employment. The defendant is the owner of a patent stop watch attachment. Plaintiff's assignor, Simon Goldsmith, claims that he was employed to sell chronographs for defendant on a commission of 5 per cent. on all sales, whether made by him or by any person acting for defendant or having the right to manufacture and sell the chronographs. The defendant, admitting the employment, contends that Goldsmith was to receive a commission only on sales made or effected through him, and that he had been fully paid for such sales, excepting the sum of \$180, being the amount of commissions on sales made by plaintiff's assignor, but collected since the termination of their relations. The issue presented was whether the defendant agreed to pay Goldsmith, not only a commission on sales which he made, but on sales with which he had absolutely nothing to do, and, indeed, which were made by third parties, who had simply acquired a license to use defendant's patent in connection with the manufacture of watches.

Plaintiff's case rests entirely upon his own testimony. The commissions were paid monthly. When the first payment was made, on February 11, 1905, a statement was prepared, setting forth in detail the names of the parties to whom sales had been made and the sums collected, and underneath the total was the percentage stated, "5%," and a computation showing the amount due to be \$32.17, below which was the following, in the handwriting of the plaintiff:

"Commission on sales expires by mutual agreement on December 15, 1905. Bills remaining unpaid on that date still entitled to same commissions to be paid to me as soon as received, and on all sales that I make and accepted by Victor Nivois up to December 15, 1905.

"Wit.: S. L. Johnston.

Simon Goldsmith."

Prior to the signing of this paper, and on July 13, 1904, defendant entered into an agreement with the New York Standard Watch Company, by which that company was to manufacture, sell, and deliver to defendant 100,000 watch movements with stop watch attachments under the patent owned by defendant, for \$3.35 each for the seven-jewel movement, and \$3.75 each for the ten-jewel movement. Of this company one Zurbrugg was president. He was also president of a corporation known as the "Keystone Watch Case Company" and of the Philadelphia Watch Case Company. On December 30, 1904, a license was granted by defendant to the Keystone Company (which recited the agreement of manufacture made with the Standard Company), granting to that company a license to use the patented attachment for export business only, on a royalty of 50 cents to defendant on each watch movement sold by the Keystone Company; and on January 25, 1905, a similar license was granted to the Philadelphia Watch Case Company. It should be noticed that these three agreements antedated the paper writing executed by Goldsmith. In December, 1905, when the final monthly statement was rendered of sales made by Goldsmith, upon which he received his commissions, he claimed commissions on the export sales made by the Keystone and Philadelphia Companies and all sales made by defendant. His right thereto being disputed, he assigned his claim to the plaintiff, who commenced this action.

It does not appear that prior to December, 1905, when the last pay-

ment of commissions then due Goldsmith was made, he demanded or claimed to be entitled to commissions on the export sales made by the Keystone and Philadelphia Companies under their licenses. While Goldsmith testified that, embraced in the monthly statements itemizing the sales made and upon which the 5 per cent. commission was calculated, there were included sales not made directly by him, it appears that in those instances the names of such customers appeared upon a list which he submitted to defendant, and thereafter, when any sales were made through correspondence by defendant with persons on such list, the commission was allowed by defendant and included in the sales upon which the monthly calculation was made. There seems to have been no discussion on the subject between the parties, but the defendant assumed that plaintiff's assignor was entitled to a commission whenever a sale resulted from correspondence with a person on the list of possible customers furnished or submitted to him by Goldsmith. There is no explanation made by Goldsmith why, during the entire period of employment, he made no demand or claim for commission upon the export trade of defendant's licensees, and the only explanation made of the paper writing of February 11, 1905, which limits the commissions to sales made by Goldsmith, is that he was forced to sign the paper, but without any very clear explanation of the nature of the coercion used.

When it is considered that the writing above quoted is Goldsmith's own phrasing, and that the body as well as the signature are in his handwriting, and that no objection was raised to its form intermediate its execution in February and the termination of the relations in December, it would seem that the plaintiff should have sustained the claim of Goldsmith having been "forced" to execute the paper by some fact or circumstance in addition to Goldsmith's general statement that his act was not voluntary. In addition to the defendant's evidence, the witness to the writing, Sadie L. Johnston, who at the time of the trial was no longer in defendant's employ, fairly met Goldsmith's statement that he was driven or "forced" to sign the paper. Under the licenses which defendant granted to the Keystone and Philadelphia Companies, he had no control over the sales made by those companies, receiving simply a royalty of 50 cents on each watch movement sold by them; and yet plaintiff's claim for commissions is founded, not upon the royalty, but upon the selling price of the chronographs at the rate of \$3.35 on the seven-jewel movement, and \$3.75 on the ten-jewel movement. As the defendant's royalty from the Keystone and Philadelphia Companies was only 50 cents on each movement sold, irrespective of whether it was a seven-jewel or ten-jewel movement, if Goldsmith's story is correct, he was to receive about one-third of the amount realized by his employer, and this, too, on licenses granted without any assistance from him and on sales effected by the licensees.

It is not necessary for us to determine whether the plaintiff made out his case by that fair preponderance of evidence which is required to sustain a verdict, because of errors committed by the trial justice to which reference will be made. Neither is it necessary for us to

determine on this appeal whether the paper writing of February 11, 1905, embodies all the elements of a contract, so as to exclude the parol evidence offered by plaintiff, contradictory of the writing. It may be mentioned, however, that the contention of the respondent that the writing on its face indicates that the parties did not intend thereby to completely set forth all the terms of the employment, because it did not specify the rate of commission, nor the term of the hiring, overlooks the account, which precedes the writing above quoted, but is part thereof, showing that the commission is figured at 5 per cent., and that the term expires on December 15, 1905. But, if it was not a binding contract, it is very persuasive evidence that the parties understood that the commissions were to be paid only on the sales made by Goldsmith.

It was essentially a part of plaintiff's case to prove the number of sales of chronographs made by the Keystone and Philadelphia Companies, in order to fix the amount of the commissions upon which plaintiff founded his right to recover. For that purpose he read in evidence the deposition of Zurbrugg taken at plaintiff's instance. Zurbrugg was asked to state how many chronographs were manufactured by the New York Standard Watch Case Company up to December 15, 1905, and how many of said chronographs of seven jewels and how many twelve-jewel chronographs had been sold, and to whom they had been delivered. To this the witness answered:

"I have a memorandum according to which the New York Standard Company sold to Victor Nivols, up to December 15, 1905, 12,896 chronographs; up to the same date, to the Philadelphia Watch Case Company, 2,177; the Keystone Watch Case Company, 1,396. I do not know how they were divided as to jewels. There have been some manufactured since that, but I could not say how many. I have not the faintest idea."

A proper objection was made, both to the interrogatory and to the answer, and a motion was made to strike out the answer, which was denied, and an exception was noted to the court's ruling. It is quite evident, from the witness' answer, that he was simply reading from a memorandum. Undoubtedly, a witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that it is probable that the transaction was at that time fresh in his memory (Stephen's Digest of Evidence, art. 136); and he may use a memorandum, no matter by whom or when made, to refresh his recollection, if, after refreshing his recollection, he can testify from memory (Howard v. McDonough, 77 N. Y. 592; Rathborne v. Hatch, 80 App. Div. 115-118, 80 N. Y. Supp. 347; Wise v. Phenix Fire Ins. Co., 101 N. Y. 637, 4 N. E. 634). But here the witness did not testify from memory, nor use the memorandum to refresh his recollection. It did not appear that he made the sales, or had any personal knowledge regarding them. His evidence would indicate that he had no personal knowledge concerning the sales, because he had not "the faintest idea" how many chronographs had been manufactured since December 15, 1905, and did not know how those which were sold prior to that date were divided as to jewels. He simply testified that he had a memorandum according to which the

Standard Company had made sales in the amount stated by him, without proof of the correctness of the items.

The injury to the appellant through this error of the learned trial justice is intensified, when the record is examined and found to be barren of any other evidence of the amount of sales made by these various companies, and upon which a recovery was secured. The plaintiff's assignor on his cross-examination, stated that other than the sales made by himself, concerning which there was no dispute, he only knew of the sales by the defendant's licensees from information furnished him by Mr. Zurbrugg, to whose deposition we have referred. Indeed, the trial justice thought that "there should appear better evidence than the witness (Goldsmith) has given upon this point upon the number of sales by each of these concerns." On objection made, he stated that the testimony of Goldsmith as to these sales was simply based on statements made by Zurbrugg in his deposition, and that it was quite evident, from the cross-examination of the witness, that he could not give any testimony, other than by hearsay, on the subject of the sales made by the Standard, Keystone, or Philadelphia Companies. The verdict, therefore, rested entirely upon the evidence of Zurbrugg, which was erroneously admitted.

The judgment and order appealed from should be reversed, and a new trial ordered, with costs to appellant to abide the event.

LEVENTRITT, J., concurs. GILDERSLEEVE, P. J., concurs in result.

JOSIAS v. NIVOIS.

(Supreme Court, Appellate Term. November 29, 1907.)

APPEAL—RIGHT OF REVIEW—ESTOPPEL—ENTRY BY APPELLANT OF ORDER.

Where an order denying an application to vacate and set aside a verdict and the judgment entered thereon recites that it was entered upon defendant's motion, he cannot appeal therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 970.]

Appeal from City Court of New York.

Action by Herman Josias against Victor Nivois. From an order denying defendant's motion to set aside a verdict, he appeals. Appeal dismissed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Harry L. Herzog (Moses Cowen, of counsel), for appellant.

Herbert R. Limburg, for respondent.

PER CURIAM. The defendant appeals from an order denying his application to vacate and set aside the verdict in this action, and the judgment entered thereupon, for the special reasons mentioned in the notice of motion. The order recites that it was entered upon his mo-

tion. The order is not appealable. *Raymond v. Tiffany*, 115 App. Div. 350, 100 N. Y. Supp. 807. The appeal must therefore be dismissed.

Appeal dismissed, with \$10 costs and disbursements.

HALPERN et al. v. SHERMAN.

(Supreme Court, Appellate Term. November 29, 1907.)

PROCESS—SERVICE—EVIDENCE.

Evidence held sufficient to support a finding that process had been duly and personally served on defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, §§ 202–205.]

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Max Halpern and others against Oscar Sherman. From a Municipal Court judgment in favor of plaintiffs, defendant appeals. Dismissed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Edward Snyder, for appellant.

Benjamin F. Schreiber, for respondents.

PER CURIAM. The defendant appeals upon the ground that no service of the summons was ever made upon him, and submits affidavits in support of his contention. The respondent also submits the affidavit of the person who served the summons, who testifies positively to the time and place of the service and to his acquaintance with the defendant served. This witness is corroborated by a person who testifies that he was with the person making the service, and heard him address the defendant by his name, and saw him hand him the copy of the summons in this action. The affidavits submitted uphold the respondent's contention. The appeal must be dismissed, leaving the appellant to apply to the court below to open his default.

Appeal dismissed, with \$10 costs.

HAPGOODS v. LYNCH.

(Supreme Court, Appellate Term. November 29, 1907.)

BROKERS—EMPLOYMENT AGENCY—COMMISSIONS.

Where plaintiff, an employment agency, obtained a temporary position for defendant, plaintiff was entitled, both under Employment Agency Law, Laws 1907, p. 589, c. 327, § 5, and the terms of the agreement between the parties, to 10 per cent. of defendant's salary.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Hapgoods against Morice A. Lynch. From a Municipal Court judgment for defendant, plaintiff appeals. Reversed. Judgment ordered for plaintiff.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

H. B. Bradbury, for appellant.

James J. Quill, for respondent.

PER CURIAM. The court below found in favor of defendant upon the disputed question of fact as to whether the position obtained by him was a temporary one or not. It follows from that finding that the plaintiff became entitled by the terms of the agreement between the parties, as well as by the provisions of the employment agency law (Laws 1907, p. 589, c. 327, § 5), to 10 per cent. of the defendant's salary. It was, therefore, error to render judgment for the defendant.

The judgment is reversed, and in modification a judgment ordered in favor of the plaintiff for the sum of \$3.13 and \$5 costs in the court below, and, as modified, affirmed, without costs of this appeal to either party.

FELD v. PLATT.

(Supreme Court, Appellate Term. November 29, 1907.)

CARRIERS—LOSS OF GOODS—INSTRUCTIONS.

Where, in an ordinary baggage case, there was no affirmative proof that plaintiff's agent, to whom the carrier's receipt was delivered, was ignorant of its contents, the refusal to charge that the burden was on plaintiff to establish such ignorance was reversible error.

Appeal from City Court of New York, Trial Term.

Action by Simon Feld against Edward T. Platt, as treasurer, etc., of the United States Express Company. From a judgment for plaintiff for \$531.64, and from an order denying a motion to set aside the verdict and for a new trial, and to reduce the verdict to \$50, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

O'Brien, Boardman, Platt & Dunning (George W. Field and Russell H. Robbins, of counsel), for appellant.

Leidy & Goodstein (Herman B. Goodstein, of counsel), for respondent.

PER CURIAM. This is the ordinary "baggage case." There was no affirmative proof that the plaintiff's agent, to whom the receipt was delivered, was ignorant of its contents. Therefore the request to charge that the burden was on the plaintiff to establish such ignorance was proper, and its refusal error.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

TUTTLE v. HAYES et al.

(Supreme Court, Appellate Term. November 29, 1907.)

1. FRAUDULENT CONVEYANCES—RETENTION OF POSSESSION—PRESUMPTION.

Where a picture is not delivered under an alleged sale, and no written evidence of the transfer of title exists, the sale will be presumed fraudulent and void as to creditors; and, under the express provisions of Personal Property Law, Laws 1897, p. 511, c. 417, § 25, this presumption will become conclusive, unless the person claiming the property affirmatively shows that the sale was made in good faith, and not to defraud creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 800, 816.]

2. SAME—ACTIONS—QUESTION FOR JURY—GOOD FAITH OF PARTIES.

In an action against a sheriff for levying upon a picture, claimed by plaintiff, which was in possession of the execution debtor, the question whether the picture had been sold by the debtor to plaintiff in good faith, and not to defraud creditors, *held*, under the evidence, a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 923-932.]

Appeal from City Court of New York, Trial Term.

Action by Silas Tuttle against Nicholas Hayes, as sheriff, and others. From a judgment of dismissal, plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Joseph M. Williams, for appellant.

Thompson & Warren, for respondents.

PER CURIAM. The defendant Hayes, as sheriff, levied upon a certain picture under an execution upon a judgment against one Mrs. Dunne, in whose possession the picture was. Plaintiff claims to have bought the picture from Mrs. Dunne prior to the levy. No bill of sale or other written evidence of the transfer of title from Mrs. Dunne to plaintiff existed, and the picture was never delivered to plaintiff, but remained in the possession of Mrs. Dunne. Under these circumstances the presumption arises that the transfer was fraudulent and void as against the creditors of Mrs. Dunne, which presumption became conclusive of such fraud, unless plaintiff affirmatively showed that it was a bona fide sale, made in good faith, and not to defraud creditors. Personal Property Law, 1897, p. 511, c. 417, § 25. The court dismissed the complaint. Plaintiff appeals.

So far as the facts relating to the sale are concerned, plaintiff's testimony is undisputed. The only evidence of defendant is as to the value of the picture, and the claim that it was left by Mrs. Dunne in her apartment when she moved, and that plaintiff did not call to claim it. The evidence of plaintiff is that Mrs. Dunne asked for a loan of \$100, that he refused to give it, and that she then offered him the picture, which she stated was worth \$500; that inquiry led him to doubt that it was worth so much, and finally he agreed to pay her \$100 for the picture; that he gave her this sum and said he would call

the next day for the picture; that he sent an expressman for it within a day or two; that the expressman did not get it; and that he did not send again. A check for the \$100 so paid to Mrs. Dunne was introduced in evidence. Mrs. Dunne herself testified that she sold the picture to plaintiff, through her daughter, to whom she gave directions for the sale, and who corroborates her statement, and admits receiving the \$100 from the plaintiff. Even assuming that it was the intent of Mrs. Dunne to defraud her judgment creditors by selling the picture to plaintiff before it could be seized by the sheriff, still there is nothing to indicate knowledge of such intent on the part of plaintiff, who paid a valuable consideration for the picture. Upon the one side there is the statutory presumption of fraud, and on the other the testimony of the vendee and vendor tending to repel such presumption. A question of fact was therefore presented, which should have been submitted to the jury.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

(56 Misc. Rep. 498.)

BAUMSTEIN v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Term. November 29, 1907.)

1. CARRIERS—STREET RAILROADS—ACTS OF CONDUCTOR—ASSAULT ON PASSENGER.

A carrier is absolutely liable as an insurer for injuries to a passenger from an aggravated assault perpetrated by the carrier's conductor, followed by the passenger's arrest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1121-1123.]

2. COURTS—MUNICIPAL COURT—JURISDICTION.

The Municipal Court has jurisdiction of an action by a passenger on a street car against the carrier for an aggravated assault, followed by his arrest, committed and caused by the carrier's conductor.

3. CARRIERS—ASSAULT ON PASSENGER—PLEADING.

Where a complaint against a carrier for injuries to a passenger alleged the passenger's unwarranted arrest caused by the conductor, it was competent to show both the arrest and an unwarranted assault committed on the passenger by the conductor, though the complaint was silent as to the assault; it being within the power of the court to have ordered an amendment of the complaint to conform to the proof.

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by Max Baumstein against the New York City Railway Company. From a Municipal Court judgment dismissing plaintiff's complaint on the merits, he appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Morris Meyers, for appellant.

William E. Weaver, for respondent.

PER CURIAM. On April 3, 1906, plaintiff was a passenger on one of defendant's cars. At the time of paying the fare of himself

and one Lipman Kuku he requested the conductor to give him two transfers. This request was several times repeated. Instead of giving the transfers, the conductor assaulted both the plaintiff and Kuku, and, in the language of plaintiff, "he punched me off the platform and Lipman Kuku went down." The conductor, not content with the assault, caused both to be arrested and taken to the station house. After plaintiff proved his case, not alone by his evidence, but by the evidence of an eyewitness to the assault, a motion was made to dismiss the complaint upon the ground "that the plaintiff has not made out facts sufficient to constitute a cause of action." The motion was granted, and the complaint dismissed upon the merits.

The dismissal was unwarranted, and upon the established facts plaintiff was entitled to recover. A more flagrant violation of a duty owed by a carrier to a passenger could hardly be conceived. No attempt was made to contradict the evidence offered. The assault, according to plaintiff's story, was an aggravated one, followed by his arrest, and upon what theory it was determined that for the indignities inflicted upon him the defendant could not be held does not appear. In *Busch v. Interborough R. T. Co.*, 187 N. Y. 388, at page 392, 80 N. E., at page 198, the court, quoting from *Thompson on Negligence*, said:

"A carrier is liable absolutely as an insurer for the protection of a passenger against assaults and insults at the hands of his own servants, because he contracts to carry the passenger safely and to give him decent treatment en route. Hence an unlawful assault or an insult to a passenger by his servant is a violation of his contract by the very person whom he has employed to carry it out."

And in that case it was ruled that the Municipal Court had jurisdiction of such an action. While the complaint is silent as to the assault, the proof is clear on the subject, and it was competent to show both the assault and arrest under the allegations of the complaint. If the complaint was dismissed, because in the court's view the arrest and malicious prosecution alone were made the issuable fact, it was within its power to have ordered an amendment to conform to the proof, so as to promote substantial justice. The dismissal of the complaint cannot be sustained.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

HOWARD v. SATTLER et al.

(Supreme Court, Appellate Term. November 29, 1907.)

COURTS—APPEAL—DECISIONS REVIEWABLE—ORDER OF MUNICIPAL COURT.

An appeal will not lie to the Appellate Term for an order of the Municipal Court directing that an interlocutory judgment be entered.

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Robert R. Howard against Gustave Sattler, impleaded, etc. Judgment for plaintiff, and defendant Sattler appeals. Appeal dismissed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

H. Cooper, for appellant.

H. N. Wessel, for respondent.

PER CURIAM. Notwithstanding the notice of appeal herein recites that the defendant Sattler appeals from an "interlocutory judgment entered herein on the 30th day of October, 1906," no such judgment appears to have been entered. There is an order bearing that date, directing that "an interlocutory judgment be entered," etc.; but the record contains no interlocutory judgment. An appeal will not lie from an order only. *Muttart v. Muttart* (Sup.) 93 N. Y. Supp. 468. It must be from the judgment.

Appeal dismissed, with \$10 costs.

RAIMS v. PENZA.

(Supreme Court, Appellate Term. November 29, 1907.)

TRIAL—TRIAL BY COURT—DUTY OF COURT—DIRECTION OF VERDICT.

Where, in an action for two weeks' salary due under a parol contract of employment terminated by plaintiff giving the required notice, defendant gave evidence that the contract was not to terminate until a specified time, and that before that time plaintiff stated that he was forced to break his contract, and agreed that he would leave the employment for two weeks and leave the salary with defendant, to be retained as liquidated damages if he failed to return and complete the contract, the action of the court in refusing to hear further evidence and rendering judgment for plaintiff was error calling for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 390-395.]

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by Giovanni Raims against Raffaele Penza. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Morris Meyers, for appellant.

Giuseppe L. Maggio, for respondent.

PER CURIAM. The plaintiff, an actor, sued on oral complaint to recover two weeks' salary. The defendant pleaded a general denial and "breach of contract." The evidence of the plaintiff tended to support his contention that the contract of hiring was for an indefinite period, and that it reserved to him the privilege of cancellation upon two weeks' notice, which notice he gave. The defendant, to establish his defense, submitted proof that the contract, made in January, 1907, was not to terminate until the following May; that in the latter part of January the plaintiff stated that he was forced to break his contract in order to work at a rival hall; that he (the defendant) insisted that the plaintiff was under contract until May 1st, whereupon the plaintiff

agreed that he would go to the other hall for two weeks, and that he would leave two weeks' salary with the defendant, to be retained as liquidated damages if he failed to return and complete his contract.

The defendant's version of the employment was supported by the testimony of a disinterested witness, and his testimony as to the circumstances and conditions under which the plaintiff left in January was corroborated by another disinterested witness. This evidence certainly required some explanation on the part of the plaintiff; but, without calling upon him to offer any evidence to rebut the defendant's proof, the court at the close of the defendant's case abruptly ordered the last witness to "step down," and stated:

"I will hear no more witnesses in this case. Judgment for the plaintiff, \$32."

It is unnecessary to comment on the character or weight of the evidence adduced. Suffice it to say that the action of the trial judge was neither proper nor calculated to subserve the ends of substantial justice. The defendant was thereby deprived of his day in court, and he is entitled to have the issue which he presented tried.

The judgment must therefore be reversed, and a new trial ordered, with costs to appellant to abide the event.

(56 Misc. Rep. 484.)

SCHANO v. STORCH.

(Supreme Court, Appellate Term. November 29, 1907.)

BROKERS—COMMISSIONS—WHEN EARNED.

Where a broker's efforts to procure a purchaser fail because of the purchaser's refusal to purchase on the terms fixed by the broker, and the negotiations between them are broken, the fact that the owner subsequently negotiated with the purchaser, and effected a sale to him in consequence of modifying the terms thereof, does not entitle the broker to his commissions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 66, 69.]

Appeal from Municipal Court, Borough of the Bronx, First District.

Action by Charles Schano against Samuel Storch. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Henry Levy, for appellant.

Willoughby B. Dobbs, for respondent.

PER CURIAM. This was an action for commissions on the sale of real estate. The preponderance of proof shows that plaintiff never brought the defendant and the purchaser together. The proposed purchaser refused to buy on the terms named by plaintiff, the negotiations between them were broken off, the plaintiff did nothing further, and the transaction, so far as he was concerned, came to an end. In other words, his efforts ended in failure. Subsequently the defendant

negotiated with the proposed purchaser, the terms of sale were modified, and a sale was effected. Where a broker's efforts fail, his employer is not precluded from thereafter negotiating with the purchaser found by the broker, even on the same terms; and the mere fact that the broker's efforts may have led to subsequent negotiations, which, under more favorable circumstances, resulted in a sale, does not alone entitle the broker to a commission. *Donovan v. Weed*, 182 N. Y. 43, 74 N. E. 563; *Miller v. Vining*, 112 App. Div. 304, 98 N. Y. Supp. 466; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Wylie v. Marine National Bank*, 61 N. Y. 415. The judgment is against the weight of evidence, and should be reversed, and a new trial granted, with costs to appellant to abide the event.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

GOLSTEIN et al. v. KOROL.

(Supreme Court, Appellate Term. November 29, 1907.)

APPEAL—RETURN—CORRECTION—FAILURE TO ATTACH PAPER IN EVIDENCE.

Where a paper admitted in evidence and marked as an exhibit is not attached to the return on appeal, and the case cannot be determined without it, the return will be remitted to the files of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, § 2831.]

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Isaac Golstein and another against George Korol. From a judgment for plaintiffs, defendant appeals. Return remitted to the files of the court.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

S. N. Tuckman, for appellant.

Jacob Friedman, for respondents.

PER CURIAM. The release executed by the defendant Prager to the defendant Korol appears to have been admitted in evidence and marked as an exhibit. It is not attached to the return, and the case cannot be determined without that instrument.

The return is therefore remitted to the files of this court, to enable counsel to take such action therein as they may deem proper.

TRUE & TRUE CO. v. KILLOUGH.

(Supreme Court, Appellate Term. November 29, 1907.)

JUDGMENT—JURISDICTION.

A judgment rendered without jurisdiction of defendant by service of a proper summons is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 80, Judgment, § 25.]

Appeal from Municipal Court, Borough of Manhattan, Fourteenth District.

Action by the True & True Company against Robert Killough. Judgment for plaintiff, and defendant appeals. Reversed, and complaint dismissed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Paul M. Crandall, for appellant.

PER CURIAM. The affidavits submitted upon this appeal are not contradicted, and show that the judgment herein is void, for the reason that the court below never acquired jurisdiction over the person of the defendant by service of a proper summons.

Judgment reversed, with costs, and complaint dismissed.

HINDS v. CALAMARAS et al.

(Supreme Court, Appellate Term. November 29, 1907.)

COURTS—MUNICIPAL COURTS OF NEW YORK CITY—PROCEDURE—OPENING DEFAULT—AUTHORITY OF COURT.

Under the express provisions of Municipal Court Act, § 253, the Municipal Court of the city of New York has power to open the default of the defendant in failing to appear on the return day of the summons.

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by William A. Hinds against Nathan Calamaras and others. From an order refusing to open default, defendants appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

J. Quintus Cohen, for appellants.

PER CURIAM. The court below refused an application to open the default of the defendants herein in failing to appear upon the return day of the summons, alleging in its order want of power so to do. This was clearly error. Although the notice of motion, in addition to asking for the opening of the defendants' default, asked also for the restitution of the money paid under protest by them to the marshal upon an execution theretofore issued upon the judgment, nevertheless, if we assume, without deciding, that the court below had no power to order restitution, it had ample power to open the default and set the cause down for trial. Section 253, Mun. Ct. Act (Laws 1902, p. 1562, c. 580). The moving papers presented good and sufficient reasons for excusing the defendants' default, and nothing was shown in opposition thereto upon the hearing of the motion.

Order reversed, and new trial ordered, with costs to appellants to abide the event.

BICK v. BLEECKER.

(Supreme Court, Appellate Term. November 29, 1907.)

APPEAL—REDUCTION OF JUDGMENT.

Where the only competent evidence as to the value of fruit, for the conversion of which plaintiff sued, fixed it at a certain amount, a recovery of a greater sum will be reduced to that sum on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4498-4505.]

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by Isaac Bick against Harry Bleecker, sued as Hirsch Doe. From a judgment for plaintiff, defendant appeals. Reduced and affirmed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Bernard Breitbart, for appellant.

PER CURIAM. It appears from the record that the defendant is the owner of a number of push carts which he rents. One was rented by the plaintiff, and, not being returned by him, the defendant went to the market and found and took the cart. There was some fruit in the cart belonging to the plaintiff when the defendant took it, for the value of which plaintiff sued. There is no competent evidence of the value of the fruit, except that given without objection by the defendant and his witness, which fixes it at \$2.

The judgment should be reduced to the sum of \$2, and \$5 costs in the court below, and affirmed, without costs of this appeal to either party.

(56 Misc. Rep. 459.)

OPPENHEIMER v. DEMUTH GLASS MFG. CO.

(Supreme Court, Appellate Term. November 29, 1907.)

1. APPEAL—RIGHT TO APPEAL—ORDER ENTERED ON APPELLANT'S MOTION.

A party cannot appeal from an order vacating a judgment granted on his own motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 970.]

2. COURTS—MUNICIPAL COURTS—DECISIONS REVIEWABLE—ORDER OPENING DEFAULT.

Under the express provisions of Municipal Court Act, Laws 1902, p. 1563, c. 580, § 257, no appeal lies in the first instance from an order opening a default and vacating a judgment entered thereon.

3. APPEAL—REVIEW.

A judgment which has been set aside is not reviewable.

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Henry Oppenheimer, trading as the Mercantile Printing Company, against the Demuth Glass Manufacturing Company. From an order granting a motion to vacate a judgment for plaintiff on the

conditions contained in the order, and to review the judgment vacated by the order, defendant appeals. Appeal dismissed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Robinson, Fishel & Robinson, for appellant.

William N. Loew, for respondent.

PER CURIAM. Judgment having been entered against the defendant by default, he moved to vacate the same and for leave to defend. The motion was granted "on the defendant depositing within three days the full amount of the judgment with the clerk." Ten dollars costs were awarded plaintiff, to abide the event of the action. The defendant appeals from so much of the order as imposed the condition mentioned, "and from each and every part of said order." He also recites in his notice of appeal that he intends to bring up for review the judgment entered in favor of plaintiff.

The order of vacatur was entered on appellant's motion. The order is not appealable for two reasons: (1) Because a party cannot appeal from an order entered on his own motion. *Raymond v. Tiffany*, 115 App. Div. 350-352, 100 N. Y. Supp. 807. (2) Because the order is not one of the class specified in sections 253 and 257 of the Municipal Court act (Laws 1902, pp. 1562, 1563, c. 580). *Bevins & Rogers*, App. Court Pr. p. 62. In *Benvenuta v. Candeloro*, 43 Misc. Rep. 684, 88 N. Y. Supp. 357, this court said:

"Under section 257 no appeal lies in the first instance from an order opening a default and vacating a judgment thereon."

It would seem that, under the provisions of the Municipal Court act as it now stands, a defendant who had suffered a default judgment to be entered against him, and upon motion has been allowed to open such default, has no remedy but to comply with the terms imposed as a condition for such favor granted and proceed to a trial of his action. The judgment is not reviewable, because it has been set aside.

The appeal must be dismissed, with costs.

EDDEL v. HILLENBRAND et al.

(Supreme Court, Appellate Term. November 29, 1907.)

1. APPEAL—INSTRUCTIONS—EXCEPTIONS.

Where no exception was taken in the trial court to the charge, it cannot be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1516.]

2. DAMAGES—ACTIONS BY BROKER FOR COMPENSATION—VERDICT—EXCESSIVE.

Where, in an action by a broker, under an alleged custom that a broker aiding another broker in a sale of real estate is entitled to one-half of the commissions, the undisputed evidence was that defendant brokers received as the entire commission only \$500, a verdict for plaintiff for \$475 was excessive, even if the custom contended for prevailed.

Appeal from Municipal Court, Borough of Manhattan, Tenth District.

Action by Ernest U. Edel against E. Francis Hillenbrand and others. Judgment for plaintiff, and defendants appeal. Reversed, and a new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Newton McGovern, for appellants.

John Oscar Ball, for respondent.

PER CURIAM. Plaintiff, a real estate broker, claims \$500 from defendants, who are copartners doing business as real estate brokers, as one-half of the commission received by the defendants on the sale of certain real estate. The plaintiff claims that he aided the defendants in the negotiations which resulted in the sale, and that under the custom of the trade he was entitled to one-half of the commission. The defendants deny the rendition by the plaintiff of any service, and claim that under the custom of the trade, where two brokers work jointly in a transaction which results in a sale, a division of the commission is usually made, but not necessarily in equal shares; the division being governed by the special circumstances attending the transaction. The issues were submitted to the jury in a charge to which no exception was taken; hence the alleged errors cannot be considered. The jury allowed plaintiff \$475 damages. This amount is excessive, as the undisputed evidence is that defendants received as the entire commission only \$500, and, even if the custom contended for by the plaintiff prevails, he is not entitled to more than one-half of that sum.

Judgment reversed, and new trial ordered, with costs to appellants to abide the event.

(56 Misc. Rep. 602.)

BONDY v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Term. November 29, 1907.)

DAMAGES—INJURY TO PERSONAL PROPERTY—VALUE OF USE OF PROPERTY.

In an action for injuries to plaintiff's automobile, where there was no evidence that he used it for business purposes, or as a source of profit, or that he hired any other vehicle to take its place while it was being repaired, its rental value during that time was not a proper element of damages, since it was not shown to be an article in daily use, whose usable value was known and readily ascertained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 272.]

Appeal from Municipal Court, Borough of Manhattan, Fourteenth District.

Action by William Bondy against the New York City Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed, on condition that plaintiff stipulate to reduce the judgment.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

William E. Weaver, for appellant.

William Bondy, pro se.

ERLANGER, J. A car operated by the defendant collided with the plaintiff's automobile, and this action was brought to recover the dam-

ages sustained by reason of the collision. Upon the question of the negligence of the defendant and freedom from negligence of the plaintiff there was a conflict of evidence. The court below found in favor of the plaintiff. The appellant urges that the judgment is against the weight of evidence. An examination of the record does not support such contention. The judgment was rendered for the sum of \$500, the extreme limit for which the court had jurisdiction. The items of damage proven were \$148 for repairs to the machine and the sum of \$69.70 for a new tire. The difference between the total of these two items and the amount of the judgment is for the usable or rental value of the automobile, which a witness testified was \$200 per week for a period of three weeks while the same was being repaired. The plaintiff testified that he was the owner of the machine, and that every time it was taken out it was used for "healthy purposes and pleasure." The proof as to rental value was objected to, and a motion was made to strike it out as irrelevant, immaterial, and not the proper measure of damage, which motion was denied.

It is urged upon this appeal that such damages are not legally recoverable upon the facts established in this case. That the use of an automobile may, upon being shown to have been used for the purposes of business or as a source of profit, have a marketable value, or a value capable of being estimated without indulging in mere conjecture, is undoubted; but nothing of the kind was proved in the case at bar. The plaintiff, so far as appears, did not incur any expense in hiring a substitute for the three weeks his machine was in the repair shop; nor is there any evidence that it was a source of profit or income to him. The evidence as to the rental value was limited to this particular machine, and it was not shown to be an "article in constant and daily use, whose usable value, being known and readily ascertained, constitutes a proper element of damages." *Volkmar v. Third Ave. R. R. Co.*, 28 Misc. Rep. 141, 58 N. Y. Supp. 1021. None of the cases cited by respondent upholds his contention. In those cases the actual reasonable outlay for the rent of articles in lieu of the injured articles was shown, as, for example, in *Wellman v. Minor*, 19 Misc. Rep. 644, 44 N. Y. Supp. 417, the plaintiff proved the amount paid for a carriage in his business while his damaged one was undergoing repairs, and in *Moore v. Met. St. Ry. Co.*, 84 App. Div. 613, 82 N. Y. Supp. 778, it was established that the wagon injured was used in plaintiff's business. The circumstances disclosed by the testimony in the case at bar are somewhat similar to those in *Foley v. 42d St., etc., Ry. Co.*, 52 Misc. Rep. 183, 101 N. Y. Supp. 780, where this court held the plaintiff was not entitled to recover for alleged damages upon such proof.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event, unless plaintiff will stipulate within five days to reduce the judgment to \$217.70 and appropriate costs in the court below, in which event the judgment, as so modified, will be affirmed, without costs of this appeal. All concur.

SCHNEIDER et al. v. FUCHS et al.

(Supreme Court, Appellate Term. November 29, 1907.)

1. PARTNERSHIP—ACTIONS—PROOF OF PARTNERSHIP.

A general denial in an action against several defendants as copartners puts in issue the existence of the copartnership, and no recovery can be had against defendants jointly, unless the proof shows such liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 416.]

2. DISMISSAL—MOTION TO DISCONTINUE.

A motion to discontinue an action brought against several defendants as copartners, made by plaintiff at the close of the entire case, should be granted, where he failed to prove a copartnership.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dismissal and Nonsuit, § 14.]

Appeal from Municipal Court, Borough of Manhattan, Thirteenth District.

Action by Meyer Schneider and another, copartners, against Charles Fuchs and another, copartners as Fuchs & Grillo. From a judgment for plaintiffs, defendants appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Robert J. Robeson, for appellants.

Morris Rothenberg, for respondents.

PER CURIAM. The defendants are proceeded against as copartners, and, without any evidence establishing the existence of that relation, judgment was rendered against them as such for \$121.50. The pleadings were oral. The action was for work, labor, and services and materials furnished, and the answer to the plea a "general denial and misjoinder." The copartnership was put in issue by the general denial, and no recovery could be had against the defendants jointly, unless the proof showed such liability. Counsel for plaintiffs at the close of the entire case conceded that he had failed to prove a copartnership by asking for leave to discontinue the action; but the court declined to grant the motion, and decided the case as above indicated. The motion should have been granted.

The judgment is reversed, and a new trial ordered, with costs to appellants to abide the event.

SMITH et al. v. HOCTOR.

(Supreme Court, Appellate Term. November 29, 1907.)

APPEAL—EXCESSIVE VERDICT—REVERSAL.

Where, in an action for attorney's services, the amount of the verdict for plaintiffs indicated that the value of the services were overestimated, the judgment should be reversed, unless plaintiffs stipulate to reduce the judgment to a proper amount.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4464.]

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by Andrew J. Smith and another against Edward Hocht, as administrator of the estate of John Hocht, deceased. From a Municipal Court judgment in favor of plaintiffs, defendant appeals. Reversed, on condition.

See 99 N. Y. Supp. 843.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

James H. Deigman, for appellant.

Beyer & Weldon, for respondents.

PER CURIAM. The plaintiffs sue to recover the value of legal services performed by them in an action brought on behalf of defendant's intestate in his lifetime against one Kohn for personal injuries, in which case the intestate discharged plaintiffs and substituted another attorney. The plaintiffs detailed the services rendered by them and recovered a judgment in the sum of \$250. We think the value of the services has been overestimated and that \$75 would be fair compensation.

The judgment will be reversed, and a new trial ordered, with costs to appellant to abide the event, unless the plaintiffs stipulate to reduce the judgment to the sum of \$75, in which event the judgment, as reduced, will be affirmed, without costs of this appeal to either party.

(55 Misc. Rep. 485.)

BJORKEGREN v. KIRK.

(Supreme Court, Appellate Term. November 29, 1907.)

CONTRACTS—BUILDING CONTRACTS—ARCHITECT'S CERTIFICATE.

In an action for services of a watchman and for extra work performed in connection with a building contract with provided that payments thereunder should only be made upon the architect's written certificates that payment was due, where the contract is introduced, but the architect's certificates are not produced, evidence as to the extra work and its value is incompetent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1308-1317.]

Appeal from City Court of New York, Special Term.

Action by Charles Bjorkegren against Leonard G. Kirk. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed, and new trial ordered.

See 103 N. Y. Supp. 994.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Wm. Steele Gray (James E. Duross, of counsel), for appellant.

J. Homer Hildreth (George H. Taylor, Jr., of counsel), for respondent.

ERLANGER, J. Plaintiff, claiming that there is due to him certain moneys on a building contract, sues to recover the same. Three

causes of action are set up in the complaint. The first is on a written order, the second for extra work, and the third for the services of a watchman. Full performance of the contract is alleged in accordance with its terms. The contract provides, *inter alia*, "that all payments shall be made upon written certificates of the architects to the effect that such payments have become due." Upon the trial the plaintiff abandoned his first cause of action and limited his recovery to the two other counts.

In order to succeed it was necessary for him to introduce in evidence the building contract referred to, and upon this having been done he was permitted to prove certain alleged extra work and the value thereof, irrespective of the architect's certificates and in despite of the objections of counsel for defendant that such evidence was incompetent. Motions were made to strike out the evidence, which were overruled, and exceptions noted. We think the exceptions present reversible error. The mere fact that the first cause of action was not proceeded with cannot aid the plaintiff. The second count recites that the extra work was performed and materials furnished "in connection with carrying out and the completion of the aforesaid contract," and the third also alleges that the defendant is indebted for moneys expended for the services of a watchman "at the premises and building named in the aforesaid contract." All the causes are so closely interwoven one with the other as to make the certificates of the architect in the present state of the complaint indispensable to the right of recovery, and, the plaintiff having failed to produce the same, the evidence should have been excluded. The same questions were passed upon by this court on the former appeal. *Bjorkgren v. Kirk*, 53 Misc. Rep. 560, 103 N. Y. Supp. 994.

The judgment must be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

CHASE & CO. v. ROSENWALD.

(Supreme Court, Appellate Term. November 29, 1907.)

SALES—CONTRACT—MODIFICATION—BREACH.

Defendant ordered 5,000 catalogues from B. for use for defendant's fall trade, under an agreement that they must be delivered early in April. One-half of said order was delivered about April 15th, and, the balance not arriving promptly, defendant canceled the contract, after which B. asked defendant to accept the balance, as they were worthless to plaintiff, and, if defendant could use them, to do so and pay for such as were used. The balance were delivered, but too late to be used. *Held* that, under the contract as modified, defendant was not liable for the catalogues not delivered in time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 424.]

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by Chase & Co. against Max Rosenwald. From a Municipal Court judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Sturcke & Andrews, for appellant.

Brussel & Beebe, for respondent.

ERLANGER, J. The defendant appeals from a judgment rendered in favor of the plaintiff arising out of the following facts:

The defendant placed an order with one Boleniew for the manufacture and delivery of 5,000 booklets or catalogues containing prices and cuts of hats sold by the defendant. The price agreed upon for the whole lot was to be \$192, of which the defendant paid to apply thereon \$100. Boleniew testified that the delivery was to be made as soon as they could "be gotten out"; that he did not remember that any particular date for delivery was agreed upon, but his recollection was that no specific time was fixed. The plaintiff claims that the order was taken on April 13, 1905, and a part of the catalogues were delivered within a few days after that date. Boleniew also swore that after the first lot of catalogues was delivered he had a conversation with the defendant; but as to what that conversation was his memory is not clear, but he remembers that the defendant was objecting because there was a delay in the delivery of the catalogues. The president of the plaintiff, who was sworn, had no knowledge as to when the order was to be filled.

The defendant testifies that the order was given in March, and that the booklets were to be delivered in the first or second week in April; that he explained to the plaintiff's agent that the catalogues were for the fall trade, and that they must be delivered early in April; that some 2,500 were delivered at or about the 15th of April, which were sent out to the trade; that, the balance of the order not arriving, he telephoned to Boleniew, who from time to time promised delivery; that after a long delay, the books not arriving, he called Boleniew up by telephone and canceled the order; that Boleniew, after considerable discussion of the matter, asked him (defendant) to take the balance, as they were then all printed, and would be worthless to the plaintiff, and if he (defendant) could use them to do so, and if he did use any of them to pay him (plaintiff) such an amount as would be satisfactory to defendant. Subsequently the balance of the catalogues were delivered to the defendant under the last agreement, but too late to be used by him for the purposes for which they were ordered, and none were ever used. In this testimony the defendant was corroborated by one witness, who was at the time of the transaction a partner with the defendant.

The evidence of the defendant and his witness as to the last arrangement made with the plaintiff's agent was not disputed, and both are positive that the time the whole lot was to be delivered was not later than April 15th. It appears, therefore, that, although the defendant contracted to take and pay for the 5,000 booklets, it was upon condition that they be delivered at a certain specified time, which the plaintiff failed to do, except as to about 2,500 of them; that the plaintiff acknowledged his inability to fulfill the terms of the original contract,

and a new one with regard to the balance of the booklets was made. Under the new contract the plaintiff became entitled to pay for only such of the booklets as the defendant was able to use to reach his customers for the fall trade, which proved to be none. Upon the undisputed evidence given by the defendant, he should have had a judgment.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

BRINN et al. v. COHEN.

(Supreme Court, Appellate Term. November 29, 1907.)

1. SALES—ACTION FOR PRICE—DELIVERY—NECESSITY FOR SHOWING.

In an action for goods sold and delivered, delivery must be shown.

2. ALTERATION OF INSTRUMENTS—EVIDENCE—PRESUMPTIONS.

Where, in an action for goods sold and delivered, it appeared that receipts in plaintiff's possession, and offered by them to corroborate their testimony as to a sale and delivery, had been altered, strong evidence was required to rebut any possible presumption that the alterations were made to meet the issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Alteration of Instruments, § 238.]

3. SALES—ACTION FOR PRICE—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show a sale and delivery of goods, as alleged by plaintiffs.

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Simon Brinn and another against Julius Cohen. From a judgment for plaintiffs, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

William Rosin, for appellant.

Solomon Brinn, for respondents.

ERLANGER, J. By a verified complaint plaintiffs allege that on August 17, 1906, they sold and delivered to the defendant merchandise of the agreed value of \$423.78. By a verified answer a general denial was made. The issue was tried, and plaintiffs prevailed. From the judgment of \$471.80 in their favor, defendant appeals.

Delivery was an essential fact to establish; in fact, it was a sine qua non to a recovery. To prove the claim one of the plaintiffs testified with great particularity how the purchase of four pieces of goods was made on the day in question, how the delivery was made, how he accompanied the messenger who carried the goods to the defendant's place of business, how he happened to see the goods in defendant's "store," and how, when the last piece of the four articles was delivered, he obtained from the defendant in his (defendant's) "store" a receipt for the same. The witness, before this precise narration of the transaction, testified that the receipt was signed in the place of business of plaintiffs after the purchase was made. The other plaintiff

testified that he remembered, August 17, 1906, when defendant called and was shown some goods by his brother which were purchased, and that he (the defendant) had purchased goods before. A receipt for the goods, apparently dated August 17, 1906, was offered in evidence to corroborate plaintiffs' version of the transaction on that day. The defendant positively denied the purchase and delivery. He admitted that on August 16, 1905, and on August 17, 1905, he had dealings with plaintiffs, and that in the same month and year he had another transaction with them, consisting of the purchase of two pieces of Venetian cloth, which he returned; that on each of the three occasions he signed a receipt for the goods delivered, and that plaintiffs had in their possession three receipts for the transactions; that the merchandise so purchased by him was paid for; and that since August 17, 1905, he had no dealings with plaintiffs whatsoever. Plaintiff, recalled, testified that in January, 1906, there was sold to defendant some merchandise, and he relied upon his books for corroboration. Up to this point there was presented the conflict, not rare in trials of issues of fact, and if there were nothing else in the case, the result could hardly be interfered with.

But appellant has raised a very serious question, and, if he is supported in his contention, the judgment must be reversed. He refers to the three receipts, and directs the attention of the court to certain erasures and changes in each, and argues that, in order to fasten upon him a liability for a sale and delivery as of August 17, 1906, the receipt (Plaintiffs' Exhibit 1) given on August 17, 1905, for four pieces of merchandise was altered by erasing the figure "5" in the date of the year and substituting therefor the figure "6," so that the receipt as altered would show on its face a transaction as of August 17, 1906, the crucial date in the case. Another receipt was offered in evidence by plaintiffs (Exhibit 2) bearing a date on its face as of August 17, 1905, for four pieces of merchandise, and this receipt, it is claimed by them, refers to the transaction had on that day. Finally, we are referred to a third receipt, calling for two pieces of merchandise (Plaintiffs' Exhibit 4), showing on its face a date as of August 16, 1905. All these receipts are written in pencil, and upon a mere inspection of them it is glaringly apparent that they were changed and altered as charged by the defendant. No attempt was made to explain this unusual condition of affairs, except that one of the plaintiffs was called, and he denied that he "rubbed" the date. These exhibits were at all times in the sole and exclusive possession of plaintiffs, and, when the charge of an alteration was made, in view of the fact that they were introduced to corroborate their story of a delivery and sale, strong evidence was required to rebut any possible presumption in favor of defendant that the alterations were made to meet the issue which the pleadings presented and raised. The denial made was entirely insufficient, and when we consider in this connection the highly improbable story that the plaintiff personally "walked to the store of defendant and seen the goods," and there obtained his receipt after the last piece was delivered, it is difficult to determine upon what theory it can be held that plaintiffs established their case by that fair preponderance of evidence which the law requires.

The court below was probably impressed with the idea that the defendant's denial that he had any transaction with plaintiffs after August 17, 1905, was fairly overcome by entries in the plaintiffs' books showing dealings between the parties after that time. The books were not in evidence. No foundation was laid for their admission, but the parties consented that the court might examine them. This examination showed that in January, 1906, business was transacted with a "J. Cohen, 879 Myrtle Avenue." The address was stricken out, and "No. 43 Eldredge Street," the address of defendant, inserted in its place, and plaintiff explained the erasure by saying, "I made a mistake, and put that in." He could not remember at first how many "Julius Cohens" he had for customers. Then he declared that he never sold goods to the other Cohen. The court seemed in no way impressed with this additional erasure, and declared that the books supported the claim of plaintiffs, and rendered judgment in their favor as shown.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

(56 Misc. Rep. 457.)

TOBIAS v. METAL STAMPING CO.

(Supreme Court, Appellate Term. November 29, 1907.)

COURTS—MUNICIPAL COURTS OF NEW YORK CITY—COSTS—TAXATION—APPEAL.

An appeal cannot be taken from an order reviewing the taxation of costs under a judgment in the Municipal Court of the city of New York, but it must be taken from the judgment.

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by William A. Tobias against the Metal Stamping Company. From an order reviewing taxation of costs, plaintiff appeals. Appeal dismissed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

James E. Smith, for appellant.

Lachman & Goldsmith, for respondent.

ERLANGER, J. The notice of appeal purports to be from "an order * * * amending and modifying a judgment * * * wherein the amount of said judgment was reduced \$10." The record shows, however, that a motion was made by the defendant upon an order to show cause "why the taxation of costs should not be reviewed and the defendant allowed to tax his costs in the sum of \$10, and why said costs should not be deducted from the amount of the judgment awarded the plaintiff." This motion was granted, and an order entered "that the taxation of costs herein be and the same is hereby reviewed, and the defendant hereby is allowed the sum of \$10 costs, and that said \$10 costs be deducted from the amount of the judgment heretofore awarded plaintiff, and that the judgment entered herein June 25, 1907, be modified by deducting therefrom said sum of \$10." This motion was made and the order granted under the

provisions of section 342 of the Municipal Court act (Laws 1902, p. 1589, c. 580), and is not an appealable order. The appeal should have been taken from the judgment. *Bevins & Rogers*, App. Term Practice, 63; *Spiegelman v. Union Ry. Co.*, 95 App. Div. 92, 88 N. Y. Supp. 478.

Appeal dismissed, with \$10 costs. All concur.

WALKLEY v. CUPETA.

(Supreme Court, Appellate Term. November 29, 1907.)

COURTS—MUNICIPAL COURT OF NEW YORK CITY—APPEAL.

Under Municipal Court Act, Laws 1902, p. 1563, c. 580, § 257, providing that an appeal will lie from an order denying a motion to open a default, an appeal is permitted only from an order, and until the order is entered no appeal will lie; hence, where it seems that a motion to open a default was made and denied, but no order denying the motion appears upon the record, and respondent claims that none was ever made or entered, the appeal will be dismissed.

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Frank E. Walkley, Jr., against Elizabeth M. Cupeta. From a denial of a motion to open a default, defendant appeals. Appeal dismissed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Leon N. Futter, for appellant.

J. Wilson Bryant, for respondent.

PER CURIAM. This appeal must be dismissed. The notice of appeal recites that it is taken from an order "made and entered herein June 28, 1907, denying defendant's motion to open her default." No such order appears in the record, and it is claimed by the respondent that none was ever made or entered, although it seems that such a motion was made and denied. Until an order is entered no appeal will lie, as such an appeal is only permitted to be taken from "an order." Sections 253, 257, Municipal Court Act (Laws 1902, pp. 1562, 1563, c. 580).

Appeal dismissed, with \$10 costs.

SWIFT & CO. v. MUTUAL COMMISSION CO.

(Supreme Court, Appellate Term. November 29, 1907.)

COURTS—MUNICIPAL COURT OF NEW YORK CITY—APPEAL.

Where, on appeal under the provisions of Municipal Court Act, Laws 1902, p. 1578, c. 580, § 311, the undisputed affidavits show that no service was made on defendant, a judgment for plaintiff will be reversed.

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by Swift & Co. against the Mutual Commission Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Beardsley & Hemmens, for appellant.

PER CURIAM. This appeal is taken by virtue of the provisions of section 311 of the Municipal Court act (Laws 1902, p. 1578, c. 580). The affidavits submitted are not disputed, and show that no service was made upon the defendant.

Judgment reversed, with costs, and complaint dismissed.

COLDERARO et al. v. KEMPNER.

COLUCCI v. SAME.

(Supreme Court, Appellate Term. November 29, 1907.)

LANDLORD AND TENANT—LEASE—CONSTRUCTION—DEPOSIT BY TENANT—SUMMARY PROCEEDINGS—EFFECT.

A lease required the tenant to make all necessary repairs to the premises, and provided that a sum deposited by him should be regarded as liquidated damages, as security for the rent and for the performance of the covenants of the lease, and that if the premises became vacant, or the tenant should be dispossessed by summary proceedings, the landlord might let the premises for the remainder of the term for account of the tenant, who agreed to make good any deficiency, including the expense of the landlord in re-entering. *Held*, that the deposit survived the issuance of a warrant in summary proceedings and the dispossession of the tenant thereunder, and that he was liable for any deficiency due the landlord for loss of rent and for expenses incurred by the latter by reason of any breach of the covenants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 745.]

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Actions by Rosario Colderaro and another and by Domenick Colucci against Ralph E. Kempner. From two judgments in favor of the respective plaintiffs, defendant appeals. Judgment in each case reversed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Jay C. Guggenheimer, for appellant.

Maurice J. Katz, for respondents.

GILDERSLEEVE, P. J. These cases were tried together. The plaintiffs seek to recover the amounts deposited by them with the defendant as landlord to secure the performance of the covenants of a lease executed between each plaintiff as tenant and the defendant as landlord. In the Colucci Case the amount deposited and for which suit was brought was the sum of \$333.33, the amount of rent reserved in the lease was \$167.67 per month, and the plaintiff recovered the sum of

\$150. In the Colderaro Case the amount deposited was \$600; the claim being reduced to \$500 to bring it within the jurisdiction of the court. The amount of rent reserved was \$308.33 per month, and the amount recovered in the court below \$250. The premises in each case were rented to be used as a dwelling for private families and stores, and the leases contained a clause by which the tenants obligated themselves to make all repairs, inside and outside, of whatever nature necessary to keep the premises in as good condition as they were at the date of the lease. They also contained an agreement that the sum deposited should be regarded as liquidated damages, as security for the rent, and as security for the performance of "each and every covenant" contained in the lease, and that "in case of such repossession, or if the premises became vacant, or the tenant dispossessed by summary proceedings, the landlord may let the premises for the remainder of the term for account of the tenant, who agrees to make good any deficiency including the expense of the landlord in re-entering." Some time after the making of the leases and the entry by the tenants they were dispossessed by summary proceedings taken by the defendant as landlord, and these actions were brought prior to the date of termination fixed in the leases, upon the theory that the leases were terminated by such proceedings, and that thereby the plaintiff became entitled to the immediate return of their deposits. In each case the defendant counterclaimed for loss of rent, repairs, etc.

An examination of the terms and conditions of the leases show clearly that it was the intention of the parties thereto that the deposit should survive the issuance of a warrant in summary proceedings, and that the tenants were liable under their covenants to make good any deficiency due the landlord for loss of rent, or any expenses necessarily incurred by him by reason any breach of any of the covenants of the lease. *McCreedy v. Lindenborn*, 172 N. Y. 400, 406, 407, 65 N. E. 208; *Scott v. Montells*, 109 N. Y. 1-4, 15 N. E. 729; *Lesser v. Stein*, 39 Misc. Rep. 349, 79 N. Y. Supp. 849; *Anzolone v. Paskusz*, 96 App. Div. 188, 89 N. Y. Supp. 203. The record shows no basis for the rendition of the judgment as given herein. Proof on the part of the defendant was given as to loss of rent, etc., and for legitimate necessary expenses, which was disregarded by the court, and the amount of the judgment rendered in each case indicates that it was an arbitrary conclusion, not based upon any evidence. The amount seems to be, practically, one-half of the amount of the plaintiff's claim in each case, and the plaintiffs' attorney can find no warrant in the testimony for the rendering of judgments for the said amounts, and to support the same wanders into the field of speculation. That some of the items of the defendant's counterclaim are not properly chargeable to the plaintiffs, and that some are not properly proven, gives the plaintiffs but little aid in their attempt to support the judgment. The most cursory examination of the defendant's proof establishes that there was no foundation for the amount of the judgment as rendered, and there must be a new trial.

Judgment in each case reversed, and new trials ordered, with costs to appellant to abide the event. All concur.

GALEF v. STANDARD FISH CO.

(Supreme Court, Appellate Term. November 29, 1907.)

CONTRACTS—SUFFICIENCY OF PERFORMANCE—ACTIONS.

Where one, who agrees with the owner of a building to repair it as ordered by the tenement house department, the work to be done to the satisfaction of the building and tenement house departments, fails to show due performance of the contract, and produces no certificates from the departments that the work is satisfactory to them, and does not show that they are unreasonably withheld, there can be no recovery for the work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1808.]

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by Hyman Galef against the Standard Fish Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Frank Harvey Field (Walter Lester Glenn, of counsel), for appellant.

Samuel Hellinger, for respondent.

PER CURIAM. The plaintiff seeks to recover from the defendant \$100 balance due for work, labor, and services alleged to have been rendered by Isaac Galef under a written contract with the defendant. The complaint alleges "that Isaac Galef duly performed all of the said work in accordance with the said agreement"; that prior to the commencement of this action the said Isaac Galef assigned the claim to plaintiff. The answer denies the material allegations of the complaint. The agreement is as follows:

"New York, November 12, 1906.

"I hereby agree to furnish labor and materials and to repair the entire building of No. 40 Peck Slip as per order of the tenement house department October 8, 1906, and I agree to do this work to the satisfaction of the building and tenement house departments and under their directions, and in accordance to the plans to be furnished by me and approved by them, for the sum of two hundred (\$200) dollars.

"O. B. Vio. No. 28060/06.

I. Galef."

"We hereby agree to employ I. Galef to do the above work on the above terms.

Standard Fish Company.

"C. M. Frankard."

Plaintiff's assignor admitted that before the foregoing contract was executed he had received the violation notice and was familiar with its requirements. He also admitted that no certificate was obtained by him after the completion of the work. The plaintiff not only failed to prove "due performance," as alleged by him, but he also failed to establish that the work was performed to the satisfaction of the departments mentioned in the agreement. This was a sine qui non to a recovery, unless it was shown that the certificates were unreasonably withheld. On the contrary, it appears that, immediately upon the completion of the work, a new violation was placed upon the premises, in which was included part of the work called for in the original

violation. Under these circumstances plaintiff was not entitled to recover, and the judgment in his favor must be reversed.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

BRILL v. NEW YORK EDISON CO. et al.

(Supreme Court, Appellate Term. November 29, 1907.)

1. NEGLIGENCE—EXCAVATIONS IN STREETS—LIABILITY—EVIDENCE.

In an action for negligence in digging a trench in a street in front of plaintiff's property, the evidence showed that one of the defendants obtained a permit from the department of water supply to make an excavation, and that such applications by the codefendant were made through said defendant. There was no evidence that the codefendant requested said defendant to act for it in making any application for a permit to make the excavation, or that the codefendant actually did the work. *Held* insufficient to show the codefendant's liability.

2. SAME.

In an action for negligence in digging a trench in a street in front of plaintiff's property, the evidence showed that one of the defendants obtained a permit from the department of water supply to make the excavation. The evidence showed that said defendant did not dig any trench in the street, or do any work in or about the street in front of plaintiff's premises. *Held* insufficient to prove said defendant's liability.

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by Max Brill against the New York Edison Company and another. From a judgment for plaintiff against defendant the New York Edison Company, it appeals, and from a judgment dismissing the complaint as against defendant the Empire City Subway Company, plaintiff appeals. Reversed on defendant's appeal, and affirmed on plaintiff's appeal.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Beardsley & Hemmens, for appellant New York Edison Co.

Adam K. Stricker, for appellant Brill.

J. Haviland Tompkins, for respondent.

ERLANGER, J. This is an action charging both defendants with negligence in having dug a trench in front of plaintiff's premises on Beekman and Nassau streets, in consequence of which it is alleged large quantities of water were permitted to accumulate therein, which percolated through the foundation wall of plaintiff's building and entered the cellar thereof. The court rendered judgment in favor of plaintiff against the New York Edison Company for \$272, and dismissed the complaint as against the defendant the Empire City Subway Company, Limited. Cross-appeals were taken; one by the Edison Company from the judgment against it, and the other by the plaintiff from the judgment dismissing the complaint against the Empire City Subway Company.

To connect the Edison Company with the digging of the trench, plaintiff offered in evidence a permit issued by the department of

water supply, gas, and electricity to the Empire City Subway Company, which authorized it to take up the pavement and excavate for the purpose of constructing subways or electrical conductors on the north side of Beekman street, to connect with the north intersection of Beekman and Nassau streets; also a second permit, issued to the same company, to make an opening on the north side of Nassau street at the intersection of Beekman street; and, finally, a list of excavations of the New York Edison Company, claimed to have been transmitted to the department of highways, bearing date December 10, 1906, and signed by two officers of the Empire City Subway Company. In this list there appears the following entry:

"Beekman street, December 1st, on E. C. Nassau and extends west 20 feet. Purpose, surface, etc."

The plaintiff claims that the excavation complained of, and the resultant damage, occurred between October 1, 1906, and November 15, 1906, and that his premises were situated on the northeast corner of Nassau and Beekman streets. It is therefore evident that on the face of the permits issued to the Empire Company there is nothing to connect the Edison Company with the trench complained of, and it appears, too, in the list transmitted to the department of highways of excavations of the Edison Company, dated on December, 1906, after the alleged damage, that the only excavation referred to is not in front of plaintiff's premises. It was, therefore, necessary to furnish further proof to connect the Edison Company with the wrong alleged to have been committed by it. Plaintiff contends that that evidence was supplied by the chief clerk of the Empire Company, who was asked:

"Q. Is it not a fact that applications by the Edison Company for subways are made through the Empire City Subway Company, by having them make the application. Now, isn't that true?"

And the answer was:

"A. Yes; they do."

Assuming that the objection on the part of the Edison Company that the evidence was not binding on it was properly overruled, we do not see how that evidence sufficiently connected the Edison Company with the trench. There was no evidence offered or presented that that company requested or secured the Empire Company to act for it in making any application for any permit to open a trench in front of plaintiff's premises, or that the defendant actually did any work in or about the trench complained of, or that any of the workmen had been employed by it, or any payments made to any one for the work done in respect of that trench. In view of the fact that the judgment must be reversed, and a new trial granted, it is not deemed necessary to discuss any other question in the case.

We think that the trial justice properly disposed of the case so far as it relates to the other defendant. The only witness who was examined regarding the work testified that during the year 1906 the Empire Company did not dig any trench anywhere on Beekman street or do any work in or about or in front of plaintiff's premises. There

was an entire absence of any proof even remotely connecting the Empire Company with the work of digging the trench.

The judgment appealed from as against the Edison Company should be reversed, and a new trial granted, with costs to appellant to abide the event; and the judgment in favor of the Empire Company should be affirmed, with costs. All concur.

(56 Misc. Rep. 568.)

STATE BOARD OF PHARMACY v. DAVEY.

(Supreme Court, Appellate Term. November 29, 1907.)

DRUGGISTS—VIOLATING PHARMACY LAWS—ACTION FOR PENALTY—COMPLAINT—SUFFICIENCY.

Where plaintiff complained in the Municipal Court against defendant as follows: "Violation Pharmacy Laws. Sale of borax which was not of the standard, strength, quality, and purity established by the United States Pharmacopœia"—giving no section of the law claimed to have been violated, not stating either time or place, and not setting forth in what respect the article sold failed to comply with the law regulating its sale, nor whether defendant might not come within one of the several exceptions or limitations specified in section 199 thereof, a demurrer to the complaint was properly sustained.

Appeal from Municipal Court, Borough of Manhattan, Tenth District.

Action by the State Board of Pharmacy against Andrew Davey. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Hieronimus A. Herold, for appellant.

John A. Hardiman, for respondent.

GILDERSLEEVE, P. J. As appears from the record in this case, on the return day of the summons, the parties appeared by counsel, and the plaintiff complained against the defendant: "Violation Pharmacy Laws. Sale of borax which was not of the standard, strength, quality, and purity established by the United States Pharmacopœia"—and the defendant "files a demurrer." There is a written demurrer on file which recites the following grounds:

"First, that several causes of action, each being to recover one penalty for each of several separate and distinct alleged violations of chapter 667 of the Laws of 1900, known as the 'Pharmacy Law' have been improperly united; second, that the complaint does not state facts sufficient to constitute a cause of action."

The demurrer was sustained in the court below, and the plaintiff appealed to this court, and upon the argument in February, 1907, the appeal was dismissed. Although the record from that appeal is not before us, we assume that the appeal was then dismissed upon the ground that the appeal was taken from the order sustaining the demurrer, and not from the judgment, as there appears to have been no judgment entered until April 18, 1907.

Both parties state in their briefs that this action was brought to re-

cover for several penalties of \$25 each for alleged violations of section 197, c. 667, p. 1479, of the Laws of 1900. Statements of attorneys in briefs constitute no part of the record, and this court cannot so regard them; nor, except so far as the statements therein are borne out by and are to be found in the record, can they be considered by the court. An examination of the complaint does not disclose that any number of penalties are sued for, except as it may be so inferred from the amount demanded in the summons, which is \$400; but the demand in the summons forms no part of the complaint, and it might well be said that, had the plaintiff been permitted to go to trial, no effort to prove but one violation on the part of the defendant would have been made, and but one penalty claimed, so that the criticism made by the defendant that the complaint set forth several causes of action in one is without force.

As to the second ground, viz., that the complaint does not state facts sufficient to constitute a cause of action, we deem that to be well taken. Municipal Court Act, Laws 1902, p. 1535, c. 580, § 145, subd. 1, provides that:

“ * * * The pleadings may be oral and the substance thereof shall be endorsed upon the summons and entered in the docket book of the court.”

Section 149, Mun. Ct. Act, in language almost identical with section 481, subd. 2, Code Civ. Proc., declares that:

“The complaint must state in a plain and direct manner the facts constituting the cause of action.”

It is evident, therefore, that a complaint in a Municipal Court is to be tested, if its sufficiency be called in question, by the same rules as are applied to complaints in the Supreme Court. The rule in the Supreme Court is well known. The pleader in that court must state every fact which he must prove to entitle him to maintain his suit, and every fact which the defendant has a right to controvert in his answer must be distinctly averred. The fact that the Municipal Court act permits a pleader to plead orally does not alter this rule, if the pleading is objected to; and this has been so held many times.

In the case of *Stone v. Case*, 13 Wend. 283, the plaintiff made the following oral complaint:

“The plaintiff declares against the defendant in this suit in assumpsit, for that, in consideration of a certain piece or pieces of wheat, the defendant agreed and promised to pay the plaintiff a certain sum of money, to wit, \$20; also in consideration of the plaintiff's interest in and to a certain piece or pieces of wheat the defendants agreed and promised to pay the plaintiff another sum of money, to wit, \$20.”

The defendants filed written demurrers. The court overruled the demurrers, which the Supreme Court on appeal held to have been error. In the opinion the court said that:

“Although pleadings in Justices' Courts are to be received with liberality, yet, when they are objected to before the justices, they are to be governed by the same rules as in other courts.”

In the case of *Timmerman v. Morrison*, 14 Johns. 369, the plaintiff declared orally for goods sold, money had and received, money paid,

and services rendered. The defendant demurred, and the demurrer was overruled. On appeal to the Supreme Court, that court held:

"That the demurrer to the declaration was well taken and that the defendant was entitled to judgment thereon."

See, also, *Van Hoesen v. Van Alstyne*, 3 Wend. 75; *People v. Judges*, 21 Wend. 21; *Cushingham v. Phillips*, 1 E. D. Smith, 418.

In the case of *Halloran v. Coney Island Jockey Club* (City Ct.) 81 N. Y. Supp. 143, the plaintiff pleaded orally in the Municipal Court as follows: "For money had and received and lost at gambling." The defendant filed a written demurrer thereto. The plaintiff failed to amend, and the action was then transferred to the City Court, where the demurrer was argued at Special Term. O'Dwyer, C. J., in sustaining the demurrer, said:

"It is only necessary to refer to the language employed in the oral complaint to determine that no fact is stated from which it appears that the plaintiff has a cause of action for money had and received, or for any other cause against the defendant. * * * In the Municipal Court a declaration must be good in form, as well as in substance, if objected to before the justice; and, if defective in form or substance, a demurrer thereto will lie."

The Municipal Court act distinctly provides for the interposition of demurrers and "a demurrer is an objection to the legal sufficiency of the pleading demurred to." It denies the legal proposition involved in such pleading, and thus makes an issue of law. *Rumsey's Pr.* vol. 1, p. 462.

Applying the rule hereinbefore stated, it needs no argument to show that the complaint in the case at bar is woefully deficient in all the material allegations necessary to state a cause of action. It gives no section of the law claimed to have been violated, neither time or place is stated, nor does it set forth in what respect the article sold fails to comply with the law regulating its sale, nor whether the defendant may not come within one of the several exceptions or limitations specified in section 199 thereof. Its only statement is a mere conclusion of law, with not a single fact set forth according to the rules of pleading. That the court below did not sustain the demurrer upon the right ground gives no aid to the appellant, if it should be sustained upon any of the grounds legally interposed.

Judgment sustaining the demurrer affirmed, with costs, with leave to the appellant to plead over in the Municipal Court upon payment of the costs in the court below and of this appeal within six days.

LEVENTRITT and ERLANGER, JJ., concur in the result.

OPPENHEIMER v. MITTENTHAL

(Supreme Court, Appellate Term. November 29, 1907.)

TRIAL—DIRECTION OF VERDICT—UNCONTRADICTED EVIDENCE.

Where defendant's evidence was neither impeached nor contradicted, and it was neither improbable nor suspicious, and precluded a recovery by plaintiff, the court's refusal to direct a verdict in defendant's favor was error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 383, 384.]

Appeal from Municipal Court, Borough of Manhattan, Tenth District.

Action by Manney Oppenheimer against Harry Mittenhal. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Leon Laski, for appellant.

I. Henry Harris, for respondent.

PER CURIAM. Plaintiff brought the action upon a check for \$220, signed by defendant and delivered to plaintiff, upon which check payment had been stopped. The answer sets up a lack of consideration, and alleges as a separate defense that the check was given to pay a gambling debt. The trial was before the court with a jury. The plaintiff proved the making and delivery of the check, the stoppage of payment thereon, and rested. Defendant then took the stand, and swore he played a game of poker with plaintiff, and lost at said game the money for which the check was given. No other evidence was offered by either party, and at the close of defendant's case defendant's counsel moved for the direction of a verdict. This motion was denied, to which ruling defendant excepted. The jury found for the plaintiff. The defendant moved to set it aside upon all the grounds stated in section 999 of the Code, which motion was denied, and defendant duly excepted, and appeals from the judgment entered.

We think the motion made by the defendant for a direction in his favor should have been granted, and the refusal of the judge was error, which calls for reversal. *Lomer v. Meeker*, 25 N. Y. 361; *Hull v. Litthauer*, 162 N. Y. 569, 57 N. E. 102; *Buckley v. Doig*, 115 App. Div. 413, 419, 100 N. Y. Supp. 869. The evidence of the defendant was not impeached nor contradicted, either directly or by any circumstances disclosed by the record. His story was in no sense improbable or suspicious, and the absence of any attempt to controvert it in a single detail called for a direction in his favor.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

MOSS REALTY CO. v. DI ORISCI et al.

(Supreme Court, Appellate Term. November 29, 1907.)

1. JUDGMENT—DEFAULT—REMEDY—OPENING.

The remedy of a defendant served with process against a default lies in a motion to open the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 80, Judgment, § 246.]

2. APPEAL—DEFAULT JUDGMENT.

Defendants not served with process are entitled to the relief against a default afforded by an appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 612, 885.]

Appeal from Municipal Court, Borough of Manhattan, Tenth District.

Action by the Moss Realty Company against Francesco Di Crisci, Guieseppe Laino, Emanuele Colluci, and others. From a final order, Di Crisci and others appeal. Appeal dismissed as to appellant Colluci, and order reversed as to appellants Di Crisci and Laino.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Alexander Lamont, for appellants.

James, Schell & Elkus (Edgar J. Treacy, of counsel), for respondents.

PER CURIAM. The remedy of the defendant Colluci lies in a motion to open his default. The two tenants not served are entitled to the relief afforded by an appeal. The petition does not disclose the relation existing between the tenants, and personal service of the precept should have been made upon them individually. As to the tenants Di Crisci and Laino, therefore, the final order should be reversed.

Appeal dismissed as to appellant Colluci, and final order reversed as to appellants Di Crisci and Laino.

GOODMAN et al. v. LINETZKY.

(Supreme Court, Appellate Term. November 29, 1907.)

1. BROKERS—ACTIONS FOR COMMISSIONS—EVIDENCE—OTHER TRANSACTION.

In an action by real estate brokers for a commission for negotiating an exchange of defendant's property, which defendant refused to carry out, a receipt given by one of the plaintiffs to defendant for a commission paid him by defendant for effecting a subsequent exchange of the same property with another purchaser is inadmissible, because foreign to the issues.

2. TRIAL—INSTRUCTIONS—SUFFICIENCY.

In an action on an agreement of defendant and one S. to pay plaintiff a certain commission for negotiating an exchange of their properties, which agreement provided for payment of the commissions on both sides if either party should refuse to carry out the exchange contract, and it appeared that defendant had defaulted, although S. was ready, able, and willing to perform, it was error to charge that, if there was a breach or alleged breach by defendant of the agreement to exchange, plaintiffs had a cause of action against S. for his proportion of the commission, since, as he was ready, able, and willing to carry out the contract, he was not liable for commissions in the absence of the agreement alleged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 596.]

3. SAME.

For the same reason it was error to charge that, irrespective of the agreement as to payment of the commissions, plaintiffs had a cause of action against S. for his proportion of the commissions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 596.]

Appeal from City Court of New York, Trial Term.

Action by Tobias Goodman and another against Harris Linetzky. From a judgment for defendant, and an order denying a new trial, plaintiffs appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Feltenstein & Rosenstein (Moses Feltenstein, of counsel), for appellants.

John L. Bernstein, for respondent.

ERLANGER, J. The defendant was awarded a verdict, which is challenged by the plaintiffs upon the ground of errors of law committed by the trial court in the admission of evidence over and against their objection and exception, and, further, because of certain instructions to the jury in respect to a collateral issue which was in no way involved in the action. The plaintiffs contend that both the admission of the proof and the charge to the jury was so clearly erroneous as to call for a reversal of the judgment. We think the position taken is in all respects sound, and that there must be a new trial. The facts are as follows:

Plaintiffs claim that they were employed by the defendant either to sell or exchange a piece of real estate owned by him, and that pursuant to such employment they procured one Siegel, who was willing to exchange a parcel of real estate which he owned for the piece owned by the defendant. After Siegel was found the fact was communicated to the defendant, and both Siegel and the defendant examined the respective parcels to be exchanged before they personally met. On October 1, 1906, all parties were present at the office of the plaintiff Goodman, and the particulars of the exchange, with price and terms, were prepared on one of the forms of Goodman; the defendant signing the memorandum containing the terms of Siegel's property, and Siegel signing the memorandum containing the terms of the defendant's property. These memoranda were thereupon delivered to the parties in interest. After the parties were introduced the negotiations were opened by the manager of Goodman, who is alleged to have said to the contracting parties:

"Gentlemen, we came here for the purpose of a deal, making an exchange of the two properties, and before I enter into any negotiations I want it strictly understood that my commission is 1 per cent., and I want it further understood, if we do come to any agreement and one backs out, that the other must pay commission for both, as I have been fooled in these deals before, and I know what they are."

Thereupon the defendant is alleged to have replied:

"If I make a deal, I am not going to back out. I make it, or don't make it."

And Mr. Siegel is alleged to have assented to those terms. After this conversation the particulars referred to were signed and interchanged. The following day, October 2, 1906, was fixed to close the contract; but the defendant failed to appear, nor did he at any time thereafter carry out the terms of the compact. On behalf of plaintiffs both Peck and Siegel testified to the foregoing.

The defendant and his son denied that any agreement concerning commissions was made. The defendant testified that, when he was requested to sign the memorandum referred to, he refused so to do,

and the son testified that he signed his father's name thereto, because the manager of the plaintiff Goodman said:

"What are you afraid to sign? This is the particulars of the house. There is no specified terms; nothing—simply the particulars. What are you afraid to sign for?" And I went to work and signed 'H. Linetzky.'"

During the cross-examination of the plaintiff Peck it was developed that after the transaction failed he found another owner of real estate who exchanged a piece of property owned by him for the property in question owned by the defendant, for which he (Peck) received a commission and gave the following receipt:

"New York, October 22, 1906.

"I, the undersigned, hereby acknowledge the receipt of seventy-five (\$75) dollars from Harris Linetzky in full for all commissions due me in the exchange of premises 962-964-966 Washington avenue, by Harris Linetzky and Samuel Wormser, and I hereby represent that I am the only broker who procured the said exchange.
L. Peck."

The witness admitted the payment, and also his signature. Whereupon the paper was offered in evidence and read to the jury. Due objection was made to its admission, which was overruled, and an exception was taken. We think the admission of this receipt cannot be justified upon any principle in the law. It had absolutely nothing to do with the issue, near or remote, and its only possible effect was to mislead the jury. The paper on its face shows an entirely different purchaser, and for aught we know, from the amount of the commission, entirely different terms. If the contract upon which this action is based was made, plaintiffs were entitled to recover, notwithstanding that one of them subsequently produced another purchaser and effected an exchange of defendant's property, for which a commission was paid by him. If it be true that the defendant defaulted as charged, either or both of the plaintiffs could thereafter deal with him with regard to the same property upon the same or other terms, and, if a new purchaser was found, the acceptance of a commission on the subsequent transaction would not impair their right to recover for prior commissions earned, unless the claim was released or discharged by them.

The defendant, not content with the warning which the objection and exception gave to him concerning the receipt, went further, and requested the court to charge the jury on a question that was clearly collateral to the issue. The court had instructed the jury that if a special contract was made, whereby the defendant agreed to pay the entire commission of \$610, and they believed the plaintiffs' witnesses in that regard, the plaintiffs were entitled to a verdict for that sum. On the other hand, if they found that no such contract was made, their verdict must be for the defendant. This charge stated concisely the question which the jury was to determine. At the close of the charge the court, upon defendant's request, instructed the jury:

"That if, from the evidence, there was a breach or alleged breach of the contract in behalf of the defendant to exchange the property, that then and in that event the plaintiff had a proper cause of action for \$410 against Mr. Siegel; in other words, if there was an alleged breach by this defendant of the exchange contract, and no special contract as alleged was made, that the plaintiffs still have a cause of action against Mr. Siegel for \$410."

The defendant thereupon requested the court to further charge:

"That, irrespective of the agreement, the plaintiffs had a cause of action against Mr. Siegel for \$410, or the amount of his commissions."

The court so charged. To both of these instructions plaintiffs excepted. Both instructions were clearly error. Siegel had testified for the plaintiffs that he was ready, able, and willing to make the exchange; that he assented to the proposition that the party defaulting was to pay the total commission of \$610; and that the defendant refused to appear at the appointed time and place to complete the contract of exchange. Upon what theory plaintiffs could recover from Siegel, if the special contract had not been made, does not appear. Plaintiffs proved that the special contract was made. That excludes the hypothesis of any other contract or obligation thereunder. If the special contract was not made, then there was no liability on the part of the defendant, and necessarily a verdict for the defendant freed Siegel at the same time. This must logically follow from the contention of the parties. The court in its main charge was right. If the later instructions supplanted those first given, then the charge, as we have seen, was wrong. In no aspect of the case, as it was presented upon the trial, could Siegel be held liable to plaintiffs for \$410, irrespective of the agreement made with them. The jury under the last instructions found for the defendant. This was a natural result, for they must needs have reasoned that by the defendant's success Siegel's liability still remained.

The judgment must be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

EIDLIN v. STATE BANK.

(Supreme Court, Appellate Term. November 29, 1907.)

JUDGMENT—FAILURE OF PROOF—FORM OF JUDGMENT.

Where plaintiff, at the close of his evidence, was not entitled to judgment for failure of proof, and defendant's motion to dismiss the complaint on that ground was denied, whereupon defendant rested, it was error to give judgment for defendant on the merits; the proper judgment being one of dismissal only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 80, Judgment, § 359.]

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Meier Eidlin against the State Bank. From a Municipal Court judgment in favor of defendant, plaintiff appeals. Modified and affirmed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Abraham H. Sarssohn, for appellant.

Feltenstein & Rosenstein, for respondent.

PER CURIAM. The proof on the part of the plaintiff was not sufficient to entitle him to a judgment. A motion to dismiss the com-

plaint, made by the defendant's counsel upon substantially that ground, was denied. The defendant thereupon rested, and the court gave a judgment for the defendant upon the merits. This was error. The defendant was entitled only to a judgment dismissing the complaint for failure of proof. *Bowen v. Farley*, 113 App. Div. 767, 99 N. Y. Supp. 205; *Ætna Life Ins. Co. v. Deparquet Co.*, 53 Misc. Rep. 581, 103 N. Y. Supp. 800.

Judgment modified, by directing judgment for a dismissal of the complaint without prejudice to a new action, and, as modified, affirmed, without costs of this appeal to either party.

SHEA v. HEDDEN CONST. CO.

(Supreme Court, Appellate Term. November 29, 1907.)

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

Where, in an action for injuries to an employé falling from a scaffold, there was no evidence that the scaffold was defective, and the proof showed that the proximate cause of the injuries was the employé's misstep from a plank of the scaffold, and that after the accident he admitted that the fall was due to the fact that he had been drinking, the employé failed to establish a cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Master and Servant, §§ 987-996.]

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by Daniel Shea against the Hedden Construction Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Frank V. Johnson (Allen E. Brosmith, of counsel), for appellant.
Cavegan & McQuaid (Joseph L. Dougherty, of counsel), for respondent.

PER CURIAM. This action was brought to recover damages for personal injuries alleged to have been sustained by plaintiff while in the employ of defendant as a hod carrier on a building in course of construction. The pleadings are oral. The complaint stated was "negligence, personal injuries." The answer is "general denial, bill of particulars." The statement in the plaintiff's bill of particulars, designed to set forth the alleged negligence, is as follows:

"That at the time he [plaintiff] was injured he was in the employ of defendant as a laborer, and was working on the ground or street floor of said building, and by reason of the negligence of defendant plaintiff fell from said floor where he was working into the basement of said building."

It appears from the evidence that at the time of the accident the plaintiff was carrying mortar in a hod from the sidewalk to the masons at work on a scaffold on the first floor of the iron beams; that he stood upon two planks, each of which was from 8 to 10 inches wide, laid

with the ends resting upon two mortar tubs; that the scaffold upon which plaintiff was dumping the mortar was about 5 feet above the planks upon which he stood. The following is plaintiff's description of the accident, viz.:

"Q. Describe what you fell from. A. I fell from the plank. Q. What plank? A. A scaffold plank. Q. And how did you come to fall? A. I made a misstep."

Testimony was offered as to the nature of plaintiff's injuries, and the trial court fixed the damages at \$30. The record contains no evidence of any defect in the planks, or fault in the position in which they were placed, or that they broke or gave away. The evidence will not sustain a conclusion that the place upon which he stood at the time he fell was insecure or defective. A careful consideration of the entire evidence points to the conclusion that the proximate cause of plaintiff's injuries was his misstep from the plank. Moreover, evidence was elicited tending to show that plaintiff admitted, after the accident, that his fall was due to the fact that he had been drinking. Plaintiff failed to make out a cause of action, and the judgment must be reversed.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

SAMUELS et al. v. BLOOM et al.

(Supreme Court, Appellate Term. November 29, 1907.)

SALES—PARTIES.

Stockholders were not liable personally for the price of goods ordered by the corporation through one of the stockholders as president, the order being signed, "The B. & M., J. Bloom, Pres.," though the stockholders' names were printed on letter heads used in correspondence after the order was given.

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by Henry Samuels and others against Jacques Bloom and another. From a judgment for plaintiffs, defendants appeal. Reversed, and complaint dismissed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Joseph Wilkenfeld, for appellants.

Joseph Beihlf, for respondents.

PER CURIAM. The plaintiffs brought this action, which is one for goods sold and delivered, against Jacques Bloom and Henry Meyer personally. Bloom only was served with process, and he alone appeared in the action. The correspondence between the parties clearly shows that the goods were ordered by "The B. & M.," a corporation organized under the laws of Illinois and doing business at Peoria, Ill., of which corporation Bloom was president, and said goods were delivered to such corporation, which sent the goods back as being of inferior quality, but plaintiffs refused to accept them. What subse-

quently became of the goods does not appear. The order for the goods was signed, "The B. & M., J. Bloom, Pres." It is conceded that the goods were ordered from a catalogue sent by plaintiff to "The B. & M.," and defendants claim the goods did not correspond in quality to those mentioned in the catalogue and which were ordered by "The B. & M.," through Bloom as president of said corporation. The court gave judgment against Bloom personally.

The evidence clearly shows that the goods were not ordered by Bloom personally, and there is nothing to indicate that plaintiffs were wrongfully misled into giving the credit to Bloom and Meyer personally, instead of to the corporation, beyond the fact that in the corner of some of the letter heads in small print appeared the names: "J. Bloom. H. Meyer." Defendant explains that these were old letter heads, and, in any view, the appearance of these names on the letter heads, used by defendant in correspondence with plaintiffs after the order had been given, did not overcome the fact that all of defendant's letters, as well as the order itself, were signed, "The B. & M., J. Bloom, Pres.," which was sufficient notice to plaintiffs that the order was given by the corporation, and not by Bloom personally. It seems to us that plaintiffs have sued the wrong party, and that the judgment must be reversed, and the complaint dismissed, with costs.

Judgment reversed, and complaint dismissed, with costs.

WILKE v. FORTY-SECOND ST., M. & ST. N. AVE. R. CO.

(Supreme Court, Appellate Term. November 29, 1907.)

CARRIERS—STREET RAILWAYS—TRANSFERS—REFUSAL—PENALTY—PASSENGER IN GOOD FAITH.

One not shown to be a street car passenger in good faith may not recover from the company a penalty for refusing a transfer.

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by William Wilke against the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railroad Company for refusing a transfer. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Henry F. Gannon, for appellant.

Walter L. Bunnell, for respondent.

PER CURIAM. The evidence does not show that the plaintiff was a passenger in good faith. The judgment must be reversed, upon the authority of *Nicholson v. N. Y. City Ry. Co.* (Sup.) 103 N. Y. Supp. 695.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

WHEELER v. BLUMENTHAL

(Supreme Court, Appellate Term. November 29, 1907.)

WAREHOUSEMEN—ACTIONS AGAINST—SUFFICIENCY OF EVIDENCE.

In an action against a warehouse keeper to recover for articles stored and not returned, delivery of the goods to the keeper and failure to return the same *held* to be shown by preponderance of the evidence.

Appeal from Municipal Court, Borough of Manhattan, Twelfth District.

Action by Francis H. Wheeler against Ben Blumenthal, doing business under the name of the West End Storage Warehouse. Judgment for defendant, and plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Louis O. Van Doren, for appellant.

Eugene Blumenthal, for respondent.

PER CURIAM. The action is brought by plaintiff, as owner of certain household goods, against defendant, as a storage warehouse keeper, to recover the value of certain of the articles stored by plaintiff with defendant, which articles were not returned by defendant on demand of plaintiff.

The facts are substantially as follows, viz.: On September 27, 1906, plaintiff placed her furniture in storage with defendant. One Collins carted and moved the goods from plaintiff's residence to defendant's warehouse. Among the goods were some crockery, glass, and table ware, which Collins packed into 11 barrels. There were three van loads in all. The barrels went on the last load. The wagon was driven by Collins to defendant's warehouse. Collins swears he took off the wagon all of the goods that had been placed on it, and delivered the same to defendant's servants and agents, and the goods were taken into defendant's warehouse, and then the empty wagon was driven away by Collins. Upon demand of plaintiff, subsequently made, most of the furniture was returned to her by defendant, but not the articles involved in this action, which had been placed on the last load at the time of moving, as above indicated.

Proof of value was made of the lost articles. Defendant's agent admits that all of plaintiff's goods that had been delivered to defendant by Collins were placed in defendant's receiving room, and admits that he saw Collins bring goods into the warehouse. The plaintiff herself saw the wagon upon which the lost goods had been loaded driven to defendant's warehouse by Collins. The wife of the janitor of the house whence the goods were taken swears that all of plaintiff's property was so taken away. The court dismissed the complaint for failure of proof. The preponderance of evidence clearly shows delivery of the goods to defendant and the failure by him to return them.

The judgment must be reversed, and a new trial ordered, with costs to appellant to abide the event.

(56 Misc. Rep. 502.)

SALEMON v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Term. November 29, 1907.)

TRIAL—DELIBERATIONS OF JURY—SENDING JURY BACK TO CORRECT VERDICT.

On the trial of a personal injury case, defendant introduced no evidence, except that it had received no report of the accident. After the jury had retired, they returned, and the foreman stated that as they had plaintiff's testimony as to what happened to him, but no evidence as to the accident from defendant, they found a verdict for plaintiff. The court then instructed them that a verdict, if found for plaintiff because there was no evidence for the defendant in regard to the accident, would have to be set aside, but that they must find a verdict for plaintiff or defendant, regardless of the absence of evidence by defendant in regard to the accident, and, after giving other instructions applicable to the case, sent the jury out a second time. *Held*, that the court's action was proper, since, until the jury is discharged, they may correct their verdict, either at their own instance or that of the court, and for that purpose may be sent back, before their verdict is recorded, not only to correct a mistake in form, or to remedy obscurity, but to alter it in substance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 792, 793.]

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by Abraham Salemon against the New York City Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

William E. Weaver, for appellant.

Morris Meyers, for respondent.

PER CURIAM. This is an accident case. The defendant does not raise, on this appeal from a judgment in favor of the plaintiff, any question of negligence or contributory negligence, but bases its appeal solely on the ground that the court erred in sending the jury out a second time. The defendant introduced no evidence, except to show that it had received no report of the accident. After the court had made its charge, to which no exception was taken, and the jury had retired for the first time, they returned, and the foreman made the following statement:

"As we have the testimony by the plaintiff as to what happened to him, we find that there is no evidence from the company, that there was something the matter with the conductor, or that he did not hear, or anything, and we find a verdict for \$400."

The court then asked: "For the plaintiff?" To which the foreman replied: "Yes, sir." The jury were then polled, and each answered that his verdict was for \$400 for the plaintiff. The defendant then moved to set aside the verdict on the ground that "they have said that they gave this verdict because there is no evidence from the railroad company." The plaintiff then moved to have the jury sent back to the jury room, "with instructions that the fact that the defendant has put in no defense does not relieve the plaintiff from the necessity of proving

his case by a fair preponderance of evidence." The court then said to the jury:

"If you found a verdict for the plaintiff because there was no testimony offered by the railroad company in regard to the accident, the conductor, or the car, then your verdict must be set aside by the court. You must find a verdict for the plaintiff or defendant, regardless of the absence of testimony on the part of the railroad company in regard to the accident."

And the court then went on and gave instructions as to the law of negligence applicable to the case, and sent the jury out a second time. The defendant objected to this second sending out of the jury, and excepted to the court's ruling in that regard. The jury came in a second time, and announced a verdict for \$400 for plaintiff.

The conduct of the court in sending the jury out a second time seems to have been proper under the circumstances. Until the jury is actually discharged, they may correct or alter their verdict, either at their own instance or that of the court. *Rogan v. Mullins*, 22 App. Div. 117-119, 47 N. Y. Supp. 920; *Warner v. N. Y. C. R. R. Co.*, 52 N. Y. 438, 11 Am. Rep. 724. They may be sent back, after giving their verdict and before it is recorded, not only to correct a mistake in form, or to make that plain which was obscure, but to alter it in substance, if they so determine and agree. *Warner v. N. Y. C. R. R. Co.*, *supra*.

The judgment should be affirmed, with costs.

REEDY ELEVATOR CO. v. BERMAN et al.

(Supreme Court, Appellate Term. November 29, 1907.)

1. EVIDENCE—PAROL—ADMISSIBILITY TO EXPLAIN RECEIPT.

In an action on a \$1,000 note given for part of the price of an elevator sold to defendants, title being reserved by plaintiff until final payment, plaintiff could show by parol testimony that a written receipt given by him, a receiver in an action for foreclosure of a mortgage on the building in which the elevator was installed, for \$500, in settlement of plaintiff's claim, "for release of title to elevator only, in accordance with order of" the court in the foreclosure action, was given with the understanding that the payment should not release the claim against defendants for the remaining \$500.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1829-1842.]

2. SALES—CONDITIONAL—DEMAND FOR RETURN OF PROPERTY—EFFECT.

Where title to an elevator was to remain in the seller until final payment, the seller's action in demanding that the receiver in an action for foreclosure of a mortgage on the building in which the elevator was installed return the elevator did not amount to a rescission of the contract of conditional sale, but was a threat to rescind; the seller not taking possession nor assuming control of the elevator.

3. SAME—SURRENDER OF TITLE—EFFECT.

Where title to an elevator was to remain in the seller until final payment, the seller's surrender of title on payment by the receiver in an action for foreclosure of a mortgage on the building in which the elevator was installed of one-half the balance due was not a surrender of its claim against the buyers for the remainder of the price.

Appeal from City Court of New York, Trial Term.

Action by the Reedy Elevator Company against Morris Berman and Joseph Moskowitz. From a judgment for defendant Moskowitz, and an order denying a new trial, plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Wesselman & Kraus (Bertram L. Kraus, of counsel), for appellant.
Max D. Steuer, for respondent.

PER CURIAM. The plaintiff furnished to defendants an electric elevator for \$2,400, the title to which elevator was to remain in plaintiff until the final payment should be made, and plaintiff received from defendants \$1,400 and a promissory note for the remaining \$1,000, upon which note this action was brought. The apartment house of defendants, in which said elevator was placed, was subject to a mortgage, and a receiver was appointed in a foreclosure action. The receiver paid to plaintiff \$500, who gave the following receipt to the said receiver, viz.:

"Received from Henry I. Randall, receiver appointed in the above-entitled action (foreclosure case), the sum of \$500 in settlement of the claim of Reedy Elevator Company, for release of title to elevator only, in accordance with order of this court."

Upon the trial the court below directed a verdict for defendants; both parties having asked for the direction of a verdict. Plaintiff appeals.

It will be observed that this receipt does not state that the \$500 were accepted in full settlement for the whole amount due for the elevator—i. e., \$1,000—but that the \$500 was paid for "a release of title only," which title it is conceded would otherwise have remained in plaintiff until the full payment of the \$1,000 due. There is no indication on the face of the receipt that plaintiff abandoned its claim for the balance of the amount still owing from defendants to plaintiff for such elevator. The \$500 were paid simply in return for a waiver by plaintiff of that clause of the contract of sale which kept title in plaintiff until the full amount of the purchase price was paid. The balance still remained due from defendants to plaintiff, but the receiver obtained the right to retain the elevator in the apartment house by this waiver of title by plaintiff, who had demanded the return of said elevator. On the trial plaintiff's counsel sought to show that at the time of the payment of the \$500 it was expressly stated and agreed that payment of said money should not operate as a release of the claim against defendants. The court refused to permit him to do so, although the rule is that a receipt can be explained, and that parol evidence is competent to show the purpose for which the receipt was given and to what demand it was applicable, and a receipt given for a specific purpose cannot be used for a different purpose. The receipt states that the \$500 were given "in accordance with the order of the court." This order directs the receiver "to satisfy the claim of the Reedy Elevator Company to the elevator"—i. e., its title thereto

and right to remove said elevator from the apartment house; but the order makes no mention of plaintiff's claim against defendants for the balance due for breach of contract in failing to pay in full for said elevator. The evidence which plaintiff sought to introduce, as above indicated, would not have varied the terms of the receipt, as there is nothing in the receipt inconsistent with plaintiff's retention of its claim for the balance due from defendants.

Plaintiff did not surrender the note to the receiver upon the payment of the \$500 and the giving of the receipt, nor was any demand for such note made by the receiver, who had nothing to do with plaintiff's claim against defendants for breach of contract, but wished merely to prevent plaintiff from removing the elevator from the building, which plaintiff had a right to do so long as the title remained in said plaintiff, and which it had threatened to do, whereupon the receiver made an arrangement with plaintiff to give up this right for \$500, and obtained the order of the court authorizing him to carry into effect such arrangement with plaintiff. Although the plaintiff concededly demanded the return of the elevator, it need not be held to have thereby elected to rescind the contract of conditional sale between itself and defendants. It did not actually take possession or assume control of the elevator, nor did it make a demand for its return upon defendants themselves, but upon the receiver. Its surrender of title to the elevator was not a surrender of its claim against defendants for the breach of contract. The demand on the receiver for the return of the elevator was more in the nature of a threat to rescind the conditional contract of sale with defendants than an actual rescission of such contract.

It may also be said that this claim of a rescission was not pleaded in the answer and is raised for the first time on appeal. The answer sets up the defense of a discharge in bankruptcy; but no evidence was introduced on that subject, nor is it referred to on the appeal. The plaintiff has shown itself entitled to recover the remaining \$500, and it was therefore error to direct a verdict in favor of the defendants.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

(56 Misc. Rep. 524.)

COHEN et al. v. BACHRACH.

(Supreme Court, Appellate Term. November 29, 1907.)

1. JUDGMENTS—CONCLUSIVENESS—DISMISSAL.

Dismissal of a complaint as to a defendant is not a bar to another action, unless the dismissal was on the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1028, 1032, 1034.]

2. COURTS—NEW YORK MUNICIPAL COURT—APPLICABILITY TO CODE PROVISIONS.

Code Civ. Proc. § 1209, providing that a final judgment dismissing a complaint does not prevent a new action on the same cause, unless it expressly declares or it appears by the judgment roll that it was rendered on the merits, has no application to the Municipal Court of New York City.

3. JUDGMENT—NEW YORK MUNICIPAL COURT—DISMISSAL—SCOPE OF ADJUDICATION—CONCLUSIVENESS OF JUDGMENT ROLL.

In an action in the City Court of New York the question whether a dismissal of an action in the Municipal Court was upon the merits is a matter of proof, and the judgment roll is not necessarily conclusive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1822-1825.]

4. SAME—DISMISSAL ON MERITS—SUFFICIENCY OF EVIDENCE.

In an action in the City Court of New York on an alleged oral contract of suretyship, it appeared that a prior action in the Municipal Court on the same cause had been dismissed as to B., the defendant in the instant case, and that the only evidence in the former action as to B.'s liability was the testimony of a plaintiff that B. said, "You should continue the work, and I will see to it," but B. denied that he had ever had a contract with plaintiffs, and at the end of the trial plaintiffs' counsel asked, "Does your honor find there was no contract between plaintiffs and B.?" to which the court replied, "Yes, sir; I shall find as a matter of fact. I do not think you have sufficiently sustained the burden of proof." *Held*, that the Municipal Court judgment was on the merits, and barred the action in the City Court.

Appeal from City Court of New York.

Action by Isaac Cohen and another against Abraham M. Bachrach. From a judgment for defendant and an order denying a new trial, plaintiffs appeal. Affirmed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Alderman & Alderman (Joseph Fischer, of counsel), for appellants.
Philip S. Seligman (Max D. Steuer, of counsel), for respondent.

GILDERSLEEVE, P. J. The action is brought to recover the sum of \$400. Plaintiffs had a contract with one Pollack and one Goodman to do certain work on a building. Pollack and Goodman got into financial troubles, and defendant, according to plaintiffs' claim, promised that he would pay to plaintiffs all money due or to become due under their contract with said Pollack and Goodman, if plaintiffs would complete their work to be done under said contract, and plaintiffs claim that they did complete, and earned the \$400 which they seek to recover. Defendant puts in issue the claim of the plaintiffs, and sets up the defense of *res adjudicata*. The court below held that a judgment of the Municipal Court, rendered in an action between these plaintiffs, as plaintiffs, and this defendant, said Pollack, said Goodman, and the Ogden Lumber Company, as defendants, was a complete bar to plaintiffs' cause of action herein, and the court directed a verdict for defendant. Plaintiffs appeal.

The action in the Municipal Court was to foreclose a mechanic's lien, and was for the same amount and the same work involved in the case at bar. The Municipal Court gave judgment for the plaintiffs against Pollack and Goodman, for \$308.42, and "dismissed as to other defendants"—i. e., the defendant in the case at bar and the Ogden Lumber Company. Unless the complaint was dismissed as to this defendant on the merits, the judgment of the Municipal Court was no bar to the present action. There is no statement in the judgment roll that the dismissal was on the merits. Section 1209 of the Code,

providing that a final judgment dismissing the complaint does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment roll; that it is rendered upon the merits, has no application to the Municipal Court. *Stecher v. Free Sons of Judah*, 45 Misc. Rep. 340, 90 N. Y. Supp. 332, 333 (Appellate Term, Bischoff, J.). The question, therefore, as to whether the judgment of the Municipal Court was or was not upon the merits was a matter for proof in the ordinary course, and the judgment roll was not necessarily conclusive. *Stecher v. Sons of Judah*, supra.

It appears from the record that in the Municipal Court action plaintiffs under an amendment to their complaint at the trial sought to hold this defendant as owner of the premises and under his promise to pay to plaintiffs the amount due and to become due if plaintiffs would complete the work to be done under their contract with Pollack and Goodman, which is the same ground upon which plaintiffs seek to hold defendant in the case at bar, and at the end of the trial of the Municipal Court action the plaintiffs' counsel asked the court:

"Does your honor find there was no contract between plaintiffs and Bachrach [this defendant]?"

To which the court replied:

"Yes, sir; I shall find as a matter of fact. I do not think you have sufficiently sustained the burden of proof."

The only evidence which plaintiffs seem to have offered in the Municipal Court action in support of their claim of a contract with Bachrach, whereby they were to finish the job and he was to pay for it, was that of one of the plaintiffs to the effect that Bachrach said: "You should continue the work, and I will see to it." The Municipal Court justice might very well have reached the conclusion that plaintiffs had not sufficiently sustained the burden of proof, and found as a matter of fact, upon a conflict of proof, that there was no such contract between plaintiffs and Bachrach. The latter swore positively in the Municipal Court action:

"I got somebody else to do this work—Rado Bros. I have paid them for that work. * * * I never had a contract with Cohen and Goldstein [plaintiffs]."

It seems to us that it must be held that the Municipal Court judgment was on the merits, and is a bar to the plaintiffs' cause of action herein.

The judgment and order should be affirmed, with costs. All concur.

(56 Misc. Rep. 565.)

ÆTNA ELEVATOR CO. v. DEEVES et al.

(Supreme Court, Appellate Term. November 29, 1907.)

MECHANICS' LIENS—CONSENT OF OWNER—IMPROVEMENTS BY LESSEE—COVENANT TO REPAIR BY LESSEE.

A covenant in a lease obligating lessee to keep the premises in good order and repair during the term does not imply a consent by lessor, within Mechanic's Lien Law, Laws 1897, p. 516, c. 418, § 3, providing that a contractor or materialman who performs labor or furnishes material for the improvement of real property with the owner's consent shall have a lien;

there being a distinction between "improvements" and "repairs," within the contemplation of that section.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Mechanics' Liens, §§ 72, 73.]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the Ætna Elevator Company against Richard Deeves and others, demanding judgment that plaintiff had acquired a lien for labor performed and materials furnished, that there was due an amount specified, with interest and costs, together with such other relief as might seem just. Judgment for defendants, and plaintiff appeals. Affirmed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Wm. P. Martin (Alfred B. Nathan, of counsel), for appellant.

Kurzman & Frankenheimer (John Frankenheimer and Walter Frank, of counsel), for respondents.

GILDERSLEEVE, P. J. The facts are conceded by stipulation to be substantially as follows, viz.: On December 29, 1906, and for some time prior thereto, defendants were the owners of certain real estate; i. e., the Everett Hotel, on Seventeenth street and Fourth avenue. On March 6, 1906, when defendants were such owners, they leased said premises to a corporation known as the "Everett House Company." The lease was in writing, and was for a term of 21 years. Among other things the lease provided as follows, viz.:

"The party of the second part [the lessee; i. e., the Everett House Company] * * * agrees to keep the premises in good order and repair during said term at its own cost and expense."

Between November 15, 1906, and November 20, 1906, plaintiff performed certain work and furnished material for said Everett House Company, in connection with the repair of an elevator on said premises, at the agreed price and reasonable value of \$227.32. The repairs in question were necessary to the proper working of the elevator. The defendants, however, deny that the repairs made to said premises were made with their consent, as owners or otherwise, or that they derived any pecuniary benefit from such repairs, or that the premises were enhanced in value by such repairs. No testimony was introduced in support of such denials, and no claim is made that the repairs were not properly done; while it is admitted by defendants, as we have seen, that such repairs were necessary to the elevator. The inference, therefore, the plaintiff claims, is that the value of the premises was enhanced to the extent of these repairs, and that defendants, as owners, derived a benefit from these necessary repairs by such enhanced value of their premises. Upon nonpayment of its claim by the Everett House Company the plaintiff filed a mechanic's lien against the premises on the 29th day of December, 1906, and subsequently brought this action, demanding judgment:

"First, that on December 29, 1906, it acquired a valid lien upon the interest of the defendants in the said premises; and, second, that there is now due to the plaintiff from the defendants the sum of \$227.32, with interest from

the 20th day of November, 1906, and costs, together with such other and further relief as to the court may seem just."

Section 3 of the mechanic's lien law (Laws 1897, p. 516, c. 418) provides thus:

"A contractor or * * * materialman, who performs labor or furnishes material for the improvement of real property, with the consent or at the request of the owner thereof, * * * shall have a lien for the principal and interest of the value or the agreed price of such labor and materials upon the real property improved * * * from the time of filing a notice of such lien as prescribed in this article."

It is admitted that no formal request was made by the defendants for the repair of the elevator, nor any formal consent from them obtained; but the plaintiff claims there was an implied consent, arising from the stipulation in the lease from the defendants to the Everett House Company that the latter was "to keep the premises in good order and repair during said term." It will be observed that this is not a mere abstract permission to the lessee to make alterations or repairs, but that the defendants specifically imposed the duty of keeping the premises in good order and repair upon the lessee as an obligation and condition of the lease. It is claimed, therefore, that there is no application here of the doctrine of *Hankinson v. Van Tine*, 152 N. Y. 20, 46 N. E. 292, to the effect that an abstract permission by the owner to the lessee to make "alterations" did not amount to a consent by the owner, within the meaning of the statute, to the furnishing of labor and material by a third party. A distinction between a permission to make alterations and an obligation to make improvements seems to be approved by Chief Judge Cullen in the case of *Rice v. Culver*, 172 N. Y. 66, 64 N. E. 761. In the case of *Tinsley v. Smith*, 115 App. Div. 708, 101 N. Y. Supp. 382, the court says:

"Where the tenant covenants to make specific improvements or repairs, the landlord has been held to have consented thereto within the meaning of the statute."

In the case at bar the tenant covenanted generally to "keep the premises in good order and repair during the said term" of the lease. In the case of *Rice v. Culver*, supra, the court says (page 65 of 172 N. Y., page 762 of 64 N. E.):

"There is a marked distinction between the passive acquiescence of an owner, in that he knows the improvements are being made, * * * and his actual and express consent or requirement that the improvement should be done. It is the latter that constitutes the consent mentioned in the statute."

In the case at bar, as we have seen, the owners required the lessee to make "repairs"; but the word "improvements" is not mentioned. Again, in the above-cited case, at page 66 of 172 N. Y., page 763 of 64 N. E., Chief Judge Cullen says:

"The case [where permission to erect certain buildings was given] is entirely different from those in which the tenant covenanted by the lease to erect buildings or make improvements."

It seems to us, however, that the covenant in the lease obligating the lessee to "keep the premises in good order and repair during the said term" did not imply a consent, within the meaning of the statute, on

the part of the owners to the furnishing of the requisite labor and materials by a third party to make necessary repairs, although the repairs in question are conceded to have been necessary, and the charge therefor reasonable and proper, and though there is no dispute as to their being made in a proper and workmanlike manner, and we think that it was not error for the court below to give judgment for the defendants. There seems to be a sharp distinction between "improvements" and "repairs," and the statute refers only to "improvements" in its provision under consideration. The lien, therefore, should not be allowed, as defendant neither required nor consented to the making of improvements by the lessee in the sense contemplated by the statute.

The judgment should be affirmed, with costs. All concur.

(56 Misc. Rep. 440.)

TRUNK et al. v. HOWARD LAUNDRY CO.

(Supreme Court, Appellate Term. November 29, 1907.)

LANDLORD AND TENANT—CONTINUANCE TO PREPARE FOR TRIAL—RECOVERY OF POSSESSION.

Where, after a preliminary application for a continuance of proceedings to dispossess a tenant had been denied on the day succeeding that on which the precept was returnable, the case having been continued by the clerk on the previous day because of the absence of a justice, defendant filed a verified answer raising a material issue and claiming that the current term had not expired, it was error to deny an application for a continuance for one day in order to enable defendant to prepare for trial.

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by John Trunk and another against the Howard Laundry Company. From an order denying defendant's motion to open its default, it appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Myron Sulzberger, for appellant.

Leopold W. Harburger, for respondents.

PER CURIAM. These proceedings were instituted by the landlords to dispossess the tenant upon the ground that it is a monthly tenant, and that it held over without permission after the expiration of its term. The precept was returnable at 3 p. m. of April 1, 1907, and, there being no justice present at that time, the clerk adjourned the trial until 9 a. m. of April 2d. When the case was called on that day one Donnellan, an attorney, appeared in behalf of the attorney for the tenant, and asked that the trial be adjourned until April 3d to enable the defendant to prepare for the same, and also for the reason that the attorney for the defendant was anxious to attend the funeral of the vice president of the club of which he, said attorney, was a member. This request was denied, and the tenant was directed to file an answer. A verified answer was then drawn up by Donnellan, and sworn to by the treasurer of the defendant, denying the allega-

tions of the petition, and averring that by the terms of the lease the defendant was a tenant from year to year; the term not expiring until May 1, 1907. This answer was filed, and when the case was called again, at 3:15 p. m., Donnellan made a second application for a postponement until 9 a. m. of the following day, so that the defendant could be represented by its attorney, and a hearing then had upon the merits. This application was refused, and an inquest was taken, a warrant at once, on April 2d, at about 3:45 p. m., issued to a marshal, who immediately placed the landlords in possession of the premises. The foregoing facts appear in the moving papers on the motion to open the tenant's default, and are not substantially disputed. That motion was denied, and from the order denying the same this appeal was taken.

While, perhaps, the reason given, that the tenant's attorney desired to attend the funeral of a fellow member of his club on practically the return day of the precept, was not a legal excuse for delaying the trial, we think that under the circumstances the request for an adjournment for a single day to prepare for trial should have been granted. The tenant had interposed a verified answer setting up facts which, if true, would have entitled it to possession of the property from which it was sought to be removed. It had a right to a reasonable time in which to prepare to meet the issues presented by the pleadings, and the request for an adjournment of one day was not unreasonable, as less time would hardly have sufficed. It is almost the universal practice upon the return day of process to grant an adjournment without any substantial reason being given, and almost as a matter of course; in brief, the unseemly haste to rush this proceeding should not be countenanced.

The order appealed from is reversed, the default of the tenant opened, and a new trial ordered, with costs to abide the event.

FINKELSTEIN et al. v. FABYIK et al.

(Supreme Court, Appellate Term. November 29, 1907.)

1. LANDLORD AND TENANT—LEASE—REQUISITES—RECEIPT FOR RENT.

An instrument reciting receipt from defendants of \$10 for deposit on rent of two specified lofts, "rent to be \$65 per month and to run for two years," did not constitute a lease of the lofts for two years; it having been delivered to defendants by an agent of the owners not authorized to make leases, and it also being contemplated that a lease should be subsequently executed by the owners.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 55.]

2. SAME—TERMINATION OF TENANCY—NOTICE TO QUIT—PAYMENT OF RENT.

A payment on account of rent after notice to remove was not binding on the landlord, under the rule that notice to quit terminates the tenancy.

3. FRAUDS, STATUTE OF—AGENT OF OWNER—AUTHORITY TO LEASE.

Under the express provisions of Laws 1896, p. 592, c. 547, § 207, an agent, in order to execute a lease for more than a year, must have written authority from his principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 255.]

4. PRINCIPAL AND AGENT—LEASE BY AGENT—RATIFICATION.

Defendants paid plaintiff's agent, who was only authorized to collect rents and had no power to execute leases, a deposit on rent of premises and received a receipt reciting that the rent was to be \$65 per month, to run for two years. Defendants entered and paid rent for two months from March 15th at the rate of \$65 per month, which was received by the landlord. Before May 15th notice was served on defendants that the landlords elected to terminate their occupancy and required removal on May 15th, on which their term expired under a monthly hiring, and on May 18th dispossess proceedings were begun. *Held*, that there was no ratification of the agent's act in attempting to lease the premises for two years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 661.]

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Summary dispossess proceedings by Herman Finkelstein and another against John Fabyik and others. From a Municipal Court judgment dismissing the proceedings, plaintiffs appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Schenkman & Brown (Edward A. Brown, of counsel), for appellants.

Alvin C. Cass, for respondents.

ERLANGER, J. On March 12, 1907, the tenants paid to one Rose Emil \$10 and obtained from her the following receipt:

"March 12th, '07.

"Received of J. Fabyik & Co. Ten no/100 dollars for deposit on rent of two lofts No. 652 East 12th street. Rent to be \$65 per month, and to run for two years.
Rose Emil."

The tenants entered into possession of the premises and paid rent for two months, from March 15 to May 15, 1907, at the rate of \$65 per month, and it is conceded that the landlord received the money. Before the 15th of May, 1907, notice was served upon the tenants to the effect that the landlords elected to terminate their occupancy of the premises, and requiring them to remove on May 15, 1907, the day on which their term expired under the monthly hiring, and unless they so removed summary proceedings would be begun to oust them. On May 18, 1907, proceedings were instituted to dispossess the tenants, and the usual petition was filed. The tenants answered, denying the expiration of their term; that their rent was paid on May 15, 1907, for the month terminating on June 15, 1907; and that they held an agreement in writing with the landlords for a two-year hiring of the premises. On May 22, 1907, a trial was had, which resulted in the dismissal of the proceedings upon the merits, with \$10 costs. The landlords appeal.

It was developed upon the trial that when the tenants saw Mrs. Emil they were informed by her that the rent would be \$65 each month, and that when they spoke of the lease she replied, "The lease would be given by the owners;" that she was unable to read English;

"that the receipt was written by them," and that she "thought they wrote a receipt for \$10"; that her sole duties were to collect the rents, and that she never leased any part of the premises to tenants. One of the landlords testified that after the tenants took possession he had a conversation with one of them; that he was informed that they had a lease for two years, and when he asked to see it they did not produce it; that various appointments were made looking to the execution of a lease, but none was executed, although he expressed his willingness upon the stand to make one. It also appears that Mrs. Emil on May 15th was paid \$65. She testified that she refused to accept it as rent and declined to give a receipt; that she offered to return it, but it was not accepted; and that she still retains it. Both sides rested on this evidence.

The receipt was relied upon as a lease, and the court by his ruling must needs have held that it constituted a lease for two years, unless it was determined by him that the payment to Mrs. Emil on May 15th was sufficient to permit the tenants to remain in possession until June 15th following. Just what was decided is not clear. If the court held that the receipt was in effect a lease, it was error (*Larkin v. Radosta*, 119 App. Div. 515, 104 N. Y. Supp. 165); and if he ruled that the payment after notice to remove was given bound the landlords, it was likewise error. Notice to quit terminates the tenancy. *McAdam's Landlord & Tenant* (3d Ed.) 600, note to section 174. No proof was offered to show that Mrs. Emil had any authority whatsoever to act for the landlords, except to collect the rents. Under the real property law an agent, in order to execute a lease for more than one year, must have written authority to act. *Laws* 1896, p. 592, c. 547, § 207. Nor was ratification established.

The judgment must be reversed, and a new trial ordered, with costs to appellants to abide the event. All concur.

(56 Misc. Rep. 589.)

ROBINSON CLAY PRODUCT CO. v. AMERICAN LOCOMOTIVE CO.

(Supreme Court, Appellate Term. November 29, 1907.)

1. SALES—DELIVERY—TIME FOR DELIVERY.

When a date for delivery is mentioned in a contract of sale, the goods must be delivered on that day, and, if not, the purchaser may usually refuse to accept a subsequent tender; and in ordinary cases, where no specified time for delivery is mentioned, delivery must be made within a reasonable time after the making of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 218.]

2. SAME.

What constitutes a reasonable time for delivery under a contract of sale usually depends upon the circumstances of the case, such as the parties may be supposed to have contemplated in a general way when making the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 218.]

3. SAME.

In a contract of sale, defendant's requirement that the shipment of goods should be the "earliest possible" must be construed as meaning that the goods should be sent as soon as plaintiff could possibly send them, and

signified rather more than that the goods should be sent within a reasonable time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 219.]

4. SAME—RESCISSION BY BUYER—DELAY IN DELIVERY.

In an action for goods sold and delivered, evidence examined, and held not to support defendant's contention that a delay of 39 days in sending the goods justified defendant's cancellation of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 291.]

5. SAME—ACTIONS FOR PRICE—SUFFICIENCY OF EVIDENCE.

In an action for goods sold and delivered, where the price was fixed at a certain discount from the regular list price, less freight, testimony by plaintiff's agent that he was entirely familiar with the price of the goods in question, and that the lowest net price was \$122.64, and the freight \$21.60, leaving a balance of \$101.04, was sufficient to sustain a judgment of \$101.04 for plaintiff, though the agent had not seen the goods shipped, where the quantity and class of the goods were undisputed, and his statement of the net price was evidently taken by making the agreed deductions from the price list.

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by the Robinson Clay Product Company against the American Locomotive Company for goods sold and delivered. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Simpson, Thatcher & Bartlett (Arthur S. Hamlin, of counsel), for appellant.

George D. Beattys, for respondent.

GILDERSLEEVE, J. Defendant wrote to plaintiff on October 25, 1906, requesting a quotation of prices on specified varieties of sewer pipe and a statement of the date of the "earliest possible delivery." The plaintiff replied on October 27, 1906, that it could furnish the pipe "at 83 per cent. discount from list, allowing freight to destination," and that it had all the articles on hand, with one exception—i. e., "the 12x12x12 V branch"—and that it "could make immediate shipment on receipt of order." The exception above mentioned was only a single item out of some 32 items specified in defendant's letter of October 25th. Thereafter, and on November 19th, defendant sent an order for the goods specified, upon which order was also written the words: "Shipment: Earliest possible." The order was accepted, and part of the pipe was shipped on November 27, 1906, and defendant paid for the same. The balance of the pipe, comprising the greater portion of the order and many items beside the exception above mentioned in plaintiff's letter of October 27th, was not shipped from plaintiff's factory until December 28, 1906, 31 days after the shipment of the first car load of goods, and 39 days after the giving of the order. On account of this long delay defendant claims to have obtained the articles elsewhere and refused to accept the shipment from plaintiff or to pay for the pipe. It notified plaintiff by telegram on December 26th, two days before the pipe was sent from plaintiff's factory, that it would not accept delivery after such delay.

This telegram, however, was signed by one Van Alstyne without prefixing the name of defendant, and plaintiff's agents claimed they did not know Van Alstyne was the representative of defendant. The plaintiff brought this action to recover the price of the pipe in the second shipment, and the court gave judgment in plaintiff's favor. Defendant appeals.

When a specified date for delivery is mentioned in the contract, the goods must be delivered on that day, and in case of failure the purchaser may usually refuse to accept a subsequent tender; and in ordinary cases of sales, where no specific time for delivery is mentioned in the contract, delivery must be made within a reasonable time after the making of the contract. What constitutes a reasonable time usually depends upon the circumstances of the particular case, such as the parties may be supposed to have contemplated in a general way when making the contract. *Eppens v. Littlejohn*, 164 N. Y. 191, 58 N. E. 19, 52 L. R. A. 811. The requirement of defendant that the shipment of the goods should be the "earliest possible" must be construed as meaning that the goods should be sent as soon as plaintiff could possibly send them, and signified rather more than that the goods should be sent within a reasonable time. It was what may be called a "hurry order." Is there anything to indicate that it was in the contemplation of the parties, at the time of making the contract, that unless the goods were sent before December 29, 1906, the defendant was to be at liberty to refuse acceptance, and was the delay of 39 days an unreasonable one? We should be inclined to hold that defendant's request in the first instance for a statement of the time of the "earliest possible delivery," and plaintiff's reply that it had all the articles on hand with one exception, and that it "could make immediate delivery on receipt of order," together with defendant's request in the order itself that the shipment should be the "earliest possible," made it clear that it was contemplated by the parties in making the contract that all possible haste in delivery was to be an element of said contract, and that, in view of such understanding, a delay of 39 days was an unreasonable one, were it not for certain qualifying circumstances. On the letter head of the plaintiff's letter of October 27, 1906, conspicuously appeared the words:

"Quotations are for prompt acceptance. Shipments are subject to strikes, accidents, car supply, and delays beyond our control."

After waiting a few days to hear again from defendant, plaintiff sent a representative to defendant to urge defendant to give the order, and stated to defendant's representative that it was necessary for plaintiff to have the order at once if defendant wanted a quick delivery, that there was a car shortage that was increasing, and that it would be difficult for defendant to get its goods as quickly as it might want them. After calling several times in vain, plaintiff's representative abandoned his efforts to secure the order. Defendant waited until November 19th before giving the order, with full notice that delay in giving the order might result in considerable delay in receiving the goods after the order had been given, and that plaintiff's quotations

in its letter of October 27th were "for prompt acceptance," and that "shipments were subject to strikes, accidents, car supply, and delays beyond plaintiff's control." It will, therefore, be seen that defendant has been guilty of delay, as well as plaintiff. That plaintiff, on receiving the order, nearly a month after its letter of October 27th, had ceased to have all the articles, with one exception, on hand, and that it could no longer make shipment immediately, is apparent from plaintiff's undenied inability to get the goods ready and ship the same. There is nothing to indicate that plaintiff had received any intimation that defendant intended to cancel the contract for the failure of plaintiff to make a prompt or immediate delivery, until the goods had actually been sent and tendered to defendant on or about December 28th, except the telegram of December 26th, signed by one Van Alstyne, who was unknown to plaintiff, and whom plaintiff was unable to connect with defendant, the American Locomotive Company. Under the circumstances indicated we are inclined to the opinion that the evidence does not support defendant's contention that the delay in sending the goods justified a cancellation by defendant of the contract of purchase and sale.

The errors presented on rulings upon the evidence are not of such a serious character as to require a reversal. The price of the goods was fixed in the contract at 83 per cent. discount from the regular list price, less freight to Dunkirk, less 2 per cent. if paid in 15 days. No list of prices was put in evidence, nor was any testimony given as to what the list price was, except the general statement of one Lowenthal, an agent of plaintiff, who said he was entirely familiar with the class of goods in question, and that the lowest net price of the goods on the car sent to defendant was \$122.64, and that the freight to Dunkirk was \$21.60, making \$101.04, for which sum, with interest and costs, judgment was given in favor of plaintiff. Although this witness has not actually seen the goods on the car, the quantity and class of those goods are undisputed, and his statement of the net price is evidently taken by making the contract deductions from the price list. If his evidence was too indefinite to satisfy defendant's counsel, he could have gone into further detail on the cross-examination; but he did not see fit to do so. While this evidence is open to criticism, we do not think, under all the circumstances of the case, that there was insufficient proof of the agreed price to sustain the finding of the court below in that regard.

Upon the whole case, we are of opinion that the judgment should be affirmed, with costs.

Judgment affirmed, with costs. All concur.

(56 Misc. Rep. 549.)

HERRMAN v. LAEMMLE et al.

(Supreme Court, Appellate Term. November 29, 1907.)

1. RELEASE—CONSTRUCTION—LEASE—SURRENDER BY LESSEES—LIABILITIES FOR BREACH OF COVENANTS.

By an instrument, executed by both parties to a lease, reciting that the lessees were desirous of yielding possession and being absolved from further liability for rent, they surrendered possession to the lessor and released him from an option granted to them to purchase, and the lessor agreed to accept the surrender and release the lessees "of and from all obligation to pay rent." *Held*, that such release, though construed most strongly against the lessor, did not release the lessees from liability for breach of a covenant to take good care of the premises and to repair.

2. LANDLORD AND TENANT—SURRENDER—EFFECT.

The rule that where a landlord, with full knowledge of the condition of his property, consents to a cancellation of the lease, he bars his recovery of damages for a breach of covenant to repair and care for the premises, does not apply where the surrender is pursuant to a written instrument expressly releasing the tenants from their covenants to pay future rent only.

Appeal from City Court of New York.

Action by James S. Herrman against Joseph Laemmle and others. From a judgment of the City Court of New York, setting aside a verdict in favor of plaintiff and dismissing his complaint on the merits, he appeals. Reversed, and verdict reinstated.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Richard T. Greene, for appellant.

Fredk. A. Stroh, for respondent Laemmle.

Davis & Kaufman, for respondent Jetter.

McEachen & Elkus, for respondent Martin.

ERLANGER, J. It appears from the complaint that in April, 1901, the plaintiff let to the defendants by written lease the premises therein described; that, contrary to the covenant to take good care of the premises and repair the same at their own cost and expense, they destroyed, mutilated, and otherwise damaged certain portions of the building, and removed machinery and fixtures therefrom. It is also alleged that on the 26th day of October, 1903, the defendants by written agreement surrendered possession of the premises to plaintiff, and thereby released him from the option granted to them to purchase the property; that he accepted such surrender and released them from that day of and from all obligation to pay rent. Damage in the sum of \$2,000 is claimed to have been sustained, for which judgment is demanded. The defendants answered separately, and, after putting in issue the material allegations of the complaint, claimed that the said agreement of October 26, 1903, instead of releasing them only from future rent, operated as well to release them from all obligations assumed under their lease. Plaintiff proved the damage sustained to his property, and after resting his case a motion was made to dismiss the complaint upon the ground that the agreement referred to released them from all liability. The motion was denied, with leave to renew

after the verdict of the jury was returned. The defendants submitted their evidence. After the close of the case a motion was again made to dismiss, and the court said:

"I will adhere to the view I expressed before, and I will let this case go to the jury, and if such course is unsatisfactory to counsel they may move to set the verdict aside, and I will then consider the questions of law, as I think the question involved is a very serious one."

The court then charged the jury, who found for the plaintiff in the sum of \$900. Defendants thereupon moved to set aside the verdict under section 999 of the Code, and again pressed the motion to dismiss. Decision was reserved, and some time thereafter the court disposed of the motion in the following memorandum:

"I am still of the opinion, expressed at the close of the trial, that the agreement of October 26th operated as a cancellation of the lease, and the landlord, having accepted a surrender of the possession of the premises without reserve and with full knowledge of their then condition, and released all future rents, waived any rights he then had or might have at the termination of the lease to enforce its covenants for repairs. It follows, therefore, that verdict must be set aside, and the motion to dismiss the complaint granted."

Judgment was then entered, setting aside the verdict and dismissing the complaint upon the merits, with \$69.28 costs to each defendant. Plaintiff appealed.

Appellant raises two questions on this appeal. He claims, firstly, that the court was without power to dismiss upon the merits after the verdict; and, secondly, that the court erred in its interpretation of the agreement, the effect of which was only to release the defendants from future rent and nothing else. Respondents take the position that the instrument of surrender not only canceled the lease, but its acceptance was without reserve, and *ex vi termini* freed them from the covenant to repair. The only questions necessary to decide are whether the writing will bear the interpretation given to it by the court below and whether the judgment can be upheld.

We think both must be answered in the negative. A glance at the writing suffices to show that to give it the construction contended for would destroy the apparent intent expressed upon its face. The recital shows that the defendants "are desirous of yielding up possession of the said premises and of being absolved from further liability for the payment of rent under said lease"; and, after the consideration is stated and the receipt thereof acknowledged, it proceeds:

"The parties hereto covenant and agree as follows: (1) The said Joseph Laemmle, Christian Jetter, and Henry Martin do hereby, and each of them, yield and surrender up possession of the said premises to the said James S. Herrman of and from the option granted by him to them to purchase the demised premises; said option never having been exercised. (2) The said James S. Herrman hereby accepts the surrender of the possession of the said premises, and does hereby release said Laemmle, Jetter, and Martin of and from all obligation to pay rent for the same from this day forth."

Two distinct rights were thereby released. The defendants' option to purchase was relinquished by their consent, and the acceptance by plaintiff of the surrender absolved them from all future rent. If it was intended that the release should cover and discharge other lia-

bilities coexisting at the time with the liability for rent, apt words expressing such intention should have been incorporated in the instrument which was to give them this absolute immunity. Not only does the recital declare with positive certainty the specific obligation from which defendants desired to be relieved, but the operative part of the writing, which must prevail, is likewise clear. All the rules of interpretation and construction applicable to writings govern the instrument in hand, and its terms can neither be detracted from nor enlarged. No claim of fraud or mistake is made in connection with its execution, nor, indeed, is anything of the kind pleaded. The defendants are bound by the limitations of the release to them, and to give it the effect claimed would require us to recast the instrument and write into it a release of the defendants from other covenants broken before the surrender took place. Construing the language of the paper most strongly against the plaintiff, as we must (*Kirchner v. Home Sewing Machine Co.*, 135 N. Y. 182, 31 N. E. 1104), the fact still remains that the only liability released by him is from the rent, and none other.

The claim that plaintiff had full knowledge of the condition of his property, and that the premises were yielded up to enable him to sell the same, cannot avail the defendants. Whatever the rule may be in other cases where a surrender has taken place, the omission from the release in suit of positive terms that it was intended to cover all liability for breach of the covenants of the lease, as well as for future rent, is fatal to the defendants. There are a number of cases in which it has been ruled that where a landlord, with full knowledge of all the facts in respect of the condition of his property, consents to a cancellation of a lease, he bars himself from recovering damages for the breach of covenants therein. But the principle of those cases does not apply here. In none was there a writing in form like in the case at bar. We are of the opinion that the release, both with regard to its recitals as well as the operative part, is definite, and that its terms cannot be enlarged, and that plaintiff was entitled to recover any damage provable by him prior to the surrender. It was therefore, error to set aside the verdict and dismiss the complaint. The judgment should be reversed, and the verdict of the jury reinstated, with costs. All concur.

ROBERTSON v. BIRDIE et al.

(Supreme Court, Appellate Term. November 29, 1907.)

1. LANDLORD AND TENANT—RECOVERY OF POSSESSION—SUMMARY PROCEEDINGS—VALIDITY OF LEASE.

The owner of an undivided half interest in certain property, who also owned a life interest in the other half, leased the premises for a five-year term, with the privilege of renewal for five years, at a rent not to exceed \$1,000 per year. The lessor died before the expiration of the original term, and the reversionary owner, as his heir, became the sole owner. She collected the rents until her death, after which plaintiff collected the rents as administrator and later as devisee. Prior to the expiration of the term he served notice that the rent would be \$1,800 per year after the original term ran out, and brought summary proceedings to oust them, alleging that they had agreed to pay him \$150 per month in advance after the expiration of the term, but were in default.

The lessees denied any new agreement, but admitted their possession, claiming under the renewal clause. They had tendered rent at the rate of \$1,000 a year, which plaintiff refused, contending that the original lease was void, because the reversionary owner did not join in the execution, and that there had been no ratification. There was no proof of any new agreement. *Held*, that plaintiff could not recover, for if the lease was originally valid, or had been ratified, defendants were entitled to remain, and if it was void, and there was no ratification, the relation of landlord and tenant did not exist to support the proceedings, since proof of the new agreement had failed.

2. SAME—NECESSITY FOR RELATION OF LANDLORD AND TENANT.

The relation of landlord and tenant must exist to support a summary proceeding for the recovery of real property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 82, Landlord and Tenant, § 1273.]

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Summary proceedings by Morton E. Robertson against John Birdie and another to recover possession of real property. From a judgment for defendants, plaintiff appeals. Affirmed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Ruth & Baker, for appellant.

Chas. G. Hupfel, for respondents.

ERLANGER, J. The appellant, Morton E. Robertson, brought these proceedings to oust from premises owned by him the tenants, who are respondents on this appeal. In his petition he alleges that the tenants "were in possession as tenants for a term ending May 1, 1907, under an alleged agreement of hiring," and that on April 2, 1907, he notified them that, commencing May 1, 1907, the rent would be \$1,800 a year if they continued in possession after May 1, 1907; that thereafter they undertook and promised to pay as rent \$150 per month in advance; that on May 1, 1907, there was due by virtue of said agreement \$150 rent for the said month of May; that they made default in payment pursuant to their agreement; and that they hold over without his permission. The tenants by their answer admit their occupation of the premises, but deny that their term expired on May 1, 1907. The notice to pay \$1,800 per year is admitted, but the agreement to pay that sum is denied, and so they deny that in virtue of their agreement there was due \$150 for the month of May, 1907, and that they made default, and hold over without permission, after default. By way of separate defense it is alleged that on the 1st day of May, 1907, they tendered to the landlord \$83.33, the rent for that month, but the same was refused; that they are now and always have been willing to pay said rent. The issue thus presented was tried, and judgment was awarded the tenants, upon the following facts:

In March, 1895, one Margaret Brady died, and by her will she devised the premises in question to her daughter, Margaret E. V. Robertson (the landlord's wife), and to her son, William H. Brady. Subsequently, in April, 1895, the daughter leased unto her father, John Brady, for the term of his natural life, her undivided one-half of said

property, and in October, 1898, the son by deed conveyed his undivided half to his father, the said John Brady. By these transfers John Brady became the owner in fee of one undivided half and life tenant of the other undivided half of the property. Thereupon, in June, 1901, the said John Brady leased said property to Thomas J. Nolan for 5 years and 10 months, from July 1, 1901, at the yearly rental of \$900. In this lease an option was reserved to the tenant giving him the privilege of a renewal for a further term of five years from May 1, 1907, upon the same terms and conditions as are therein contained, except that the rent was to be agreed upon, but was not to exceed the sum of \$1,000 per annum. Thereafter, and in April, 1904, John Brady, the lessor, died, leaving him surviving as his only heir at law his daughter, the said Margaret E. V. Robertson. In July, 1905, the daughter died, and by her will she devised all her real and personal estate to her husband, the appellant herein. After the lease to Nolan was executed, he assigned the same to a Mrs. McNevin, and she assigned it to the tenants in these proceedings. The record does not show when these assignments were made, but no question as to their validity is raised. It is admitted that appellant served notice on April 2, 1907, that the rent from May 1, 1907, would be \$1,800 per year; but the agreement referred to in the petition as having been made by the tenants to pay that rental was not established upon the trial. The tenants rested on their lease and the option reserved to them for an additional five years after May 1, 1907, and their willingness to pay the highest rental stipulated for the renewed term, to wit, \$1,000 a year. The proof shows that from the death of her father, in April, 1904, appellant's wife collected the rent from the tenants, and upon her death, in July, 1905, appellant himself collected the rent until January, 1906. These rents were collected by him as temporary administrator under the will of his wife, but he thereafter individually collected the water rates and rents up to May 1, 1907. It was also admitted that on May 1, 1907, the tenants offered appellant \$83.33 for rent for that month, and that it was refused.

The appellant contends that the lease made by John Brady to Thomas J. Nolan is void, because his daughter, Margaret E. V. Robertson, deceased, the reversionary owner of one undivided half of the property, did not join in the execution thereof; that a co-owner cannot destroy the unity of possession by executing a lease of the entire estate without the other owner joining with him; and that at most John Brady could only give a lease for a term measured by his own life. It is contended, also, that the facts proved upon the trial, both in respect of knowledge of the existing lease and the collection of the rents as well by appellant as by his deceased wife, established no ratification, and that the life of the lease fell with the death of Brady. The appellant by his contentions has defeated himself of the remedy which he seeks to enforce. If the lease is void for the reasons assigned by him, then clearly the conventional relation of landlord and tenant does not exist, and he cannot maintain these proceedings. On the other hand, if the relation of landlord and tenant does in fact exist, so as to enable him, under the so-called act of summary proceeding,

to invoke the provisions thereof in his favor, then that relation only arises from the fact that the lease is valid, ratified, not only by his wife, but by himself, each having full knowledge of its existence and its terms and conditions, and each having at different times collected the rents and water rates from the tenants in possession. But if it be true, as he insists it is, that no legal ratification of the lease was effected, either because of the collection of rents or by recognition of the instrument, then, again, he cannot maintain these proceedings, as he has no standing in court as landlord under the act referred to. The owner's position is an embarrassing one. He styles himself in his petition as landlord and owner of the property, but repudiates the lease under which the tenants hold, and seeks to confer jurisdiction upon the court by claiming that a new agreement of letting with the tenants was made, but offered not a particle of proof to support his allegation. In *Reich v. Cochran*, 151 N. Y. 122, at page 127, 45 N. E. 367, at page 368, 37 L. R. A. 805, 56 Am. St. Rep. 607, Martin, J., said:

"To establish the relation of landlord and tenant between the parties, and to entitle the defendant to a judgment in the summary proceedings, the existence of a valid lease upon which the rent was due from the plaintiff to the defendant was necessary."

And so, in *People v. Goldfogle*, 30 N. Y. Supp. 298, the court said:

"The question in summary proceedings is whether the relation of landlord and tenant exists."

In view of the claims made, the judgment below was right, and must be affirmed, with costs.

Judgment affirmed, with costs. All concur.

HANN v. BRETTLER et al.

(Supreme Court, Appellate Term. November 29, 1907.)

1. BROKERS—COMPENSATION.

A real estate broker, acting for both vendor and purchaser without the knowledge of the vendor, is not entitled to receive a commission on the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 48-50.]

2. SAME—EMPLOYMENT—EVIDENCE OF AGENCY.

Defendants employed K. to secure a purchaser for certain real estate. After doing so he assigned to the purchaser part of his commission. In an action by the assignee to recover the amount, evidence as to whether K. was agent for both parties examined, and held sufficient to take the question to the jury.

3. TRIAL—QUESTIONS FOR JURY—CONFLICTING EVIDENCE.

Where the evidence is conflicting, the question is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 342, 343.]

4. ASSIGNMENTS—ACTIONS—DEFENSES—RELEASE.

Where an assignor of a debt gives a release to the debtor for a valuable consideration, the debtor not having notice of the assignment, the release will be a bar in an action by the assignee against the debtor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, § 182.]

3. APPEAL.

Where there is sufficient evidence to sustain the finding of the jury, it is not reviewable on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3923-3934.]

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by Gussie Hann against Max Brettler and Oswin Stuhmer. From a judgment for plaintiff, defendants appeal. Affirmed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Sternberg & Jacobson, for appellants.

David W. Rockmore, for respondent.

GILDERSLEEVE, P. J. In September, 1905, plaintiff and her husband, one David Hann, entered into a contract with defendants for the sale of certain real estate by defendants to plaintiff. One Simon Koenig was one of the brokers who had brought about the meeting of minds, and who had been hired by defendants to procure a purchaser for the property. At or about the time of the signing of this contract, said Koenig received \$200 on account of his commissions, and signed the following receipt:

"Received from Max Brettler and Oswin Stuhmer [the defendants] the sum of two hundred dollars, part commission on sale of premises 437-439 E. 12th St. The balance due me, to wit, \$225, is to be paid to me when title to said premises passes. I warrant that Mr. Harry Brettler is entitled to \$450 of the commissions on sale of said premises, and to no part of the balance of \$225 that is due me."

The agreed price for the property was \$87,500, and the commissions were \$875, of which Koenig was to have \$425 and one Harry Brettler the remaining \$450. The said Koenig swears that he postponed the time of full payment at the request of defendants, who desired such postponement for the reason that, as only \$800 were paid at the signing of the contract for the sale of the property, if the full commission were paid, there would be nothing left for defendants. A few days later, but at what exact date does not appear, Koenig assigned his claim for the remaining \$225 to plaintiff, who was, as we have seen, one of the proposed vendees under the contract for the sale of the real estate. In November, 1905, this contract of sale was rescinded by the parties thereto, and the title was never passed. Plaintiff sued on the assigned claim for the balance of the commissions to be paid to Koenig, and recovered a verdict. From the judgment entered thereon defendants appeal.

Koenig swears that defendants wanted \$90,000 for the property, but that he persuaded them to take \$87,500, and offered a part of his commission to plaintiff and her husband to induce them to give \$87,500. He says he "was working for both parties" to bring about the sale, but was hired by defendants only, and was to get his commissions from them alone, and was working on both parties to bring about the sale

in order to earn his commission from defendants. If Koenig were really acting as the agent for plaintiff and her husband, as well as for defendants, and if such dual agency were without the knowledge of defendants, he, or his assignee, would not be entitled to the commissions claimed. *Duryee v. Lester*, 75 N. Y. 442. Under the evidence, however, this was a question of fact, which was properly left to the decision of the jury. So far as Koenig's consent to wait until the passing of the title is concerned, it is evident that at the time of the making of the contract for the sale of the real estate Koenig's full commission had been earned, and it had become due and owing at the time of the assignment of the claim therefor to plaintiff, unless there was a good consideration given for Koenig's consent to postpone payment until the passing of title. *Moskovitz v. Hornberger*, 20 Misc. Rep. 558, 46 N. Y. Supp. 462, *McAdam, J.*; *McComb v. Von Ellert*, 7 Misc. Rep. 59, 27 N. Y. Supp. 372, *Daly, J.*

This question of consideration was properly submitted to the jury by the learned court below, as the evidence on the subject is conflicting. On or about March 9, 1906, said Koenig and the said Harry Brettler executed and delivered to defendants a general release, which, however, was not under seal, by which instrument the said Koenig and Harry Brettler released all claims against defendants which they (Koenig and Harry Brettler) "ever had, now have, * * * or hereafter can, shall, or may have, for, upon, or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the day of the date of these presents." The release recites that the consideration was \$709, and defendants claim that Koenig wanted another job from them, and that in consideration of getting it, with the resulting compensation, he agreed to release the disputed claim in suit. Koenig maintains that he received \$175, instead of \$709, and that this amount was earned in another matter, and that he signed the release because he thought that by his assignment of the claim in suit to plaintiff, in October, 1905, he had divested himself of title to the claim, and therefore that he himself had no claim against defendants for the said balance due for commissions, and he denies that he ever intended to release plaintiff's said claim. The only consideration for the release, according to Koenig, was the payment of \$175, which, as we have seen, he asserts had been earned in another matter, and he maintains that, so far as the claim in suit is concerned, no consideration whatever was given for releasing the same.

Defendants claim that they had no notice or knowledge of the assignment to plaintiff at the time the release was given. Assuming this to be so, defendants had a right to deal with Koenig as the owner of the claim, and any valid bargain or agreement which Koenig made with them in respect thereto would be binding on his assignee, the plaintiff (*Huntington v. Potter*, 32 Barb. [N. Y.] 300; *Reed v. Marble*, 10 Paige [N. Y.] 409; *Heermans v. Ellsworth*, 64 N. Y. 159), so that, if a good consideration were given for a release of the claim in suit, such release would be a bar to plaintiff's cause of action. This question of defendants' knowledge, as well as that of consideration for the release, was left to the jury by the learned court in a charge to which

no exception was taken, and upon these questions, as well as upon those above mentioned, the finding of the jury is final, as there is sufficient evidence to sustain the conclusion reached by them.

The judgment should be affirmed, with costs. All concur.

IRVING et al. v. ROYAL EXCH. ASSURANCE OF LONDON.

(Supreme Court, Appellate Division, First Department. November 22, 1907.)

DEPOSITIONS—COMMISSIONS—INTERROGATORIES.

Where, in an action on a contract made by a corporation through an alleged agent, the issue is the authority of the agent, plaintiff may annex to a commission to take the testimony of officers and employes of the corporation interrogatories as to the authority of the agent, etc., and may annex to a commission to take testimony of a witness an interrogatory calling on the witness to state whether any statement was made that a contract had been made between the corporation and plaintiffs.

Appeal from Special Term, New York County.

Action by Alexander D. Irving and others against the Royal Exchange Assurance of London. From an order settling interrogatories annexed to a commission, both parties appeal. Reversed on plaintiffs' appeal, and affirmed on defendant's appeal.

This is an action for breach of contract made between plaintiffs and defendant, a foreign corporation. It was claimed that the contract was made in behalf of defendant by its agent. Plaintiffs sought, through depositions of defendant's officers and employes and a witness in a foreign country, to prove the authority of the agent to make the contract. Plaintiffs proposed the following interrogatories:

Interrogatory 3: "If you state that you have been connected officially with the defendant, the Royal Exchange Assurance Company of London, please state fully in what capacity, and for what length of time, and what duties and powers you have performed and exercised as such officer, and whether you have stated all such duties and powers performed or exercised."

Interrogatory 4: "Please state how you became such officer, whether by election or by appointment, and if the duties to be performed and the powers to be exercised by you as such officer were defined either by a by-law, or a resolution of the board of directors, or trustees, or other managers, howsoever called, or an instrument of appointment, or by any other writing. Please annex to your testimony a copy of each and every such by-law, resolution, instrument, or other writing, and state whether you have done this."

Interrogatory 5: "If you say that there was no such writing of any kind, or if it did not fully and completely fix and define all the duties and powers which you have ever in fact exercised, please state whether any other duties to be performed, and any other powers to be exercised, by you as such officer, were defined in any way, and, if so, in what other way and what such other duties and powers were, and, if in whole or in part by oral instructions from any one else, state from whom, and what those instructions were."

Interrogatory 6: "State what, if any, duties have ever been performed or powers exercised by you, and when, prior to February, 1905, without either written or oral previous instructions or authority, and what the company ever did, and how, in respect to such exercise of power by you, in any instances, in which it did anything."

Interrogatory 7: "Were you aware of a visit made by Mr. Edward B. Hiles to the city of New York, U. S. A., about the end of the year 1904, with reference to the affairs of the defendant company, in that city, or in the United States? And, if so, state what authority or instructions were given to Mr. Hiles, either before or after he sailed, by whom, and in what form—whether by resolution of the board of directors, or trustees, or managers of the de-

fendant company, or by a written power of attorney, or in the form of a letter, cable message, or any other written form; and annex to your testimony a copy of each and every such resolution, power of attorney, letter, cable message, or other writing, and state whether you have done this."

Interrogatory 8: "If you state that there was no writing declaring Mr. Hiles' authority, and defining or directing his conduct of the affairs of the defendant company while in New York upon this visit, state what oral instructions or authority, if any, so far as you know, were given to him upon this subject, and when and by whom."

Interrogatory 9: "State whether a written power of attorney, or any other instrument, or a letter or letters, or cable message or messages, or any other writing or writings, with reference to Mr. Hiles' action and conduct of the affairs of the company while in New York upon this visit was or was not received from or sent to him, after he sailed, and, if so, by whom, and by whose directions, and what such directions were, and annex a copy of each and every such instrument or writing, and state whether you have done this."

Interrogatory 10: "State whether the constitution or by-laws or other documents of the defendant company refer in any way to the subject of the appointment and removal of agents of the defendant company outside of England, and annex to your testimony a copy of any such constitution, or by-laws, or other documents, so far as they relate to that subject, and state whether you have done this."

Interrogatory 11: "State the usual course of business of the defendant company with respect to the appointment and removal of agents outside of England; that is, who has the supervision of such agents, who appoints or removes them, and in what way this has commonly been done during the five years preceding July, 1905, and what, if any, action with respect to such removal or appointment has been usually, or ever, taken by the board of directors or trustees, or other managers, howsoever called, of the defendant company."

Interrogatory 12: "If, in any instances of the removal or the appointment of agents outside of England during the five years preceding July, 1905, any action whatever by the board of directors, or trustees, or other managers, howsoever called, with respect to such appointment or removal, appears by the minutes of their meetings, or other entries, to have been taken, please annex to your testimony a true and complete extract of any such minutes, or other entries; that is, with respect to such appointment or removal, unless such minutes or entries are always in the same form, in which case annex to your testimony a copy of some one extract showing that form."

Interrogatory 13: "If you say that there are no such instances to be found, during that period, in the minutes of the meetings of the directors of the defendant company, or other entries of their proceedings, state whether during the five years preceding July, 1905, agents of the defendant company outside of England have been appointed or removed, and, if so, how many, and by whom, and when and how this was done. If there are any writings of any character authorizing or directing such appointment or removal to be made, annex true copies of the same to your testimony, stating who wrote them, and by whose directions, and what such directions were, and state whether you have done this."

Interrogatory 14: "If in response to the last Interrogatory you annex any writings, state whether similar, and, if not similar, whether any, writings exist in the case of each such removal or appointment (during that period), or whether there have been some, and, if so, how many, cases of such removal or appointment in connection with which there have been no writings authorizing or directing the same, and by whom in these latter instances each such appointment or removal has been actually made, and how it has been made, and what action, if any, and how, has afterwards been taken by the company with respect to each such removal or appointment."

Interrogatory 15: "State who was actually appointed, in the early part of the year 1905, to be the agent of the defendant company for the metropolitan district of New York, and when and how this appointment was made, and when the question of appointing him to be such agent first came up, and by whom it was introduced, and annex hereto copies of any and all instruments, letters, cable messages, or other writings to or by the defendant company,

or to or by any of its officers, or to or by any other person, on this subject, stating whether copies of all such letters and writings have been so annexed."

Interrogatory 16: "State whether the person so appointed was or was not related to or connected with some one or more of the directors, or of the principal officers of the defendant company, or of its trustees, and, if so, which, and how related or connected, and when and by whom an application for his appointment, or any suggestion of his name, was made, and, if in writing, annex a copy of each and every such application or suggestion, and of any reply thereto, and of any and all written communications between the company, or any of its officers, and any one else, upon this subject, and state whether you have done this."

Plaintiff proposed the following interrogatory to witness H. B. Guernsey:

Interrogatory 4: "State whether anything, and, if so, what, was said in any such conversation to the effect that a contract had been made by any one, and, if so, by whom, with Mr. Irving and others, and, if so, with what others, to become the agents of the defendant company, and also by whom and in whose presence any such statement was made, and what response, if any, was made by any one, and by whom, to the statement. State fully everything that was said by any one, and by whom, in any such conversation."

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, HOUGHTON, and SCOTT, JJ.

George A. Strong, for plaintiffs.

Frederick B. Campbell, for defendant.

PER CURIAM. The order appealed from must be reversed, in so far as appealed from by plaintiff, and the seventh, eighth, and ninth interrogatories to be addressed to Sir Neville Lubbock, William N. Whymper, and E. H. Britton allowed and settled as originally proposed by plaintiffs.

The order must be affirmed, in so far as appealed from by defendant, and the third, fourth, fifth, sixth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth interrogatories proposed to be propounded to the above-named witnesses, and the fourth interrogatory to be addressed to the witness H. B. Guernsey allowed and settled, with \$10 costs and disbursements to the plaintiffs, appellants.

(122 App. Div. 56.)

IRVING et al. v. ROYAL EXCH. ASSURANCE OF LONDON.

(Supreme Court, Appellate Division, First Department. November 22, 1907.)

1. DEPOSITIONS—INTERROGATORIES—MATERIALITY.

Though the judge, in settling interrogatories to be annexed to a commission, has, under Code Civ. Proc. § 892, providing that either party must be allowed to insert any question pertinent to the issue, authority to disallow questions not pertinent, he should allow questions, unless clearly not pertinent, and objection to any other question should be raised at the trial, as expressly authorized by section 911.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, § 65.]

2. SAME—CROSS-INTERROGATORIES—RIGHT TO SUBMIT.

A party took out a commission to examine witnesses on written interrogatories. The adverse party took out an independent commission to examine the same witnesses, together with an additional witness. *Held*, that under Code Civ. Proc. § 892, providing that either party must be allowed to insert any question pertinent to the issue, the party first mentioned could not be deprived of the right to cross-examine the witnesses of the adverse party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, § 67.]

Appeal from Special Term.

Action by Alexander D. Irving and others against the Royal Exchange Assurance of London. From an order settling interrogatories to be annexed to a commission, plaintiffs appeal. Reversed, with directions to settle interrogatories.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, HOUGHTON, and SCOTT, JJ.

George A. Strong, for appellants.

Frederick B. Campbell, for respondent.

PER CURIAM. This action was brought to recover damages for the breach of a contract. After issue had been joined the defendant obtained a commission to take, upon written interrogatories, the testimony of certain witnesses residing in London, England. The plaintiffs proposed certain cross-interrogatories, which the court at Special Term refused to allow, and the plaintiffs appeal from the order.

Unless the interrogatories to be annexed to a commission are settled by consent of the parties, they must be settled in the manner prescribed by the general rules of practice. Code Civ. Proc. § 891. The interrogatories, when settled, must be annexed to the commission, and "either party must be allowed to insert therein any question pertinent to the issue which he proposes." Code Civ. Proc. § 892. Under the section last cited, the judge, in settling the interrogatories, has authority to disallow questions not pertinent; and this necessarily implies that he has the power to determine whether a question proposed is pertinent or not. *Uline v. N. Y. Cent. & Hud. Riv. R. R. Co.*, 79 N. Y. 175. In the case just cited, the court held that the power to exclude questions should be sparingly exercised, for the reason that a judge cannot always foresee precisely what evidence the exigencies of the trial may render proper. Not only this, but the statute (section 911, Code Civ. Proc.) reserves the right to either party to make at the trial any objection to questions or answers which he could make if the witness were testifying there orally, and for that reason there is no necessity for determining with that same degree of accuracy that a judge would at the trial whether a question is pertinent or not. Of course, if a question is clearly not pertinent, incompetent, or immaterial, then it should not be allowed; but, unless these facts do appear, then the same ought to be allowed, and the objection raised, if at all, at the trial.

Here all the plaintiff's cross-interrogatories were disallowed. It appeared that the plaintiffs had taken out a commission to examine, upon written interrogatories, all of the witnesses except one, Megaw, whom the defendant sought to examine; and the learned judge who made the order from which the appeal is taken thought, as appears from his opinion, that because of that fact the plaintiffs ought not to be permitted to cross-examine the same witnesses when their testimony was sought to be taken by the defendants on an independent commission, or to examine Megaw, because they could have included him in their commission; and he permitted them, if they saw fit to do so, to so

amend their commission. Obviously the order cannot stand. The judge could not deprive the plaintiffs of the right to cross-examine the witness Megaw by compelling them to call him as their own witness. Nor could he deprive them of the right to cross-examine the other witnesses. The fact that they had taken out a commission to examine them is of no importance, because the section of the Code above referred to (892) specifically provides, as we have seen, that "either party must be allowed to insert therein any question pertinent to the issue which he proposes." The questions here proposed, which were disallowed, and of which the plaintiffs complain, would seem to be pertinent to the issue; and, if the answers to such questions are not pertinent, then the rights of the defendant can be protected at the trial, either by objections or motions to strike out.

The order, in so far as appealed from, therefore, should be reversed, with \$10 costs and disbursements, and the matter remitted to the Special Term, with direction to settle the interrogatories in accordance with this opinion.

(56 Misc. Rep. 582.)

ZIEGLER v. GEORGE SCHLEICHER CO.

(Supreme Court, Appellate Term. November 29, 1907.)

1. APPEAL—RIGHT OF REVIEW—PERSONS ENTITLED.

Under Code Civ. Proc. § 1296, a person not a party to a proceeding and having no interest therein cannot appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 925-933.]

2. CORPORATIONS—PROCESS—SERVICE UPON—SUFFICIENCY.

Service of process on a person as an individual is not service on a company of which he is president.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1878, 1882, 1991.]

3. JUDGMENT—PARTIES—SUBSTITUTION.

A judgment against a substituted defendant, who was not served with process, cannot be sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 25-33.]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Jacob B. Ziegler against George Schleicher. Pending the trial the George Schleicher Company was substituted for George Schleicher. From a judgment for plaintiff, George Schleicher and the George Schleicher Company both appeal. Appeal dismissed as to George Schleicher, and reversed as to the George Schleicher Company.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Norman W. Kerngood (Alfred Pagilow, of counsel), for appellant.
Harry Edwards, for respondent.

PER CURIAM. Plaintiff brought this action against one George Schleicher to recover the sum of \$50 alleged to have been paid by fraud and mistake. The parties plaintiff and defendant continued the

same until the issue was tried. At the very moment plaintiff sued he had in his possession a written agreement, out of which the alleged fraud and mistake occurred, signed on the one part by his wife, and on the other part by "George Schleicher Co." This was some notice to him that others were concerned in the transaction besides Schleicher individually; but until the trial, so far as appears, no attention was given to the subject. In the midst of the trial plaintiff was confronted with the fact that he had proceeded against the wrong party defendant, and to remedy the mischief the court permitted an amendment of the process by substituting for the defendant served a new defendant styled "George Schleicher Company," never served. It does not appear whether this company is a corporation or an association of seven or more persons; but we are informed that George Schleicher is the president of the company, and because Schleicher was served, and because he admitted he was the president of the company, the court ruled:

"We will amend the summons to read 'George Schleicher Company'; it appearing that the defendant company was served with the summons."

The defendant excepted, and proceeded with his defense, and at the close of the trial moved for judgment. The motion was denied, and an exception noted. Judgment was rendered in favor of the plaintiff against the George Schleicher Company for \$65.62. George Schleicher, the original defendant, disappeared from the case. Both he, and the George Schleicher Company, the substituted defendant, appeal.

A person not a party to a proceeding cannot appeal. *People ex rel. Turner v. Sanborn*, 46 App. Div. 630, 61 N. Y. Supp. 529. Section 1296, Code Civ. Proc., enacts when a person not a party may appeal; but that section makes no provision for a case like the one at bar.

The appeal as to George Schleicher must be dismissed, with costs to respondent.

The judgment against the substituted defendant cannot be sustained, for it was never served with process, and as to it is *coram non judice*. If execution was allowed to issue, and the property of the George Schleicher Company levied upon to satisfy the judgment, it is self-evident that such a levy and taking would offend the fundamental law of the state, which provides that no person shall be deprived of his property without due process of law.

The judgment as to the George Schleicher Company must be reversed, and the complaint dismissed, with costs to appellant.

(56 Misc. Rep. 480.)

HESS v. BLOCH.

(Supreme Court, Appellate Term. November 29, 1907.)

BROKERS—RIGHT TO COMMISSIONS—MEETING OF MINDS.

Where a purchaser for defendant's land, procured by plaintiff, refused to enter into an enforceable contract because defendant would not warrant the title to a portion of the premises covering the bed of an old street, defendant offering to quitclaim as to that portion or sell subject to a possible paramount title, there was no meeting of minds between defendant and the proposed purchaser, so that plaintiff could not recover

commissions, notwithstanding the existence of a custom to require a warranty deed where the character of the conveyance is not mentioned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 73.]

Gildersleeve, P. J., dissenting.

Appeal from Municipal Court, Borough of Manhattan, Twelfth District.

Action by Jeffrey Hess against Abraham Bloch. From a Municipal Court judgment in favor of plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J.; and LEVENTRITT and ERLANGER, JJ.

Louis J. Hamel, for appellant.

Joel Liberman, for respondent.

PER CURIAM. The plaintiff recovered a judgment for commissions in effecting the sale of real property under a written authorization from the defendant reading as follows:

"January 17, 1907.

"I hereby authorize Schwitzer & Levis to offer for sale No. 1409 Amsterdam Ave., borough of Manhattan, city of New York, on lot 25x98, for \$28,750, subject to 1st Mtge. \$17,000, @ 5%, due Feb. 1st, 1908. 2d Mtge. \$4,000, to be paid off, if possible, and new 2d Mtge. to be taken by me for \$7,000, @ 6%, for four years' standing. Said house to be delivered free of all violations of tenement house department, city of New York, and all other departments. This price and terms to hold good for six days from date. If Schwitzer & Levis sell the house, they are entitled to commission. If they don't sell, they are not entitled to anything.

A. Bloch."

The plaintiff procured a purchaser whose acceptability seems to be unchallenged, but who refused to enter into an enforceable contract because the defendant would not warrant the title to a certain portion of the premises covering the bed of an old street. The defendant was willing to quitclaim as to this portion, or sell subject to a possible paramount title. The character of the deed could not be agreed upon, and the parties separated without further negotiations. The plaintiff was permitted to introduce evidence of a custom that, where the character of the instrument of conveyance of title is not mentioned, a deed of warranty shall be delivered. It is clear that the minds of the defendant and proposed purchaser never met. They never reached any definite agreement as to the conditions and details of the sale. Therefore the plaintiff cannot be said to have earned a commission. And, even if the custom contended for by the plaintiff did exist, it could not avail him in view of the legal principles which must control his right to recover. *Hasse v. Schneider*, 112 App. Div. 337, 98 N. Y. Supp. 587.

The judgment must be reversed, and a new trial ordered, with costs to appellant to abide the event.

GILDERSLEEVE, P. J. I dissent. The judgment should be affirmed, on the opinion of the court below.

WOOD-BARKER CO. v. VAN CLIEF.

(Supreme Court, Appellate Term. November 29, 1907.)

PRINCIPAL AND AGENT—CONTRACTS—PROOF OF AGENCY.

Plaintiff, to recover on a contract made on behalf of defendant, must show authority from defendant of the person making it to do so.

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by the Wood-Barker Company against William S. Van Clief. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Holt, Warner & Gaillard, for appellant.

Hyland & Zabriskie, for respondent.

PER CURIAM. The plaintiff failed to show that the person with whom the oral agreement for the purchase involved in this action was made had authority from the defendant to enter into the contract, and the judgment must therefore be reversed.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

(56 Misc. Rep. 522.)

NOVELTY TUFTING MACH. CO. v. HUTKOFF et al.

(Supreme Court, Appellate Term. November 29, 1907.)

CORPORATIONS—FOREIGN CORPORATIONS—RIGHT TO SUE—STATUTORY PROVISIONS—"DOING BUSINESS IN STATE."

General Corporation Law, Laws 1892, p. 1805, c. 687, § 15, as amended by the substituted provisions of Laws 1901, p. 1820, c. 538, provides that no foreign stock corporation other than a moneyed corporation shall do business in this state without first having procured a certificate, etc., and that no foreign stock corporation doing business in this state shall maintain any action upon any contract made by it in the state unless prior to the making thereof it shall have procured such certificate, etc. Plaintiff was a corporation organized under the laws of another state and manufactured its products there. It dealt with about 35 people of this state during the last eight years. The president of the company came here once in a while as its representative, and as a rule, when coming to transact business, remained two or three days. Sales of some of plaintiff's machines to other parties had been canceled, and the machines were transferred to defendant for the notes in suit. There was no other evidence as to its doing business in the state. *Held*, that plaintiff was not doing business in this state within the meaning of the statute, so as to warrant dismissal of the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2520-2527.]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the Novelty Tufting Machine Company against Louis Hutkoff and another. From a judgment of dismissal, plaintiff appeals. Reversed, and new trial granted.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Douglass & Minton (Madison G. Gonterman, of counsel), for appellant.

Goldfogle, Cohn & Lind (Alfred D. Lind, of counsel), for respondents.

GILDERSLEEVE, P. J. The plaintiff brought this action to recover upon two promissory notes for the sum of \$50 each. Defendants appeared in the action by the same attorneys, and interposed a demurrer to the complaint on the ground that it did not on the face of the complaint appear that plaintiff had legal capacity to sue, as plaintiff did not allege compliance with section 15 of the general corporation law (Laws 1892, p. 1805, c. 687), as amended by chapter 538, p. 1326, of the Laws of 1901. The demurrer was overruled, and both defendants interposed answers, which admitted the making and indorsement of the notes sued upon. The defendant Nathan Hutkoff by his answer put in issue due presentation, nonpayment, and notice of dishonor. After formal proof tending to establish the liability of defendants, upon cross-examination of the president of the plaintiff corporation it was elicited that plaintiff was incorporated under the laws of the state of Wisconsin and dealt with a number of people in this state; that plaintiff dealt in the last eight years with about 35 or 36 people; that the witness traveled once in a while, and came to this state as a representative of plaintiff, and as a rule, when coming to transact business, remained as long as two or three days; that the notes in question were given in payment for some machines that had been formerly sold by plaintiff to other persons, but that the original sales were canceled, and the machines were transferred to defendants. Upon this state of facts defendants' counsel moved to dismiss the complaint upon various grounds, including the failure to show compliance with the statute, which had been duly pleaded by defendants. In granting the motion the trial justice said:

"I think, on the whole, that you have come squarely within the statute; that it affirmatively appears that your company [plaintiff] is a foreign stock corporation; that this contract was made in the state, and these notes were given in conformity with that contract."

We think this ruling was erroneous, for the reason that it did not appear that plaintiff corporation was doing business in the state within the meaning of the statute. There was no proof that it had a branch office in the state, or that it stored any merchandise in the state, or that it had a bank account in the state, or any established domicile for the transaction of business within the state. A reasonable conclusion to be drawn from the testimony is that it manufactured its machines in the state of Wisconsin, and occasionally shipped them to this state, pursuant to orders taken by agents within the state. To bring a foreign corporation within the purview of the statute, the establishment of an agency or branch office within the state must appear. As stated in *Vaughn v. Lighthouse*, 64 App. Div. 138, 71 N. Y. Supp. 799, "the

statute contemplates a location and domicile, having an office and investment of some of its capital within the state."

The judgment must be reversed, and a new trial granted, with costs to appellant to abide the event.

LEVENTRITT, J. I concur. The evidence does not sustain a finding that the plaintiff is doing business in this state. The phrase "doing business in this state" has been held to imply corporate continuity of conduct, "such as might be evidenced by the investment of capital here, with the maintenance of an office for the transaction of business, and those incidental circumstances which attest the corporate intent to avail itself of the privilege to carry on a business." *Penn. Collieries Co. v. McKeever*, 183 N. Y. 98, 75 N. E. 935, 2 L. R. A. (N. S.) 127. In this case there is not an evidentiary fact or circumstance indicative either of action or intent on the part of the plaintiff.

ERLANGER, J., concurs.

(56 Misc. Rep. 554.)

ROSENSTEIN v. DEFFAA.

(Supreme Court, Appellate Term. November 29, 1907.)

LANDLORD AND TENANT—DEFECTIVE CONDITION OF PREMISES—PERSONAL INJURIES—ACTIONS—EVIDENCE.

In an action for injuries to a tenant's daughter, caused by the defective condition of the leased premises, evidence examined, and held insufficient to show defendant's ownership or control of the premises leased, or responsibility for defect causing the injury.

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by Bernhard Rosenstein against Louis P. Deffaa. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Frank V. Johnson (Harry S. Austin, of counsel), for appellant.
Moss & Feiner, for respondent.

PER CURIAM. Plaintiff's daughter was injured by putting her foot through a grating within the stoop line of premises owned in part by defendant, and the lower part of which premises was leased to plaintiff. The grating was defective, owing to the absence of one bar. Defendant claims that the grating was within the premises leased to plaintiff, and that plaintiff allowed a peanut dealer to use it by opening it to put his things in the cellar and by piling various articles on it. The plaintiff denies this. The defendant claims he never had notice of the defective condition of the grating, which he could not see by reason of its being covered with boxes belonging to the peanut dealer. Plaintiff claims that the defect has lasted a long time, and that defendant frequently passed by the grating and came to the house to collect the rents, and had either actual or constructive notice of the defect.

The jury found for the plaintiff. The defendant's usual motion to set aside the verdict and for a new trial was denied. Subsequently the defendant made a motion to set aside the verdict and for a new trial on evidence tending to show perjury on the part of plaintiff committed upon the trial. This motion was also denied. From the judgment, and from the order denying the latter motion, defendant appeals.

On the question of ownership or control of the premises by defendant the evidence is defective, and cannot be said to be sufficient to support the judgment, even assuming that other elements necessary to constitute the cause of action alleged are established. It appears that defendant collected the rents of the premises, that he was the executor of his father's will, that the premises belonged to his father at the time of the latter's death, and that there are seven children left surviving the father. Defendant testifies that he was not the sole owner, and that he was one of the trustees of his father's estate. Furthermore, the evidence tends strongly to show that the grate in question was used by a subtenant of the plaintiff, who may or may not have been responsible for its defective condition. Again, from the evidence it may be said that plaintiff, being the tenant of the premises, was charged with the duty of making repairs to the grate.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

ROSENBLATT v. VILLAMENA et al.

(Supreme Court, Appellate Term. November 29, 1907.)

COSTS—OFFER OF JUDGMENT.

No special provision is made by the Municipal Court act for a tender, but section 148 (Laws 1902, p. 1537, c. 580) declares that a defendant may either make a written offer of judgment, with costs, or deposit the amount of his offer with the clerk, and that when such an offer or deposit is made, if plaintiff fails to obtain a more favorable judgment, he cannot recover costs from the time of making the offer, and must pay defendant's costs from that time. Plaintiff's claim for \$57.50 was conceded, but defendant interposed a counterclaim for \$15, and paid into court \$42.50. Held, that though defendant's counterclaim was established at \$15.50, defendant's deposit having included nothing for interest or costs up to the time the deposit was made, plaintiff was entitled to judgment for \$42 and costs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, §§ 137, 142.]

Appeal from Municipal Court, Borough of Manhattan, Twelfth District.

Action by Dellie C. Rosenblatt against Diodato Villamena and another. From a Municipal Court judgment in favor of defendants, plaintiff appeals. Modified and affirmed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

M. S. & I. S. Issacs, for appellant.

Baker & Hyman, for respondents.

PER CURIAM. The action was brought for the sum of \$57.50, with interest from April 1, 1907, being for rent claimed to be due

from defendants to the plaintiff. The defendants interposed a denial, and a counterclaim for \$15 for repairs alleged to have been properly chargeable to the landlords. After suit was commenced the defendants paid into court the sum of \$42.50, but with no costs or interest. Upon the trial defendants conceded the plaintiff's claim and succeeded in establishing their counterclaim, and the jury so found. The judgment, however, was entered as being in favor of the defendants against the plaintiff for the sum of \$12 costs.

The plaintiff appeals from the judgment thus rendered, and very properly. The Municipal Court act makes no special provision for a tender, but provides that a defendant may either make a written offer of judgment, with costs, or deposit the amount of his offer, if a sum of money, with the clerk, with like effect as a written offer. Section 148, Municipal Court Act (Laws 1902, p. 1537, c. 580). When such an offer, or a deposit of money, is made, if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs from the time of making the offer, and must pay the defendant's costs from that time. It follows, therefore, that unless the deposit is equal to the plaintiff's claim, with costs, the defendant is not entitled to costs. In the case at bar the plaintiff's claim was \$57.50, conceded to be due. The defendant's deposit was not equal, together with the amount of his counterclaim, established at \$15.50, to the plaintiff's claim, "with costs" up to the time of such deposit, and the judgment should therefore have been in favor of the plaintiff for the sum of \$42 and costs.

Judgment modified, by directing judgment for the plaintiff for the sum of \$42 and appropriate costs in the court below, and, as modified, affirmed, without costs in this court.

ERLANGER, J., concurs. LEVENTRITT, J., concurs in the result.

STROUT v. KENNY.

(Supreme Court, Appellate Term. November 29, 1907.)

BROKERS—REAL ESTATE—RIGHT TO COMMISSION.

Where land was listed with a real estate broker under an agreement that his commission should be any sum in excess of \$1,500 that he could obtain for the land, and he produced one who was ready, willing, and able to pay \$1,800, but who, after raising a cash deposit, canceled his oral agreement to purchase, because the vendor could not give good title, the broker was entitled to a commission; he having no reason to suspect that the title was defective, though he did not remember whether he told the vendor the name of the proposed purchaser or the price agreed upon, and the vendor having received part of the deposit and expressed her gratification as to the proposed sale.

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action for real estate broker's commission by E. A. Strout, doing business as E. A. Strout Company, against Mary Kenny. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Ring, Russell & Watterson (Harvey Watterson, of counsel), for appellant.

William G. Mulligan, for respondent.

GILDERSLEEVE, P. J. There is no dispute as to the facts in this case. The plaintiff sues for commissions upon a sale of real estate. Judgment was given for defendant. Plaintiff appeals.

The evidence clearly shows the employment by defendant of plaintiff to sell the property for \$1,500, and the stipulation that plaintiff's commission was to be any sum in excess of \$1,500 that plaintiff could obtain for the property. Plaintiff found one Rydell, who was ready, willing, and able to pay \$1,800 for the property. It was then discovered, upon the search of the title by said Rydell, that defendant could not give good title, and Rydell canceled his agreement. There is nothing in the evidence to establish a claim that plaintiff had any reason to suspect that defendant was without title to sell when he entered upon his employment and procured a purchaser. It appears that plaintiff told defendant that he had sold the property, and she took part of the deposit paid by Rydell, and expressed her gratification at having sold the property. It is true that plaintiff cannot remember if he mentioned the name of the proposed purchaser or not, or the price agreed upon; but, as she had put her price at \$1,500, and agreed to pay the balance over that sum to plaintiff as his commission, she must have understood that not less nor more than \$1,500 was coming to her, and she had no particular interest in knowing the exact sum for which the property was sold or the name of the purchaser.

The defendant put the property in plaintiff's hands for sale, and by written authority constituted him the agent in bringing about such sale, and ratified his acts in procuring such sale. The property was in Bethel, Conn., where all the transactions with Rydell took place, while defendant lived in New York City, and the whole matter of the sale seems to have been left to plaintiff, with the price fixed at \$1,500. No formal contract was made with Rydell in writing. He had orally agreed to pay \$1,800, and did pay 10 per cent. thereof to bind the agreement. Subsequently he tendered the remainder; but the defendant refused to give a deed, as she had no title to the property. Plaintiff brought a purchaser able and willing to enter into a contract on the defendant's terms, and the fact that the sale was not completed by reason of the defendant's inability to carry out the contract does not deprive the broker of his right to a commission. We think the judgment is against the evidence, and should be reversed.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

(56 Misc. Rep. 439.)

SEYMOUR v. FEIGL

(Supreme Court, Appellate Term. November 29, 1907.)

APPEAL—ORDERS APPEALABLE—MODIFICATION OF DEFAULT JUDGMENT.

Where defendant was in default at the trial of an inquest on which judgment was rendered, and did not appeal from an order denying his motion to open his default, an appeal will not lie from an order denying his motion to modify the judgment.

Appeal from Municipal Court, Borough of Manhattan, Tenth District.

Action by Alice Seymour against Fred Feigl. From a Municipal Court judgment for plaintiff, defendant appeals. Dismissed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Reno R. Billington, for appellant.

John H. Parsons, for respondent.

PER CURIAM. The defendant appeals from an order denying his motion to modify a judgment entered against him in the Municipal Court. The judgment so taken was rendered upon an inquest; the defendant being in default at the time of the trial. Subsequently the defendant made a motion to open his default, which was denied, and, so far as appears, no appeal has been taken from such order. Therefore the present appeal cannot be entertained.

Appeal dismissed, with costs.

**CONRADY et al. v. V. LOEWER'S GAMBRINUS BREWERY CO.**

(Supreme Court, Appellate Term. November 29, 1907.)

1. CONTRACTS—DEFECTS IN PERFORMANCE.

Where a contract to do certain work and furnish certain materials was not substantially complied with, and the deviations were important and intentional, and could be justified only by a new contract, which was not established, there could be no recovery on the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1365, 1370.]

2. EVIDENCE—SUFFICIENCY TO SUPPORT VERDICT.

Where there was no evidence to show the amount needed to make good defects or omissions in the performance of a contract whereby certain work was to be done and materials furnished for \$300, a verdict for \$222 cannot be upheld, since the deduction must have been a mere guess.

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Max J. Conrady and another against the V. Loewer's Gambrinus Brewery Company. From the judgment, both parties appeal. Reversed on defendant's appeal, and new trial ordered. Appeal by plaintiffs dismissed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Charles P. Robinson, for plaintiffs.
Uriah V. Tompkins, for defendant.

LEVENTRITT, J. Both parties appealed; the plaintiffs because of the insufficiency of the judgment, and the defendant because judgment was against it.

The plaintiffs undertook, under a written contract, to furnish for the sum of \$300 certain work and materials. Whether the materials should be new or secondhand was not specified. Some of the articles supplied, such as a range, boiler, doors, and windows in a new partition, were concededly secondhand. This the plaintiffs attempted to justify by pleading an oral modification of the written contract and performance accordingly. The defendant denied both performance and modification. Even if evidence of an oral amendment in conflict with the written agreement were permissible, and even if there were proof of consideration, still the plaintiffs' contention must fail, as it is based entirely upon testimony, received over defendant's objection, of conversations had prior to the written contract with a clerk who had no authority to bind the defendant. Apart from these legal obstacles, the conversations do not amount to a modification of the terms of the contract. The original contract remained unimpaired. It was not substantially complied with. The deviations were important and intentional. They could be justified only by a new agreement established by competent and satisfactory evidence. In that event the plaintiffs would be entitled to a full recovery. Their failure to adduce such evidence defeated their cause of action, and judgment should have gone for the defendant.

Under no aspect of the case could the award of \$222 be upheld. There is not a word in the record to show the amount needed to make good any defects or omissions; hence the deduction of \$78 from the agreed contract price is the result of a guess, nothing more.

The judgment should be reversed upon the defendant's appeal. Judgment reversed, and new trial ordered, with costs to defendant to abide event.

The appeal by the plaintiffs is dismissed, with costs. All concur.

KENNELLY v. WALKER et al.

(Supreme Court, Appellate Term. November 29, 1907.)

CONTRACTS—PART PERFORMANCE—ACTIONS—MEASURE OF RECOVERY.

Where a person only partially performs a contract to construct a sidewalk, his recovery is limited to the contract price, less such sum as would be required to complete the work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1502.]

Appeal from Municipal Court, Borough of Manhattan, Tenth District.

Action by Patrick Kennelly against Gustav Walker and another. Judgment for plaintiff, and defendants appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

George L. Donnellan, for appellants.

William H. Janes, for respondent.

PER CURIAM. The plaintiff entered into a written contract with the defendants by the terms of which he agreed to lay a first-class sidewalk in front of certain premises owned by them for the sum of \$100, all the work to be done to their satisfaction. It appears from the evidence of the plaintiff that the defendants would not permit him to complete the work. The defendants claimed that the work was not performed to their satisfaction, and that they were required to substitute an entirely new walk, for which they paid \$180. On conflicting evidence the trial justice found for the plaintiff for the full amount claimed.

The judgment cannot be sustained. Assuming that the plaintiff was entitled to a judgment, in view of the fact that he only partially performed, his recovery must be measured by the contract price, less such a sum as would be required to complete the work.

The judgment must be reversed, and a new trial ordered, with costs to appellants to abide the event.

(56 Misc. Rep. 598.)

MURPHY v. INTERURBAN ST. RY. CO.

(Supreme Court, Appellate Term. November 29, 1907.)

STREET RAILWAYS—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action against a street railway company for personal injuries, whether plaintiff was negligent or defendant was free from contributory negligence *held*, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 251-257.]

Appeal from City Court of New York.

Action by Lawrence Murphy against the Interurban Street Railway Company. From a judgment of dismissal, and an order denying a new trial, plaintiff appeals. Reversed, and new trial ordered.

See 88 N. Y. Supp. 187.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Rudolph Marks, for appellant.

Bayard H. Ames, for respondent.

GILDERSLEEVE, P. J. The complaint in this action was dismissed upon the plaintiff's own testimony, and from an order denying a motion for a new trial the plaintiff appeals.

Under such circumstances the plaintiff's testimony must, with all the reasonable inferences that can be drawn therefrom, be taken as true. He testified that he lived near 124th street, on Second avenue; that he left his house at 7 a. m., intending to take a south-bound car on the avenue; that he walked to the corner of 124th street, and while

at the corner and on the sidewalk he, then being about to cross the avenue, looked both ways for approaching cars. Looking north, he saw a south-bound car, between 125th and 126th streets; and, looking south, he saw a north-bound car at the corner of 123d street and Second avenue, standing still. When he started to cross the street, along the north crosswalk, this car was a full block away. He proceeded, and was hit by the north-bound car as he stepped over the first or easterly rail. He estimates the distance from the curb to the easterly rail of the car track to be from 18 to 20 feet. He was walking "the same as any one else would to get across the street." He is supported in his version of how the accident happened by at least two witnesses, and it was shown that the car approached rapidly, without any bell being rung, and that it was not stopped, after it hit the plaintiff, until near the middle of the block above 124th street. Under the facts disclosed by the testimony, we do not think it can fairly be said that, as a matter of law, the plaintiff was guilty of contributory negligence, or that the defendant was free therefrom.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

(122 App. Div. 480.)

DUDLEY v. ABRAHAM et al.

(Supreme Court, Appellate Division, Second Department. November 29, 1907.)

NEGLIGENCE—PERSONAL INJURIES—SUBMISSION TO JURY.

In an action for injuries to plaintiff through slipping on a wet or greasy spot on the floor of defendant's store, evidence held insufficient to require the submission of the case to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 279-302.]

Hooker, J., dissenting.

Appeal from Trial Term.

Action by Minnie Ida Dudley against Abraham Abraham and others. From a judgment dismissing her complaint, and from an order denying her motion for new trial, plaintiff appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and HOOKER, GAYNOR, RICH, and MILLER, JJ.

George F. Hickey, for appellant.

Frederick Hulse, for respondents.

GAYNOR, J. The plaintiff fell on the floor about two feet from the projecting base of a stone drinking fountain in a large open space in the center of the defendants' store. There were bowls and faucets at the top of the fountain, and drinking cups chained there. It is impossible to make out from the testimony of the plaintiff and her daughter whether they say she slipped on water or on grease or some slimy substance; and they were the only witnesses for the plaintiff on that head. The plaintiff said she looked at the floor after she fell, and continued:

"It was wet, and there was dirt—something slimy on it." "After I fell I saw a wet spot or something of that sort." "I do not think I could tell ex-

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actly how large was the wet spot." "After I had fallen I saw there was something wet and slimy on that floor. I cannot tell you how large was that spot where I say looked wet; it was a run lengthwise, just where my heel had taken the water." "I cannot recollect; all I can recollect is seeing the mark of my heel on the wet floor, the impression where I had fallen; that is all I can remember. I do not mean to say this floor was all wet all around there. I cannot exactly say how large was this place where I say was wet; I would only have to guess at it."

She said the mark made by her heel was about as long as the back of a chair (agreed upon by counsel as 16 inches) and as wide as her heel. "Aside from that mark I could not say how large a place was it that was wet on that floor, because I do not recollect. I have no recollection only of looking and seeing the marks and the water, but I could not specify the length of it or the largeness of the spot." "It was like slime—something slimy that I had slid on the same as you would slide on a banana peel." "It looked just like grease or something that slid and made a ridge right into the wood; just like slime, water on the dirt." The daughter is equally indefinite. "There was water, and it was slimy—you know how oil looks." "There was a large sized puddle, I should say there, of water, and she slid, you could see just where her heel went." "Well, it looked dirty looking to me." She finally said the "puddle" was "just about as large as that book" (a volume of our Reports).

No jury could do more than guess from this what the plaintiff slipped on, if she slipped at all. But if it could be found to be grease, or fruit, or some other slimy or slippery substance, there was no evidence that the defendants put it there, or that it had been there long enough for them to see it and clean it up. There is no way to prevent people, especially children, from dropping things on floors. And if it was only water, the case is the same. There is no evidence that it came from the fountain. And it could not have come from there unless some one threw it on the floor needlessly or mischievously. It would be more reasonable to suppose that some child wet the floor, a thing common enough. Nor was a little water on a floor ever taken to be dangerous until this action was brought. On wet days, and when there is a snow fall, the floors of stores and public places are wet in many places from the feet and dripping garments and umbrellas. It would be going altogether too far, and encouraging the bringing of cases like this, of which there are already too many, to hold as matter of law that this case was for the jury. *O'Reilly v. L. I. R. Co.*, 4 App. Div. 139, 38 N. Y. Supp. 779; *Id.*, 15 App. Div. 79, 44 N. Y. Supp. 264; *Kelly v. Otterstedt*, 80 App. Div. 398, 80 N. Y. Supp. 1008.

The judgment should be affirmed.

Judgment and order affirmed, with costs.

MILLER and RICH, JJ., concur. HIRSCHBERG, P. J., not voting.

HOOVER, J. (dissenting). The jury would have been justified in finding, had the case been submitted for its determination, that the plaintiff slipped upon a spot near a water fountain on the main floor

of the defendants' department store, which had the appearance of being wet and slimy. The public was tacitly invited to walk over the spot where plaintiff fell, and it was the duty of the defendants to exercise reasonable care to keep the floor in a safe condition. *Quirk v. Siegel-Cooper Co.*, 43 App. Div. 464, 60 N. Y. Supp. 228; *Graham v. Bauland Co.*, 97 App. Div. 141, 89 N. Y. Supp. 595. While it may be true, as urged by the respondents, that the mere incidental spilling of water from the fountain upon the floor would not create a condition which a reasonable person would apprehend to be dangerous, the inferences most favorable to the plaintiff present a different case. The jury were authorized to find that the defendants were not in the exercise of reasonable care in permitting that part of the floor where plaintiff fell to be in a slimy condition, for one might readily enough slip thereon. See *Dent v. Grimm*, 65 App. Div. 81, 72 N. Y. Supp. 471.

The judgment and order should be reversed, and a new trial granted; costs to abide the event.

(56 Misc. Rep. 556.)

VAN NESS v. MURPHY et al.

(Supreme Court, Appellate Term. November 20, 1907.)

NEGLECT—CONDITION OF BUILDINGS—DARK HALLWAY.

Plaintiff, who had selected an apartment in a building and was injured on a subsequent visit by opening a door which led to the cellar and falling down the stairs, held guilty of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 87, Negligence, §§ 90, 91.]

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Jane A. Van Ness against John J. Murphy and another Judgment for plaintiff, and defendants appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Herman I. Lurie, for appellants.

J. Wilson Bryant, for respondent.

PER CURIAM. From the plaintiff's own testimony it appears that she entered into a dimly lighted, or, as she expresses it, dark, hallway and deliberately opened and walked through the first door she saw. This doorway led to the cellar, and the plaintiff fell down the stairs and was injured. The only evidence of the defendants' negligence lies in the mere statement that the hallway was dark. The plaintiff had visited the premises the week preceding the accident, and had selected an apartment for her daughter on the southerly side of the hall. The entrance to this apartment was on the right, and the entrance to the northerly apartment was on the left, of the cellar door. The conditions as to light were practically the same as to the three doors. The cellar door opened into the hallway. The plain-

tiff, apparently taking no precautions against accident, opened this door and walked through into the darkness of the stairway. Under these circumstances she cannot charge the defendant with negligence. He was not an insurer of the plaintiff's safety, and the mere fact that the hallway was dark, or that the cellar door was not locked, will not support a finding of negligence. *Robinson v. Crimmins* (Sup.) 104 N. Y. Supp. 1076; *Hilsenbeck v. Guhring*, 131 N. Y. 674, 30 N. E. 580. There is no presumption that a person can walk through any door he comes to in a strange house without taking proper precautionary measures. The proximate cause of the plaintiff's accident seems to have been her own carelessness. The judgment must therefore be reversed, and a new trial ordered.

Judgment reversed, and new trial ordered, with costs to appellant to abide event.

CITY OF NEW YORK v. MARCO et al.

(Supreme Court, Appellate Term. November 29, 1907.)

WEIGHTS AND MEASURES—FALSE WEIGHTS—ACTION FOR PENALTY—SUFFICIENCY OF EVIDENCE.

In an action by a city for the statutory penalty for giving short weight in selling coal, evidence *held* insufficient to sustain a recovery.

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by the city of New York against Benjamin B. Marco and another to recover a penalty. Judgment for plaintiff, and defendants appeal. Reversed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

William C. Relyea, for appellants.

Francis K. Pendleton (Herman Stiefel, of counsel), for respondent.

PER CURIAM. We are of the opinion that the evidence is insufficient to justify the recovery of a penalty. The city inspector testified that he saw the coal weighed, and stated the process adopted, as well as the gross and net weights, although he was somewhat uncertain as to the precise conditions, attending the weighing. The official certificate of weight contains merely the statements: "Dealer's weight of coal, 4,000 lbs.," "Weighmaster's weight of coal, 3,900 lbs." The statute provides that:

"Every owner of such scales shall keep a book, in which shall be entered in ink a memorandum of every load of coal weighed at such scales, showing the name of the person, firm, or corporation delivering such coal, the net weight thereof as shown by the delivery ticket thereof of such person, firm, or corporation, the name of the purchaser thereof, the gross and net weight of the coal so weighed, and the date of weighing."

The statute evidently contemplates that the right to recover a penalty shall be based on the official record of weight. Although the weighmaster in this case kept a book the entries in which, we infer, conform to the statutory requirements, there appears in evidence a

mere duplicate certificate of net weight. The weighmaster's clerk was unable to testify to any fact, save that the net weight was 3,900 pounds. In view of the sharp conflict as to the real weight of the wagon and the net weight of the coal, as well as to weather and scale conditions prevailing at the time of the weighing, we do not feel justified in permitting the judgment, holding the defendant liable for a penalty, to stand, especially where, after allowing him a reduction of 60 pounds in which the statute permits for variation of scales, the discrepancy in weight is only 40 pounds, which might readily have resulted, under the circumstances disclosed, from defective scales or erroneous computation. The plaintiff should be required to present the record proof which the statute provides, or evidence equally satisfactory.

Judgment reversed, and new trial ordered, with costs to appellant to abide event.

WURTHLEE V. CONCRETE STEEL & TILE CONST. CO.

(Supreme Court, Appellate Term. November 29, 1907.)

MASTER AND SERVANT—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

Evidence as to the circumstances of an injury to plaintiff, an employé of defendant, while engaged in removing materials from a building, by being struck by a piece of falling wood belonging to defendant, *held* insufficient to connect defendant with the happening of the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 913-932.]

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by Christian Wurthlee against the Concrete Steel & Tile Construction Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Frank V. Johnson (Allan E. Brosmith, of counsel), for appellant. Gavegan & McQuaid, for respondent.

PER CURIAM. The plaintiff was engaged, with others of the defendant's employés, in removing certain materials from a building on which the defendant had a contract. While in the act of taking bolts from a "barrow hoist," a piece of wood fell down the shaft, struck the plaintiff on the head, and inflicted injuries to recover damages for which this action was brought. The defendant appeals from a judgment rendered in the plaintiff's favor.

The happening of the accident was clearly established, and it was shown that the piece of wood which struck the plaintiff belonged to the defendant. It was not proven, however, that the wood was set in motion by any of the defendant's employés, or that they were in any way responsible for its fall. Furthermore, the plaintiff and his witnesses testified that the employés of several other contractors were at work on the upper floors of the building at the time. There is absolutely no evidence which tends to connect the defendant with the happening

of the accident, or which suggests, even remotely, any responsibility on its part in connection therewith. The record discloses merely the proof of an accident, and there is no attempt to show who was responsible for it. Certainly it cannot be said upon the evidence adduced that any negligence can be attributed to the defendant. The judgment must therefore be reversed, and a new trial ordered.

Judgment reversed, and new trial ordered, with costs to appellant to abide event.

KEANE v. LIEBLER et al.

(Supreme Court, Appellate Term. November 29, 1907.)

1. MASTER AND SERVANT—COMPENSATION—SEPARABLE CONTRACT—BREACH—RECOVERY.

A contract employing an actor for a specified number of weeks at a weekly salary is only separable to the extent that payments are to be made weekly, and the actor, on either quitting the employment or being discharged during a week, cannot recover the entire or proportionate part of that week's salary; his remedy being by action for breach of contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 91.]

2. SAME.

Where an actor, under employment for a specified number of weeks at a weekly salary, was accused by the manager of assaulting an actress during a performance and rendered no further service, if he committed the assault and then abandoned the contract, he could not recover from the employer as for a breach by him; but if the actor was innocent of the assault, and was wrongfully discharged and prevented from completing the contract, he was entitled to recover as damages the salary unpaid, not having obtained other employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 50-53.]

Appeal from Municipal Court, Borough of Manhattan, Fourteenth District.

Action by James Keane against Theodore A. Liebler and another. From a judgment for plaintiff, defendants appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Thomas F. MacMahon, for appellants.

Mayer C. Goldman, for respondent.

LEVENTRITT, J. There must be a retrial, for the reason that the judgment rendered is not consistent with any aspect of the case. The plaintiff, an actor in one of the defendants' theatrical companies, sues to recover \$140, of which \$70 represents his agreed salary for the week ending Saturday April 20th, and \$70 is for damages resulting for an alleged wrongful discharge. The defendants interposed a general denial and a counterclaim of \$250 for damages caused by plaintiff's misconduct during the performance on the night of April 20th.

In September, 1906, the defendants employed the plaintiff to perform a role in their production of the four-act play "In the Bishop's

Carriage" for a period of 30 weeks, ending April 27, 1907, at a salary of \$70 a week. He entered their service and continued without intermission to render the role assigned to him until the midst of the performance which took place in Baltimore on the night of Saturday, April 20, 1907, the performance which ended the twenty-ninth week of the employment. On that occasion, at the close of a scene in the second act between the plaintiff and the leading actress, she fell to the stage in view of the audience, and when removed to her dressing room her face was found to be bruised and swollen. In consequence a delay of 15 or 20 minutes followed, and during that time the plaintiff left the theater and did not reappear to complete his role, which was thereupon undertaken by another member of the troupe. Up to this point the facts are undisputed. The defendants make the assertion, supported by the evidence of two eyewitnesses, that the injuries to the actress were inflicted by the plaintiff, who struck her in the face. They further submit proof that the plaintiff, immediately after making the assault, disappeared, and did not present himself to render his part in the third and fourth acts. He, on the contrary, denies that he struck her, and alleges that his nonreappearance was due to the fact that the manager, accusing him of the assault, discharged him and forbade his return to the stage.

At all events, whether the plaintiff abandoned the employment or was dismissed, he did not complete the week's service, and consequently was not entitled to the salary for that week. While the entire contract between the parties was separable to the extent that payments were to be made weekly, whether the plaintiff quit or was discharged during the week, he cannot recover the entire or the proportionate part of that week's salary. As to that portion of his compensation, his remedy is in an action for damages for a breach of the contract. *Seaburn v. Zachmann*, 99 App. Div. 218, 220, 90 N. Y. Supp. 1005; *Walsh v. N. Y. & Kentucky Co.*, 88 App. Div. 477, 85 N. Y. Supp. 83; *Turner v. Kouwenhoven*, 100 N. Y. 115, 2 N. E. 637. The judgment awarded was in favor of the plaintiff for \$70, apparently upon the first item of his claim; that is, for salary for the week including the Saturday on which he did not complete his services. The salary for that week was not earned, and cannot be recovered as such. During the thirtieth—the final—week of the plaintiff's engagement, the troupe performed in Brooklyn, and the plaintiff testified that he tendered his services daily, but they were rejected. If the plaintiff committed the assault of which he is accused, and then abandoned the contract, he is chargeable with a breach of it, and cannot succeed in holding the defendants. If, on the other hand, he is innocent, was wrongfully discharged by the defendants, and prevented from completing his contract, his damage is \$140, as it appears that he did not obtain other employment during the final week. Neither condition would warrant the judgment rendered for \$70. It must therefore be reversed.

Judgment reversed, and new trial ordered, with costs to the appellant to abide the event. All concur.

(56 Misc. Rep. 529.)

NORWOOD v. PREFERRED ACC. INS. CO. OF NEW YORK.

(Supreme Court, Appellate Term. November 29, 1907.)

INSURANCE—ACCIDENT INSURANCE—ACTIONS—RECOVERY.

In an action on an accident policy, evidence examined, and held to authorize a recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1702-1728.]

Appeal from City Court of New York, Trial Term.

Action by Herbert E. Norwood against the Preferred Accident Insurance Company of New York. From an order of the City Court of the city of New York setting aside a verdict for plaintiff and dismissing the complaint, and from a judgment entered thereon, plaintiff appeals. Reversed, and verdict reinstated.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Williams & Caldwell (Charles Caldwell, of counsel), for appellant.
Jacob Fromme, for respondent.

ERLANGER, J. On the 15th of May, 1894, the defendant issued to the plaintiff a certain policy of insurance, whereby it insured the plaintiff against the effects of bodily injury, and whereby, among other things, it agreed to pay to the plaintiff, in case the bodily injury resulted in the entire loss of one foot at or above the ankle, the sum of \$1,000. The policy was subject to certain conditions. It provided that in the case of accidental injury notice should be given, with full particulars, within ten days from the date of such injury, and, in the event of the failure to give such notice within said time, all claims under the policy were to be invalidated. It also provided that:

"No legal proceedings for a recovery hereunder shall be brought within three months after the receipt of such proofs at the home office of the said company, nor be brought at all unless begun within six months from the date when the said company shall have received such proofs. The application for the policy and the classification of risks by the company are made a part of this contract. Fraud or concealment in obtaining this policy, or any attempt by like means to obtain indemnity, shall render the policy and all insurance hereunder absolutely void."

And, finally, it provided that there should be no liability on the part of the defendant from any accident resulting from "unnecessary exposure to danger" or "voluntary exposure to obvious risk of injury."

On the 11th day of February, 1902, plaintiff was injured while in the act of, or immediately after, alighting from a railroad train, which resulted in the loss of his right foot above the ankle. Within ten days thereafter notice of said accident was given. On January 5, 1903, this action was brought to recover the amount of the policy. The defendant by its answer seeks to avoid liability upon the ground that the action was not brought within six months from the date when the defendant received proofs of injury; that the accident occurred through plaintiff voluntarily or unnecessarily exposing himself to

danger, or to obvious risks of injury; and that the plaintiff forfeited his right to recover under the policy by a misstatement in the proof of injury as to the manner in which the accident occurred. When plaintiff rested, the defendant moved to dismiss the complaint upon these three grounds. The trial court denied the motion, and ruled that the evidence presented questions of fact for the jury. After all the proof was in, the motion to dismiss was renewed, and again denied. The jury found for the plaintiff for the sum of \$1,260. Thereupon a motion was made to set aside the verdict, under section 999 of the Code, and to dismiss the complaint, which was granted. From the order setting aside the verdict and dismissing the complaint, and the judgment entered thereon, plaintiff appeals.

The defendant bases its contention that the action was not commenced in time, upon the theory that it only received proofs of claim on May 29, 1902, and, as the action was not brought until January 5, 1903, the six-months limitation specified in the policy had intervened. The record shows that on February 11, 1902, the day of the accident, the wife of plaintiff sent a postal card to the defendant, informing it of an injury to her husband, resulting in a loss of his foot above the ankle, and giving the number of the policy, to wit, 124,004. Thereafter, and on February 20, 1902, a statement of disability or injury prepared on one of defendant's blanks was filled out by her and sent to and retained by the defendant. This statement set forth in detail the nature of the injury, how it occurred, the name and address of the attending physician, and all particulars in connection with the injury, as required by this printed form. To quote the language of the form furnished, it was a statement of the injury, "with full particulars" relating thereto, and these "full particulars" were amply set forth. Accompanying this statement was a letter by plaintiff's wife as follows:

"Kimball C. Atwood, Secy.—Dear Sir: Mr. Norwood has not been able to sit up and write. I have filled this statement in the best I can, and, if not satisfactory, please return, and send another, and I will try to get Mr. Norwood to do it himself, if he is then able."

It was admitted that this statement and the letter were received on February 20, 1902. Thereafter, and on the said May 29, 1902, an "additional" statement of the injury was furnished. The record does not show who requested these additional proofs. When the plaintiff attempted to show at whose request they were prepared, the court, on defendant's objection, excluded the evidence. Between September 5, 1902, and October 7, 1902, negotiations were had between the parties looking to an adjustment of the claim. In the final letter of October 7, 1902, written by the general counsel of the defendant, an offer of \$250 in settlement, made by a Mr. Lockwood on behalf of the defendant, was renewed, and the plaintiff was given until October 11, 1902, to accept the same, and if not then accepted the offer was to be considered withdrawn, "and the insured will then be at liberty to take such course in the matter as he may consider to be for his own best interest." From the evidence of plaintiff's former attorney, who was called as a witness on the part of the plaintiff, it ap-

peared that in September, 1902, he had an interview with both the president and the then secretary of the defendant, and its general counsel, in which they stated that they were still investigating the matter, that he need not be in a hurry about commencing an action, and that they would decide whether they would settle or not after further investigation.

While that conversation is denied on behalf of the defendant, we must, in view of the finding of the jury and the ruling of the court dismissing the complaint, adopt the inferences most favorable to the plaintiff. The plaintiff had given the notice of loss required by the policy when the postal card was sent on February 11, 1902, and furnished proof of disability or injury on February 20, 1902, when upon the blanks of the defendant he furnished "full particulars" of the injury in detail and as required by the defendant. The six months, therefore, within which to commence this action, would have expired on August 20, 1902. The defendant, however, continued its negotiations looking to a settlement of the claim down to October 7, 1902, and as late as September, 1902, was pressing upon plaintiff's attorney to delay commencement of the action until it could further investigate the claim and determine whether to settle the claim or stand suit. The defendant could have insisted that, as no suit had been brought prior to August 20, 1902, the insured had forfeited or lost all right of recovery by reason of the short statute of limitations fixed by the policy. But, instead of that, it continued to treat the policy as valid, and induced the plaintiff's attorney not to sue until further investigation could be made, and after such further investigation the letter of October 7, 1902, was sent, from which it appears that the defendant had concluded to renew an offer to settle, fixing a limit of time within which the offer must be accepted, and, if not accepted, the insured would then be at liberty to take such course as he deemed for his best interest, implying that, if he rejected the offer, he could then sue. In *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, at page 419, Judge Earl said:

"It may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as a matter of law waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based on any new agreement or an estoppel."

See *Roby v. A. C. Ins. Co.*, 120 N. Y. 510, 24 N. E. 808; *Kiernan v. Dutchess Co. Mut. Ins. Co.*, 150 N. Y. 190, 44 N. E. 698.

The defendant takes the technical position that the six months should be computed from May 29, 1902, when the further or additional proofs of disability or injury were furnished. As we have stated, because of defendant's objection, the court excluded evidence as to the circumstances under which and at whose request these additional proofs were delivered; but we have the letter accompanying the proof of claim filed February 20, 1902, in which plaintiff's wife stated that, if they were not satisfactory, they should be returned to her, and she would send another. They were not returned, and, in view of its objection, the defendant cannot complain that the jury were left to infer at whose re-

quest they were furnished. The act of the assured in giving additional information subsequent to February 20, 1902, whether orally or in the form of a writing, did not substitute the latter information for the proofs first submitted and retained. Indeed, we find very little additional information in the later proof not found in the earlier one. The argument of the defendant entirely disregards the proof furnished on February 20th. These proofs cannot be considered as a mere notice of the injury, because the postal card, which preceded the proofs, sent on February 11th, gave the notice of the accident within the time and terms of the policy. We hold, therefore, that the action was commenced within time.

With regard to the second proposition raised by defendant, that the accident occurred through plaintiff voluntarily or unnecessarily exposing himself to danger or to obvious risks of injury, it is sufficient to say that the jury determined that issue in favor of plaintiff. The proof shows that when he alighted the train was going "very slow and had nearly stopped"; that for 20 years he had been employed as a brakeman, and was accustomed frequently to ride on trains and alight therefrom while in motion; that on the day he was injured his coat became caught in some way and he seemed to be dragged along. The evidence of another witness showed that the forward truck that passed over plaintiff's foot was about 18 inches or 2 feet away when the train stopped, indicating that at the time of the casualty the train had almost come to a standstill. Here was a combination of facts from which the jury could infer whether the exposure to risk was voluntary, unnecessary, or obvious, or the result of pure accident. In *Lehman v. Great Eastern Casualty Co.*, 7 App. Div. 429, 39 N. Y. Supp. 912 (affirmed 158 N. Y. 689, 53 N. E. 1127), the court said:

"As we regard it, a voluntary performance of an act must require an exercise of the will of the actor. In other words, it is an act done in obedience to, and regulated by, the will of the person who does it. It follows, therefore, that it must be done designedly, and not accidentally, and, consequently, one cannot be said to be guilty of a voluntary exposure to danger, unless he intentionally and consciously assumes the risk of an obvious danger."

Counsel for defendant argued that that is just what plaintiff did do, namely, "intentionally and consciously" place himself in danger, by leaving the train as described by him. With this contention we cannot agree. It may be assumed that all creatures are desirous of preserving their lives and keeping their bodies from harm. *Morrison v. N. Y. C. R. R. Co.*, 63 N. Y. 643. The assertion, therefore, that the plaintiff "intentionally" placed his person in jeopardy, is not of a character to carry with it conviction that such was the fact. We think the finding of the jury in plaintiff's favor on this question was correct.

Neither do we think that the third point, that plaintiff forfeited his right to recover under the policy by a misstatement in the proof of injury as to the manner in which the accident occurred, is tenable. The question whether there was any fraud or concealment was considered by the jury, and their finding against the defendant is supported by the evidence. In *Titus v. Insurance Co.*, supra, it was held that:

"A misstatement would not avoid the policy, if it was a mere mistaken expression of opinion; but the misstatement must be false and fraudulent."

The proofs of February 20th were prepared, as we have stated, on a printed form of defendant, which, among other things, contained the question:

"State fully and particularly how the injury was received and what you were doing at the time of the injury."

Plaintiff's wife, who prepared the proofs, answered this inquiry as follows:

"Walking along the side of the car New York Central R. R., slipped on something, and fell under car."

She testified that this was in her handwriting, and that plaintiff was not present at the time she wrote it. In the statement furnished May 29th, the blank was filled out by an attorney in substantially the same manner. That there was no fraud or concealment intended is manifest from the correspondence with the defendant by one of plaintiff's former attorneys, who stated the facts as they were related by the plaintiff at the trial. It also appears, from the uncontradicted evidence of plaintiff, that after he returned to work on April 28, 1902, he had an interview with a Mr. Lockwood, a representative of the defendant, to whom he recited how the accident happened, and to whom he stated that he "stepped off the train, and slipped and fell on the platform, and lost my foot." The only evidence offered by the defendant against these facts were the written statements and proofs above referred to. The jury accepted the explanation of the plaintiff, and apparently by their verdict believed him. This negated any finding of intentional fraud or concealment.

The order and judgment appealed from should be reversed, and the verdict reinstated, with costs to the appellant.

GILDERSLEEVE and LEVENTRITT, JJ., concur in the result.

(56 Misc. Rep. 599.)

MITTLEMAN v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Term. November 29, 1907.)

1. JUDGMENT—ON MOTION TO DISMISS.

Where defendant moves for dismissal for failure of proof, it is error to render judgment for him on the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 80, Judgment, § 359.]

2. STREET RAILROADS—INJURY TO PERSON NEAR TRACKS—NEGLIGENCE.

Plaintiff, in crossing a street where a street car track made a sharp curve, at the side of which, about two feet from the track, was an unguarded excavation, after crossing the tracks, was compelled to pass between the excavation and the tracks. As she, with others, was about to cross, a car approaching the curve was stopped by a policeman to enable them to pass. Plaintiff, who was the last to cross, had passed the front end of the car, when it started, and she was struck by the rear fender as the car rounded the curve and thrown into the excavation. *Held*, that the motorman was guilty of negligence in starting the car before plaintiff had an opportunity to reach a place of safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 195-203.]

3. SAME—CONTRIBUTORY NEGLIGENCE—PASSING IN FRONT OF STANDING CAR.

A person crossing in front of a street car while at a standstill has a right to assume that it will not be started or so operated as to strike her until she has had a reasonable opportunity to pass the point of danger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 204-209.]

Appeal from Municipal Court, Borough of Manhattan, Thirteenth District.

Action by Gussie Mittleman against the New York City Railway Company. Judgment for defendant, and plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Leopold Freiman, for appellant.

William E. Weaver, for respondent.

LEVENTRITT, J. The plaintiff sues to recover for personal injuries received through the alleged negligence of the defendant. At the close of the plaintiff's case the defendant moved for a dismissal of the complaint upon the grounds that no negligence on its part had been shown and that the plaintiff had not established her freedom from contributory negligence. The court reserved decision, whereupon the defendant's counsel stated: "I will rest on my motion." No testimony was offered by the defendant. Subsequently the court rendered judgment for the defendant upon the merits. This was error. The defendant, having moved for a dismissal for failure of proof, was entitled at most to a judgment of nonsuit. *Peggo v. Dinan*, 72 App. Div. 434, 76 N. Y. Supp. 565; *Molloy v. Whitehall Portland Cement Co.*, 116 App. Div. 839, 102 N. Y. Supp. 363.

Furthermore, we are of the opinion that the plaintiff proved a cause of action. At the time of the accident the defendant was running cars through Delancey street from west to east and across the Williamsburg Bridge. The car tracks, before reaching the bridge, curved sharply toward the south, and then easterly, so that a car running along Delancey street turned and proceeded southerly for a space, turning easterly again before crossing the bridge. On the westerly side of this curve, about two or three feet from the car tracks, was an unguarded excavation about three feet deep. The plaintiff was crossing from Delancey street, going in a southerly direction to Broome street. In so doing she was compelled to pass along a path between the excavation and the car tracks as they curved towards the south. As she, with several others, was about to cross the tracks, a car approaching the curve was stopped by a policeman to enable them to pass. The plaintiff was the last to cross, and she had passed the front end of the car, when it started and she was struck by the rear fender. At that time she was about two feet from the track. The side of the car passed her safely, but the fender, which was fastened to the car by a strap, and one corner of which projected beyond the car about a foot, struck her and threw her into the excavation. Under these circumstances it cannot be said either that the plaintiff

was negligent or that she failed to show negligence on the part of the defendant. The motorman knew that the plaintiff and those who had crossed ahead of his car were proceeding near to the track and between the track and the excavation, and it was his duty to wait before starting his car until they had had an opportunity of reaching a place of safety, especially when, as it appears, even the overhang of the car, as well as the projecting fender, was liable to strike a pedestrian as the car rounded the curve. This duty he evidently failed to recognize.

Although it has been held that a person at or near a curve in a railroad track may be charged with knowledge that the rear end of a car will project a certain distance beyond the track, the decisions declaring this principle have no application to the facts disclosed in the case at bar. The plaintiff crossed in front of a car while it was at a standstill, and she had a right to assume that the car would not be started or so operated as to strike her, until she had enjoyed a reasonable opportunity to pass the point of danger.

Judgment reversed, and new trial ordered, with costs to appellant to abide event. All concur.

(56 Misc. Rep. 514.)

ELECTRICAL AUDIT & REBATE CO. v. GREENBERG et al.

(Supreme Court, Appellate Term. November 29, 1907.)

1. EVIDENCE—WRITTEN CONTRACT—VARIANCE BY PAROL—FRAUD.

Where, in an action on a written contract for electrical auditor's services, requiring payment on presentation of certificate of inspection, defendants claimed that they had been induced to sign the contract by the fraudulent representation of plaintiff's soliciting agent that it contained a provision that payment was not to be made until plaintiff had complied with a guaranty to obtain at least 40 per cent. rebates on all overcharged bills for electricity to date, parol evidence that such was the agreement made was admissible in support of the issue of fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2005-2020.]

2. FRAUD—WRITTEN CONTRACT—DUTY TO READ.

Where plaintiff's solicitor, who prepared a written instrument for services sued on, had falsely represented to defendants that it conformed to the oral contract, defendants were entitled to rely on such representations, and owed no duty to plaintiff to read the contract to discover the falsity of the representations, under the rule that one who perpetrates a fraud is estopped to claim that the party defrauded ought not to have believed or trusted him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 19-23.]

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by the Electrical Audit & Rebate Company against George Greenberg and others. From a Municipal Court judgment in favor of plaintiff, defendants appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Jacob J. Aronson, for appellants.
Werner & Fox, for respondent.

LEVENTRITT, J. The complaint in this action alleges a contract in writing whereby the defendants agreed to pay the plaintiff \$50 for inspecting their electrical installation for the purpose of determining the correctness of charges for electric current, payment to be made upon presentation of the certificate of inspection. The contract further provided that the plaintiff would, without extra charge, obtain the lowest rates for the defendants' electric current, test their meters, examine their motors whenever necessary, and audit their future bills, as also those of the preceding year and a half, and the plaintiff guaranteed "to obtain at least 40 per cent. rebates on all overcharged bills to date or refund the fee paid under this contract." The defendants in their answer allege that there was an oral agreement to the effect that the plaintiff should audit their bills for a year and that the \$50 should not be paid until the plaintiff had obtained a rebate of 40 per cent. on all their bills for the past year and a half. They then plead that they were induced to sign the paper on which this action is based through the misrepresentation of one Hirsch, the plaintiff's soliciting agent, that the writing embodied the oral agreement; that they did not intend to make or deliver the agreement which they signed; and that they were induced to do so solely by reason of the "deception, fraud, and artifice" practiced by such agent. In an effort to establish this plea, the following questions were addressed to one of the defendants on his direct examination:

"What statements did Mr. Hirsch make to you about the contents of the paper? Would you have signed the contract if you knew that it provided that you were to pay \$50 for a simple certificate of inspection?"

These questions were objected to, and the evidence sought was excluded by the trial justice. That exclusion was error. The defense was fraud in inducing the defendants to sign a contract to which they claim they had never agreed. What the real agreement was, what assurances Hirsch made that it was contained in the writing, and the mental attitude of the defendants respecting such assurances were all facts material to this defense. *Thorn v. Helmer*, *41 N. Y. 27; *Strauss & Co. v. Welsbach Gas Lamp Co.*, 42 Misc. Rep. 184, 85 N. Y. Supp. 367; *Trankla v. McLean*, 18 Misc. Rep. 221, 41 N. Y. Supp. 385. We have found frequent occasion to call attention to the rule that in the Municipal Court, in actions upon written contracts, though fraud may not be proven as the basis for affirmative relief, it is always available as a defense to a claim founded on the contract. *Pelgram v. Ehrenzweig*, 51 Misc. Rep. 31, 99 N. Y. Supp. 913; *Smith v. Hildenbrand*, 15 Misc. Rep. 129, 36 N. Y. Supp. 485; *Richards v. Littell*, 16 Misc. Rep. 339, 38 N. Y. Supp. 73; *Malkemesius v. Pauly*, 17 Misc. Rep. 371, 39 N. Y. Supp. 1095; *Schollars v. Coghlan*, 54 Misc. Rep. 612, 104 N. Y. Supp. 742. The fraud may be either that which induced the contract or which induced the execution thereof.

The plaintiff relies upon cases supporting the rule which declares parol evidence inadmissible to vary the terms of a written instrument. But he cites no case which holds that the court may not inquire or ascertain whether a contract sued upon was ever in fact made. In *Koehler & Co. v. Duggan*, 49 Misc. Rep. 100, 96 N. Y. Supp. 1025,

we held that evidence which bears upon the intention of the parties to make any contract at all, when executing a writing purporting to be a contract, does not offend the rule. Here the defense interposed and sought to be proven was not to the contract, but to the instrument which purported to represent the contract. If the plaintiff's solicitor, who prepared the instrument in suit, and who must, therefore, have been familiar with its contents, represented to the defendants that it conformed to the oral agreement, the defendants were justified in relying upon those representations, and they owed the plaintiff no duty of vigilant effort to discover their falsity. *Brown v. Post*, 1 Hun, 303, affirmed 62 N. Y. 651. They were not called upon even to read the instrument signed. *Wilcox v. American Telephone & Telegraph Co.*, 176 N. Y. 115, 68 N. E. 153, 98 Am. St. Rep. 650. One who perpetrates a fraud is not permitted to say to the party defrauded that he ought not to have believed or trusted. *Albany Savings Institution v. Burdick*, 87 N. Y. 40. It follows that the evidence which the defendants sought to introduce in support of their defense was admissible and should have been received. The judgment must be reversed.

Judgment reversed, and new trial ordered, with costs to appellant to abide event. All concur.

(56 Misc. Rep. 482.)

GOODMAN v. HESS.

(Supreme Court, Appellate Term. November 29, 1907.)

BROKERS—RIGHT TO COMMISSIONS.

Where defendant authorized plaintiff to sell real estate, agreeing to pay a commission, and in the printed form above the authorization set out particulars of the property, the selling price as \$52,000, and the annual rentals as \$5,825, and plaintiff procured a purchaser ready, able, and willing to buy on defendant's terms, the price being reduced to \$49,500, and the customer was accepted, and the sale fell through only because defendant had misrepresented the amount of annual rent, plaintiff was entitled to commissions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 94-96.]

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Tobias Goodman against Moses Hess. From a judgment dismissing the complaint, with costs, plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Otto J. Kalt, for appellant.

Charles Stein, for respondent.

ERLANGER, J. After plaintiff submitted all his proof in support of his claim for brokerage commissions, his complaint was dismissed upon "the ground that no cause of action has been made out." It is well settled that upon such a dismissal plaintiff is entitled "to the most

favorable inferences deducible from the evidence." Plaintiff's authority to sell is in the following language:

"I hereby authorize you to sell the above property for me and agree to pay you the usual commission."

This paper was signed by defendant's brother, whose acts were fully ratified by the defendant. Above the authorization was a printed form containing the name of the plaintiff, the particulars of the property, the purchase price at \$52,000, and that the annual rental was \$5.-325. The proof shows plaintiff's employment; the rendition of his services at the defendant's request; that he procured a purchaser ready, able, and willing to buy on defendant's terms; that the purchaser was accepted; that the sale fell through because of defendant's misrepresentation as to the rental value of his property, the rent being \$264 less than stated in the authorization to sell; and that the services were reasonably worth \$495. More than this he was not required to prove. It appears that, although the original purchase price was fixed at \$52,000, the defendant subsequently agreed to sell for \$49,500, and to take in exchange as part payment a piece of property owned by the purchaser and valued at \$14,000, and the remainder, over and above the mortgages, in cash. Not only were the terms accepted, but the defendant caused contracts in duplicate to be prepared based on such terms.

The contention of defendant that plaintiff could only recover by producing a purchaser willing to buy at \$52,000 is without merit. *Southwich v. Swavienski*, 114 App. Div. 681, 99 N. Y. Supp. 1079. The refusal of the purchaser to complete because of defendant's misrepresentations as to the rental value cannot defeat the claim for commissions. *Seidman v. Rauner*, 51 Misc. Rep. 10, 99 N. Y. Supp. 862; *Putter v. Berger*, 95 App. Div. 62, 88 N. Y. Supp. 462. Defendant cannot urge his own wrong, and thus deprive the broker of the commissions earned by him. But for his misrepresentation as to the rental, the contract of sale would have been signed. The plaintiff abundantly established that he produced a purchaser ready, willing, and able to buy, and, instead of dismissing the complaint, judgment should have been awarded to him.

The judgment must be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

(56 Misc. Rep. 518.)

SCHON v. HARLAN.

(Supreme Court, Appellate Term. November 29, 1907.)

WITNESSES—CREDIBILITY—INTEREST—EVIDENCE.

Plaintiff sued on a contract, alleged to have been made with defendant in his private office, that, if plaintiff would procure for him a certain patient, he would pay plaintiff one-third of the amount of the bill. Plaintiff was corroborated by R., who testified that when the contract was made she was in defendant's dental chair, and that defendant left her and went into the private room with plaintiff. Plaintiff and R. were contradicted by defendant and two other witnesses; defendant's employé testifying that she was present when plaintiff called and found R. in the

chair. R. was recalled in rebuttal, and testified that she had no interest in the case, and that defendant's employé was not in the operating room at the time, as she testified. *Held*, that a letter written by R. to defendant, informing him that plaintiff evidently had "something up her sleeve" concerning defendant and another doctor, that she had the assistance of several influential people, and that the writer had pleaded with plaintiff to "suspend her ire" until defendant could see her personally and practically advising defendant to come to terms with plaintiff, was admissible to rebut R.'s testimony that she had no interest in the matter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1177.]

Appeal from Municipal Court, Borough of Manhattan.

Action by Joan Schon against Allison W. Harlan. From a Municipal Court judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Burke & Burrell (Isaac F. Russell, of counsel), for appellant.

William C. Wolf (Theo. H. Friend, of counsel), for respondent.

ERLANGER, J. The plaintiff is a professional masseuse. The defendant is a dentist, and performed dental work for her. While she was being treated, she claims that he desired to know who her patients were, and among others the name of Madame Calve was mentioned. Thereupon he is alleged to have said: "If you will bring me up Madame Calve as a patient, I will do a handsome thing by you"—and he then and there agreed to pay her (plaintiff) one-third of the amount of his bill. This promise she asserted was many times repeated to her by the defendant. After Madame Calve had been here for a short time, and while plaintiff was engaged in treating her, the name of the defendant as a dentist was mentioned, and as the Madame was in need of dental services it was arranged that plaintiff should secure for her an appointment with the defendant, and thereupon plaintiff declares she called up the defendant on the 'phone and secured such appointment. That no disappointment would result, plaintiff testified that she personally called and urged the defendant to keep the appointment at the time fixed; that there was present on that occasion a patient of plaintiff, a Mrs. Rees, who was at the time being treated by the defendant; that the great delight of the defendant in securing Madame Calve as a patient was described, and Dr. Fisher was called in to write out the note of appointment; that before leaving she requested the defendant to step into his private office, and there she reminded him of his agreement. No one but themselves was present, and to bind the compact hands were clasped in token of it. Thereafter the defendant professionally treated Madame Calve, for which his charge was \$900. The day before the Madame sailed plaintiff demanded to know the amount of his bill, but all information on the subject was refused. Mrs. Rees testified that the defendant, on the occasion when she (plaintiff) called as above stated, left the chair and went into a private room with her; that she knew nothing about the letter (presumably the note of appointment, which

it is claimed Dr. Fisher wrote, the witness being in the chair at the time), and that the defendant asked her several times when plaintiff was going to bring Madame Calve. The defendant and two other witnesses flatly contradicted the plaintiff and her witness in every essential detail. In rebuttal Mrs. Rees was recalled and asked:

"You have no interest in this case, have you? A. Not at all; no."

Defendant's counsel then cross-examined the witness, and a letter written and sent by her to the defendant was offered in evidence. The record shows no other reason for its exclusion, except the words "objected to." The objection was sustained, and the letter excluded and marked for identification. In this letter, which was sent shortly before this action was commenced, the witness wrote, among other things:

"Miss Schon has evidently something up her sleeve which may affect you both [that is, the defendant and Dr. Fisher], more than that transaction with Madame Calve. I want to tell you something on the quiet, Dr. Harlan. Miss S. has lined up a few representative men to back up her argument. Her banker, physicians, and a couple of medical editors, and some of her pet rich patients. What she means to do God only knows; and I plead with her to suspend her ire, until you see her personally and have a calm heart to heart talk with her, as I expect a man of your rank and age would do. Don't let this little woman splatter, because she usually succeeds in what she sets out to do."

This letter was written, as claimed by the witness, without the knowledge of plaintiff, and she further testified that, beyond knowing that there was some dispute between the parties, she was entirely ignorant of their business relationship. Counsel for defendant rested upon his exception, and urges upon us that the letter was that of an interested and biased witness, and an attempt on the part of the writer to coerce the defendant by means of covert threats to pay the plaintiff's claim, and that its exclusion was error. Plaintiff was the only witness to prove the contract. She testified that in the presence and hearing of Mrs. Rees she was taken into a private room, and that then and there the compact was again discussed and confirmed. To corroborate her, it was deemed material to call Mrs. Rees, not to prove the obligation alleged to have been assumed by the defendant, but that the parties went into a private room for the purpose of some discussion, presumably to make the contract declared upon. After the close of defendant's case, Mrs. Rees was again called to inform the jury that she had no interest in the case, and that she was positive that plaintiff went into the room, and that the defendant "left her to go there." If this evidence was immaterial to the issue, then the letter was likewise immaterial, and reversible error cannot be predicated upon its exclusion. If material, then its rejection was error.

It is palpably clear that the evidence of Mrs. Rees was deemed of the utmost materiality, and this is shown from the fact that she was recalled to deny her interest in the case, and to reaffirm that the parties left her to go into a room. The jury were thereby led to believe, from other circumstances in the case, that then and there in private this contract was made, and that there was a purpose in securing this

privacy. It was competent, to overcome the possible effect of the evidence of Mrs. Rees on the jury, to show her bias and interest, to the end that her credibility could be passed upon after all the facts in connection with her testimony were known. The reference, too, in the letter, that the witness pleaded with plaintiff to "suspend her ire" until the defendant could personally see her, strongly supports the theory that the letter was probably written after consultation with plaintiff, or at least that she had some knowledge with regard to it. Furthermore, Miss Randel, employed by and called on behalf of the defendant, had testified, that she was present on an occasion when plaintiff called and found Mrs. Rees in the operating chair, and that she heard plaintiff say "that she had recommended Madame Calve to Dr. Harlan, because she knew that Dr. Harlan would do the right thing by Madame Calve, and she told Madame Calve that she expected nothing in return." Mrs. Rees met this evidence, when called in rebuttal, by declaring that "that young lady" was not in the operating room at the time in question. This additional denial indicates, not only the importance of the evidence furnished by Mrs. Rees, but also that the plaintiff's case rests largely upon it. We think the letter should have been admitted, and that its exclusion requires us to reverse the judgment.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

GILDERSLEEVE, P. J., concurs. LEVENTRITT, J., taking no part.

FRANK et al. v. MANDEL.

(Supreme Court, Appellate Term. November 29, 1907.)

CONTRACTS—SUBSTANTIAL PERFORMANCE—ACTIONS—AMOUNT OF RECOVERY.

Substantial performance of a contract does not warrant recovery of the full contract price; but the recovery is limited to an amount representing the difference between the contract price and the sum required to supply the omissions which, when remedied, would make performance complete.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1493, 1493½, 1502.]

Appeal from City Court of New York, Trial Term.

Action by Hyman Frank and others, copartners, against Samuel Mandel. From a judgment for plaintiffs, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Eisman & Levy, for appellant.

Marx & Freyer, for respondents.

LEVENTRITT, J. The evidence discloses a dispute as to whether the contract between the parties had been fully or only substantially performed; the defendant contending that materials of a certain value contracted for had not been furnished. The learned trial justice

charged in effect (1) that unless the plaintiffs had proven substantial performance they could not recover, and (2) that if they had proved substantial performance they were entitled to the full contract price.

To the second branch of the charge the defendant properly excepted. In the event of substantial performance the plaintiffs were not entitled to recover the full contract price. Under those circumstances their recovery would be limited to such an amount as would represent the difference between the contract price and the sum required to remedy the omissions, which, when remedied, would make performance complete. Following the erroneous instructions of the court, the jury returned a verdict for the full contract price. The defendant having been thus improperly deprived of a reduction to which he might be entitled, he should have a new trial.

Judgment reversed, and new trial ordered, with costs to appellant to abide event. All concur.

(C. Misc. Rep. 473.)

KURLANCHICK v. SKLAMBERG.

(Supreme Court, Appellate Term. November 29, 1907.)

1. MUNICIPAL CORPORATIONS—RIGHTS OF ABUTTING OWNER—OBSTRUCTION OF STREETS.

While one has a right to use the sidewalk for loading and unloading goods that necessarily have to be taken from and into his place of business, and may in so doing temporarily obstruct the sidewalk, he must show that his use is necessary, temporary, and reasonable, and the question whether the use is such is one of fact, to be determined with reference to time, place, and circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1446.]

2. SAME—INJURY TO PEDESTRIAN.

A pedestrian fell against a skid used by a wholesale grocer and was injured. The grocer loaded and unloaded goods by means of the skid, which was always on the walk, and on some days in use every hour. It took from 5 to 15 minutes to unload a truck. There was also evidence that the skid was in constant use. *Held*, in an action by the pedestrian for the injuries, to establish a prima facie case calling on the grocer to show, to avoid liability, that his use of the sidewalk was reasonable.

3. SAME—PROXIMATE CAUSE.

Where the use of a sidewalk by a grocer in loading and unloading goods amounted to a nuisance, and a pedestrian was injured by reason thereof, the nuisance was the proximate cause of the injury, and the grocer was liable therefor.

Appeal from Municipal Court, Borough of Manhattan.

Action by Sarah Kurlanchick against Hyman Sklamberg. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Isidor Cohn, for appellant.

Frank V. Johnson (Harry S. Austin, of counsel), for respondent.

LEVENTRITT, J. The defendant is a wholesale grocer engaged in business at No. 71 Ludlow street, a main thoroughfare of this city.

In front of his premises he had constructed a platform about four inches high and, for aught that the record discloses to the contrary, within the stoop line. For convenience in loading and unloading goods, wagons were backed against the curb and a skid run from the rear of the wagons across the sidewalk to the platform. On the 20th day of November, 1906, the plaintiff was passing along Ludlow street on her way to market. On arriving at the defendant's place of business she found the sidewalk obstructed with boxes of salt and barrels of flour to such an extent that the skid, running from the platform to a wagon then loading, was hidden from view. In attempting to pass she tripped and fell against the skid, and sustained injuries for which she sought to recover damages. The complaint alleged negligence and the maintenance of a nuisance; but on the trial the plaintiff elected to proceed upon the latter theory. At the close of the plaintiff's evidence the learned trial justice dismissed the complaint upon the ground that no nuisance had been established.

An analysis of the testimony shows that this disposition was erroneous. The defendant's manager and shipping clerk testified that the skid was used when necessary—sometimes not once in 6 hours, and sometimes every hour; that it was used on an average 5 minutes at a time. The defendant affirmed that he did an extensive business, and that the skid was on the sidewalk on an average the whole day, but that it was in use only about 15 minutes at a time. A son of the plaintiff testified that during the 4 years he had lived at No. 65 Ludlow street the skid was constantly on the walk, that he saw it morning and night on his way to and from work, that he passed the place four or five times a day, and that the skid was there even when no goods were being shipped. The testimony of another son is to the same effect. An apparently disinterested witness swore that he was obliged to pass the defendant's place of business four or five times a day, that the skid was always there, that it was in position from a truck to the platform, and that he was compelled to cross to the opposite side of the street. Another witness testified that during 2½ years that she had resided at No. 65 Ludlow street she had passed defendant's premises four or five times a day, that the skid was always there, and that men were occupied in loading and unloading trucks.

We think that this testimony was sufficient to call upon the defendant to show that the use he made of the sidewalk was reasonable with reference to the public convenience. While it is true that the defendant had a right to use the sidewalk for the purpose of loading and unloading goods that necessarily had to be taken from and into his place of business, and that he had a right in so doing temporarily to block and obstruct the sidewalk, he should have been required to meet the plaintiff's proof by showing that his use was "necessary, temporary, and reasonable" (*Murphy v. Leggett*, 164 N. Y. 121, 58 N. E. 42), as no one is permitted unnecessarily or unreasonably or permanently to obstruct a highway. It is not the convenience of the defendant, but that of the public, which is to be considered. Even if his use of the sidewalk were necessary to the convenient and profitable conduct of his business, and even if the obstruction of the walk was no more, or was even less, than it would be by any other method of use, these

circumstances would not justify the obstruction. *Callanan v. Gilman*, 107 N. Y. 360, 365, 14 N. E. 264, 1 Am. St. Rep. 831. In other words, even necessary use must yield to public convenience. Necessity does not justify a nuisance. The question always is whether the use is necessary, temporary, and reasonable—a question of fact to be determined with reference to time, place, and circumstances. In this case there was evidence that the defendant loaded and unloaded goods by means of the skid stretched across the sidewalk from the trucks to the platform, that the skid was always on the walk and was on some days in use every hour, and that it took from 5 to 15 minutes to unload a truck. There is also evidence that the skid was in constant use. We think, therefore, that the plaintiff made out a *prima facie* case and that the motion for a nonsuit should have been denied.

The defendant cites *Welsh v. Wilson*, 101 N. Y. 254, 4 N. E. 633, 54 Am. Rep. 698. In that case it was decided that a merchant, in removing cases of merchandise, had the right to place skids from a truck across the sidewalk to the steps of his store, and that a person who, undertaking to pass around the skids by the steps, slipped and was injured, could not recover, in the absence of proof of negligence. Under the circumstances there disclosed it was held that the use of the sidewalk was necessary and reasonable. In *Murphy v. Leggett*, *supra*, the court by Haight, J., referring to *Welsh v. Wilson*, say (at page 126 of 164 N. Y., page 43 of 58 N. E.):

"While we approve fully of the conclusion reached in that case under the facts there disclosed, it should not be understood as authorizing the practical obstruction of a street for the greater portion of the time, or as establishing a hard and fast rule which must control in all cases. Places and circumstances widely differ. That which would but slightly inconvenience the public in one place might in another very seriously impede and discommode travelers. The use by a merchant of a back street but little traveled might be reasonable and justified, while a like use of a main thoroughfare constantly crowded with passing people would become at once unreasonable and a nuisance that could not be tolerated."

If the use of the sidewalk by the defendant amounted to a nuisance, and the plaintiff was injured by reason thereof, it constituted the proximate cause of the injury (*Cohen v. Mayor*, 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506) and the defendant would be liable. It follows, therefore, that there must be a new trial.

Judgment reversed, and new trial ordered, with costs to appellant to abide event. All concur.

BERKOWICH v. KOMMEL.

(Supreme Court, Appellate Term. November 29, 1907.)

1. MALICIOUS PROSECUTION—CIVIL ACTIONS—ELEMENTS.

One suing for malicious prosecution of a civil action must show that the action was malicious, that there was not ground sufficient to justify a belief in its success; that it ended in failure, and that he suffered some special grievance in person or property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, §§ 17, 56-58, 69, 72-76.]

2. SAME—SUFFICIENCY OF EVIDENCE.

Evidence in an action for malicious prosecution of a civil action *held* not to show that defendant did not have reasonable cause to institute his action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 83, Malicious Prosecution, § 152.]

3. APPEAL—REVIEW—QUESTIONS OF FACT.

A verdict against the overwhelming weight of evidence will not be permitted to stand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3938-3943.]

4. MALICIOUS PROSECUTION—CIVIL ACTIONS—EVIDENCE.

An action for malicious prosecution of a civil action must be supported by very clear and satisfactory proof.

Appeal from City Court of New York.

Action by Herman Berkowich against Aaron Kommel. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Louis J. Jacovies (Henry Kuntz, of counsel), for appellant.

Nathaniel Tonkin, for respondent.

LEVENTRITT, J. The plaintiff has judgment for the malicious prosecution of a civil action. In October, 1903, the defendant commenced an action against the plaintiff in the Municipal Court of the city of New York to recover the price of goods alleged to have been sold and delivered to the plaintiff on October 2 and November 7, 1901. A general denial was interposed as an answer in that action. The trial of the issues was adjourned from time to time, until finally, on December 2, 1903, an inquest was taken, and on the judgment entered an execution was issued to a city marshal, to whom, to prevent a threatened levy on his property, the plaintiff paid the amount of the judgment. Thereafter, on motion duly made, the inquest was opened and the cause set for trial for January 14, 1904. A series of adjournments followed until February 29th, when the justice ordered the trial to proceed, and upon this defendant's refusal a judgment was rendered dismissing the complaint, with costs. The plaintiff pleads the foregoing undisputed facts, and adds that the inquest taken on December 2, 1903, was brought about and the resulting judgment secured through trick and device and the false and fraudulent statements of the defendant's attorney to the effect that the cause had been set for trial for December 4th, when, as he well knew, the date fixed was December 2d. The plaintiff further charges that the defendant instituted the Municipal Court action through malice and without probable cause to believe it could succeed, and he brought this suit to recover damages. The defendant, after putting in issue the allegations of trick and device and false representations, denies that he was actuated by malice, and denies that he did not have probable cause to anticipate success.

The plaintiff relied on his own testimony to establish his cause of action. In the course of his testimony directed to the nonexistence

of probable cause in the bringing of the Municipal Court action, he said that for several years prior to March 31, 1902, he purchased goods from the defendant, and on that day paid the entire balance owing; that he never bought the goods involved in the Municipal Court action; that he had a nephew who bought similar goods from the defendant; that on occasions he sent his nephew to make purchases from the defendant; that he signed the receipt (produced) for certain goods, but he was unprepared to say whether or not it covered that part of the goods which the defendant claimed to have delivered to him on November 7, 1901; that he had a dispute with the defendant respecting his liability for the transactions on which the Municipal Court action was based, and insisted that he had not guaranteed payment for his nephew's purchases, while the defendant maintained the contrary. A plaintiff who seeks recovery for the malicious prosecution of a civil action must prove that the action was begun in malice, that there was not ground sufficient to justify a belief in its success, that it ended in failure, and that he suffered some special grievance in person or property.

Even conceding that the plaintiff adduced evidence to support the other elements essential to his cause of action, the evidence summarized not only fails to show that the defendant did not have reasonable cause to believe in the truth and justice of the claim which he asserted in the Municipal Court, but it tends strongly to indicate the existence of such reasonable cause. When confronted with a receipt, which he admitted he had signed, he could not swear that it was not for the greater part of the very goods to recover the value of which the action had been brought in the Municipal Court. He was unwilling to assert that the defendant had not delivered those goods to him. That doubt is inconsistent with the allegation of want of probable cause that he was bound to prove as a prerequisite to his right to recover. It not only negatives that allegation, but points to the existence of a belief on the defendant's part that he had a meritorious cause of action. This conclusion is strengthened by the plaintiff's further testimony that he had occasionally sent his nephew to buy goods from the defendant, and that he had quarreled with the latter respecting his liability for his nephew's purchases. The jury should not have been permitted to say that the defendant had no faith in his claim against the plaintiff, when the plaintiff himself expressed doubt about it. Having failed to prove that the defendant was not justified in entertaining the belief that the Municipal Court action was well founded, the motion to dismiss made by the defendant at the close of the testimony should have prevailed, and the exception to its denial was well taken.

Even if this error could not be availed of as a ground of reversal, the judgment would not be permitted to stand, as it is based upon a verdict which was returned in defiance of the overwhelming weight of evidence. By convincing testimony the defendant and his witnesses established that the plaintiff had to some degree at least assumed liability for his nephew's purchases, that all such purchases were charged to the plaintiff, that the goods represented thereby were

delivered to him, that he receipted for them and the original bills were sent to him, that on March 31st, when the plaintiff claims to have adjusted his accounts, the two items in question were called to his attention, and that the plaintiff, stating that he had had a difference with his nephew, repudiated his liability and refused to satisfy the demands. All these facts were further corroborated by the documentary evidence introduced. The evidence does not survive the application of the test prescribed by the Court of Appeals for cases of this character. In *Ferguson v. Arnow*, 142 N. Y. 580, 37 N. E. 626, the court, by Earl, J., say:

"A party who brings an action for malicious prosecution against a plaintiff who has been unsuccessful in a civil action shall not be permitted to recover without very clear and satisfactory proof of all the fundamental facts constituting his case. Such actions should not be encouraged."

Judgment reversed, and new trial ordered, with costs to appellant to abide event. All concur.

(56 Misc. Rep. 527.)

SINKOVITZ v. APPLEBAUM et al.

(Supreme Court, Appellate Term. November 29, 1907.)

FRAUDS, STATUTE OF—DEBT OF ANOTHER—ORIGINAL PROMISE—NEW CONSIDERATION.

Where a subcontractor threatened to abandon work for nonpayment of money due, and the owner told him to go ahead and he would pay him when he finished the job, the promise was not void within the statute of frauds, as a verbal promise to answer for the debt of another, but was an original promise founded upon a new consideration, which inured to the owner's benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 50-58.]

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Isidor Sinkovitz against Isaac Applebaum and others. From a judgment for defendants, plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

M. Harold Hochdorf, for appellant.

Marx & Freyer, for respondents.

LEVENTRITT, J. The dismissal of the complaint under a plea of the statute of frauds was error. The evidence adduced shows that the plaintiff's claim was founded on an original promise. The plaintiff was a subcontractor under one Musnitsky, who had been employed by the defendant to make certain alterations and repairs to premises owned by him. Owing to the nonreceipt in full of an earned installment, the plaintiff concluded to abandon the work. Being informed of the situation, the defendant sought the plaintiff and said to him:

"Go ahead with your work, and I will pay you as soon as you finish the job."

Relying on that assurance, the plaintiff resumed and completed the work, and upon the defendants' failure to pay he brought this action to recover the agreed amount. After proving the completion of the work and presenting the evidence of three witnesses that the defendant promised under the circumstances detailed to pay upon such completion, the plaintiff rested his case. Thereupon the defendant moved a dismissal of the complaint on the ground that the "contract alleged to have been made between the defendant Applebaum and this plaintiff, if made at all, is void under the statute of frauds and based upon no consideration whatever." The granting of that motion furnishes the basis of this appeal, and calls for a reversal of the judgment entered thereon.

The learned trial justice concluded that the promise made by the defendant was to answer for the debt of Musnitsky, and was void because not reduced to a writing signed by the defendant. That was a mistaken conclusion. The defendant, the promisor, was the owner of the property undergoing repairs. The labor and materials furnished by the plaintiff tended to improve and enhance the value of that property. The contractor had neglected to pay an agreed installment, and the plaintiff was then within his rights in refusing to proceed further with the work. The promise inducing the resumption and completion of the work, made under such circumstances, was original, not collateral. It was founded upon a new consideration, the prompt and uninterrupted prosecution of the work, which inured to the benefit of the defendant. That benefit formed the consideration. The debt became that of the defendant. His promise was not to pay Musnitsky's debt, but his own. The contract was new and independent. As such, though oral, it was valid and enforceable. The rule controlling the disposition of this case is stated by Finch, J., in *White v. Rintoul*, 108 N. Y. 222-227, 15 N. E. 320, in this language:

"Where the primary debt subsists and was antecedently contracted, the promise to pay it is original, when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor."

The relation of the parties to the obligation here sought to be enforced is analogous to that which existed between the litigants in numerous cases which have engaged the attention of the courts, and the uniform conclusion has been that the promise does not fall within the statute, and is valid and effectual without a writing. *Snell v. Rogers*, 70 Hun, 462, 24 N. Y. Supp. 379; *Almond v. Hart*, 46 App. Div. 431, 61 N. Y. Supp. 849; *Mannetti v. Doege*, 48 App. Div. 567, 62 N. Y. Supp. 918; *Reisler v. Silbermintz*, 99 App. Div. 131, 90 N. Y. Supp. 967; *Schild v. Monroe*, *Eckstein Brewing Co.*, 108 App. Div. 50, 95 N. Y. Supp. 493; *Raabe v. Squier*, 148 N. Y. 81, 42 N. E. 516. The judgment must be reversed.

Judgment reversed, and new trial ordered, with costs to the appellant to abide the event. All concur.

(56 Misc. Rep. 545.)

SCOTT v. METROPOLITAN LIFE INS. CO.

(Supreme Court, Appellate Term. November 29, 1907.)

1. EVIDENCE—HEARSAY.

A policy provided that it should be void if insured before its date had been attended by a physician for any serious disease, or had had before such date any pulmonary disease or chronic bronchitis, etc. The policy was issued in September, 1906, and insured died of tuberculosis in November following. Her attending physician certified that his attendance extended from October 12, 1906, to November 11, 1906, and that he had never attended or prescribed for her prior to the first date, though she had been ill since June, 1905, and had been treated at Liberty Hospital from June, 1905, until September, 1906. *Held*, that such evidence as to insured's condition and treatment prior to October 12th was hearsay.

2. INSURANCE—LIFE POLICY—EVIDENCE.

The evidence was also inadmissible, as it failed to establish any connection between such alleged previous illness and the cause of her death, and did not show that such previous illness, if any, was from a serious disease within the conditions of the policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1193-1200.]

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

Action by Ellen Scott against the Metropolitan Life Insurance Company. From a Municipal Court judgment for plaintiff, defendant appeals. Affirmed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Ritch, Woodford, Bovee & Butcher (Frederick C. Tanner, of counsel), for appellant.

L. Ruser, for respondent.

LEVENTRITT, J. A policy of insurance was issued to the insured in September, 1906, and the insured died in November following. In an action brought to recover the proceeds of the policy the defendant set up as a defense the breach of a condition of the policy which reads as follows:

"Unless otherwise stated in the blank space below in a waiver signed by the secretary, this policy is void if the insured before its date has been rejected for insurance by this or any other company, or has been attended by a physician for any serious disease or complaint, or has had before said date any pulmonary disease or chronic bronchitis: * * * Provided, however, that no obligation is assumed by the company prior to the date hereof, nor unless on said date the insured is alive and in sound health."

The defendant claimed that the insured was not in sound health at the time the policy was issued; that she had a pulmonary disease, for which she had been attended by a physician for four months during the preceding year; and that she never recovered from that disease. The court below gave judgment for the plaintiff, and the defendant appeals.

To establish its defense the defendant relied on the proofs of death of the insured, and it now contends that the statements therein con-

tained operate to defeat recovery on the policy. The attending physician certified that the cause of death was pulmonary tuberculosis; that he attended the deceased at Seton Hospital, Spuyten Duyvil, from October 12, 1906, to November 11, 1906, the date of her death. Then follow these questions and answers:

"(10) Did you ever attend or prescribe for deceased, except as stated?
 * * * A. No. (11) How long had deceased been ill when you were called to attend? A. Since June, 1905. * * * (17) Was deceased ever treated by a physician, or at a hospital or other institution, prior to your attendance? If so, please specify. A. Liberty; June, 1905, till September, 1905."

These statements do not prove that at or before the date of the policy the insured had any pulmonary disease, or that she was not in sound health, or that before that date she had been attended by a physician, for any serious disease. The statement of the physician that the deceased had been ill since June, 1905, has no probative force, when considered in the light of his prior statement that he had never attended or prescribed for her, except in October and November, 1906. At most, it is hearsay. Furthermore, no relation is established between that alleged illness and the pulmonary tuberculosis which caused death, and there is no evidence that the illness was from any serious disease. The statement that the deceased was treated at Liberty from June to September, 1905, is subject to the same criticism, and, in the absence of proof that the treatment was either for tuberculosis or some other serious disease, it is of no value. The contention of the defendant finds support only in inference and unjustifiable presumptions. The defendant assumed the burden of establishing affirmatively the defense pleaded. In this regard it failed, and the court below properly rendered judgment in favor of the plaintiff.

Judgment affirmed, with costs. All concur.

BUTLER et al. v. DE VILLERS.

(Supreme Court, Appellate Term. November 29, 1907.)

EVIDENCE—PAROL EVIDENCE—VARYING TERMS OF WRITTEN AGREEMENT.

Where, in an action by a stockbroker for a balance due from a customer on stock deals pursuant to orders of a third person under a written authority authorizing the broker to accept the orders of the third person, the broker offered unnecessary testimony of conversations between him and the customer, resulting in the delivery of the authorization, it was error to permit the customer to attack the unambiguous meaning of the authorization and substitute his intention therefor, though he was entitled to show that the broker had not given the correct version of the conversations antedating the authorization.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1678.]

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by Dudley Butler and another, doing business under the firm name of Butler & Johnston against Robert De Villers. From a judgment for defendant, plaintiffs appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Kearney & Davis (Thomas Kearney, of counsel), for appellants.
James, Schell & Elkus (Joseph M. Proskauer and Frederick Mellor, of counsel), for respondent.

PER CURIAM. The plaintiffs, who are stockbrokers, sued to recover a balance alleged to be due from the defendant as the result of certain stock transactions. The orders pursuant to which the purchases and sales in dispute were executed by the plaintiff were received by them through one Bigley under a written authorization from the defendant as follows:

"New York, January 12, 1906.

"Messrs. Butler & Johnston, 40-42 Wall Street, City—Dear Sirs: I hereby authorize you to accept any orders to buy or sell placed by Mr. F. J. Bigley for my account during my absence. The above to hold good until further notice. Yours truly,
R. De Villers."

On the trial the plaintiffs offered unnecessary testimony as to the conversations between them and the defendant, resulting in the delivery of the authorization. Thereupon the defendant was permitted to introduce parol evidence which not only tended to vary, but which directly contradicted, the terms of the written instrument. While the defendant should have been allowed to show that the plaintiff had not given the correct version of the conversations antedating the receipt of the letter of authority, he should not have been permitted without limitation to attack the unambiguous meaning of the writing and substitute his intention therefor. The error committed in receiving this class of evidence calls for a new trial.

Judgment reversed, and new trial ordered, with costs to appellant to abide event.

SCHNEIDER v. FINKELSTEIN.

(Supreme Court, Appellate Term. November 29, 1907.)

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—EVIDENCE—INSTRUCTIONS.

Where, in an action for making certain excavations, there was evidence that defendant employed plaintiff to make an excavation in defendant's yard, and at the same time instructed plaintiff to do anything that a third person, then present, should direct, and that the third person on behalf of defendant, employed plaintiff to excavate a cellar, the question whether defendant's instruction was a general authorization to the third person, which authorized him to employ plaintiff to excavate the cellar, was for the jury; and an instruction authorizing a verdict for plaintiff, on finding that defendant directed plaintiff to do anything that the third person told him to do, was erroneous.

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Charles Schneider against Morris F. Finkelstein. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Charles Stein, for appellant.

Douglas Mathewson, for respondent.

GILDERSLEEVE, P. J. The defendant appeals from a judgment rendered in favor of the plaintiff. The plaintiff claims that he first took a contract to excavate the earth and rock in a space 12x12x7 feet, for which defendant agreed to pay the sum of \$150; that when this contract was made there was present one Cohen, who, plaintiff claims, had some sort of general supervision over the work then being done on defendant's premises; and that at this time, the defendant told the plaintiff "to do whatever Mr. Cohen told me to do." Subsequently, and about the time the excavating in the yard had been completed, the plaintiff testifies that Cohen asked him what he would do the excavating in a cellar to be made under the building for, and, upon being told "the reasonable cost and 10 per cent. for profit," Cohen said he would see the defendant and report. Later on Cohen said to the plaintiff, "All right! go ahead," which was done by him, and the work of excavating the cellar completed. For this he claims an extra compensation of about \$320. The defendant admits that he agreed with plaintiff to do certain excavating, but claims that plaintiff agreed to do the entire work and remove the earth and stone from both the yard and cellar for said sum of \$150; that no extra work was done; that Cohen had no supervision over the work, and no authority to direct the work, or employ the plaintiff to perform any work, and both he and Cohen deny the statement of plaintiff that, when the contract for excavating the yard was made, the defendant said to plaintiff, "Do whatever Mr. Cohen tells you to do," or that in substance, and Cohen denied that he agreed with or directed plaintiff to excavate the cellar.

Nothing but questions of fact are involved herein, and we should be disposed to permit the verdict of the jury to stand, were it not for a serious error in the charge of the learned trial judge. The judge charged the jury as follows:

"I charge you, if the fact is that the defendant, Finkelstein, told this plaintiff to do anything that Mr. Cohen told him to do, that was a sufficient authority to Cohen to employ Mr. Schneider for Mr. Finkelstein in the prosecution of that work. But, before the law should be applied, you must first believe and find the fact to be that Mr. Finkelstein did tell Schneider to do anything that Mr. Cohen should tell him to do. I charge you that, if he did, that would be sufficient to bind his credit for anything that Cohen told him to do there, remembering at the same time the contention by the defendant that no extra work was done at all—that all this was done under the original contract between him and the plaintiff to do all the excavating, not only in the yard, but in the cellar as well."

To that portion of the charge in which the court said "that the conversation between Mr. Finkelstein and Mr. Schneider, when Mr. Finkelstein is alleged to have said that he should do anything that Mr. Cohen says, is sufficient authority to bind the defendant," the defendant excepted. We think, under the facts shown in the case,

this portion of the charge was too broad. The plaintiff's own testimony shows that his first contract was made with the defendant personally, by the terms of which he was to do the work of excavating, etc., only upon a lot of land 12x12x7 feet, and it was at the time this contract was made that, as he testifies, the defendant instructed him to do anything that Cohen told him to do. It is mainly upon that alleged direction that the plaintiff relies to show authority in Cohen to agree with him upon the terms for the excavating for the cellar. Whether or not such direction, if given at all, had reference only to the excavating to be done in the yard, because at that time, according to the plaintiff, nothing had been said about excavating the cellar, or whether it meant a general authorization to Cohen to direct to be done in and about the defendant's premises whatever he saw fit, was a question for the jury to say, from all the testimony and a legitimate inference to be drawn therefrom, and that portion of the charge excepted to entirely eliminated that question from the consideration of the jury. Under the instruction given, if the jury found that the words testified to by the plaintiff were used by the defendant, they must find, as a matter of law, that such direction applied to all the work then being done in and around the premises, and not alone to the work of excavating in the yard. The case was sharply contested, and there was a serious conflict in the testimony upon the facts, and what effect this erroneous instruction might have had upon the minds of the jury it is impossible to say.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

(56 Misc. Rep. 463.)

ELDAEN REALTY & CONSTRUCTION CO. v. BENSAMON et al.

(Supreme Court, Appellate Term. November 29, 1907.)

1. LANDLORD AND TENANT—RECOVERY OF POSSESSION—SUMMARY PROCEEDINGS—PETITION—INTEREST OF PETITIONER.

Under Code Civ. Proc. § 2235, requiring that in summary proceedings to recover possession of real property the petitioner must show his interest therein, where a petition shows that petitioner is a lessee under a lease, bearing a certain date, and that petitioner's lessor acquired title to the premises at a later date, in the absence of any fact showing the date when the lease was delivered, petitioner's right to maintain the proceedings does not appear, and the court acquires no jurisdiction, since it cannot be assumed that delivery of the lease was made subsequent to the time when the lessor could convey the premises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 1308.]

2. SAME—JURISDICTION OF SUBJECT-MATTER—WAIVER.

Failure to comply with the requirement of Code Civ. Proc. § 2235, that in summary proceedings to recover possession of real property the petitioner must show his interest therein, is not waived by answering the petition, since the defect is jurisdictional, and may be raised at any time.

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Summary proceedings by the Eldaen Realty & Construction Company, landlord, against Max E. G. Bensamon, tenant, and Max Spenadel, undertenant, to recover possession of real property. From a final order for petitioner, the undertenant appeals. Reversed, and proceedings dismissed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Benjamin Reass, for appellant.

Morris S. Hirschberg, for respondent.

ERLANGER, J. The undertenant appeals from a final order in dispossess proceedings in favor of the landlord. The petition sets forth in substance that the petitioner, a domestic corporation, "is a lessee" of certain premises under and by virtue of a certain indenture of lease made and executed by one Maria L. Fahys, the present owner thereof; dated July 30, 1907; that the "35-39 West 33d Street Company," a domestic corporation, on January 11, 1907, entered into a written agreement of lease with Max E. G. Bensamon, wherein that company, as landlord, leased the premises to Bensamon, as tenant, the lease to run for two years from January 15, 1907; that at that time the "35-39 West 33d Street Company" was the owner of the premises "and on the 3d day of August, 1907, duly conveyed said premises to Mary L. Fahys"; that the tenant, Bensamon, and the undertenant, Spenadel, still occupy the premises, and hold over, after the expiration of their term, without the consent of the petitioner. The assertion that the tenant and undertenant hold over after the termination of the lease is based upon the allegation that the lease from the 35-39 West 33d Street Company to Bensamon contained a clause authorizing the landlord to terminate upon giving 60 days' notice and that such notice had been duly given. The tenant did not appear in the proceedings, but the undertenant did, and filed an answer, which the court below held to be insufficient in law, and a final order was granted to the petitioner.

The undertenant contends that the court below did not acquire jurisdiction, for the reason that the petition upon which the final order was founded failed to comply with section 2235, Code Civ. Proc., which requires that the petition shall state the "interest" of the petitioner in the demised premises. We find support for that contention. Although the petition states that the petitioner is a lessee of the premises under a lease executed by Maria L. Fahys and dated July 30, 1907, it also contains the further statement that Maria L. Fahys did not acquire title to the premises until August 3, 1907. In the absence of any fact showing the date when the lease was delivered, we cannot assume its delivery subsequent to the time when Maria L. Fahys was empowered to contract with reference to the premises. There is no fact stated in the petition upon which the petitioner's right to possession could be based. Therefore the right of the petitioner to maintain the proceedings does not appear, and the court below acquired no jurisdiction.

The contention that the objection to the sufficiency of the petition has been waived by answering in the court below is unfounded. The

defect is jurisdictional, and may be raised at any time. *Bevins & Rogers*, App. Term Pr. 74.

The order appealed from must be reversed, and the proceeding dismissed. All concur.

GORLITZER v. LEVENSON.

(Supreme Court, Appellate Term. November 20, 1907.)

1. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The exclusion of evidence offered by plaintiff is not prejudicial, in the absence of proof of loss entitling him to recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 4187-4193.]

2. SAME—RULINGS ON EVIDENCE—EXCEPTIONS—REVIEW.

Where no exception is taken to the exclusion of evidence, no question for review is presented.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1508.]

3. SAME—RECORD—QUESTIONS PRESENTED.

The exclusion of papers offered in evidence will not be reviewed, where such papers were not marked for identification and printed in the record, so that their relation to the issue in the action could be ascertained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 2905-2909.]

4. MONEY RECEIVED—EVIDENCE—SUFFICIENCY.

In an action to recover a specified sum on a check which was diverted by defendant, it appeared by plaintiff's case that the check was not paid, that payment of it was stopped, and that his assignor did not suffer any damage by reason of the making and delivery of the check. *Held* to justify the dismissal of the complaint at the close of plaintiff's case.

Appeal from City Court of New York, Special Term.

Action by Leon Gornitzer against Morris Levenson. From a judgment of dismissal of the complaint at the end of plaintiff's case, he appeals. Modified and affirmed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Samuel P. Goldman, for appellant.

Feltenstein & Rosenstein (Moses Feltenstein, of counsel), for respondent.

PER CURIAM. The action was brought to recover \$500 on a check which was diverted by the defendant. The check was never paid, and the evidence fails to show that plaintiff's assignor suffered any loss or damage whatever by reason of the making and delivery thereof. Plaintiff's assignor attempted to prove that an action was at one time brought against him to recover the face of the check, but in that regard he utterly failed. No record of any court was produced to show that any judgment had ever been recovered on the check in question, nor was it established that any one ever received a dollar on account thereof. In fact, plaintiff proved that payment of the check was stopped. The complaint was dismissed, and plaintiff appeals.

Our attention has been called to no errors which require us to reverse the judgment. The exclusion of evidence, to which some of the exceptions refer, could in no event have prejudiced appellant, in the absence of proof showing the slightest loss. The exclusion of certain papers alleged to have some bearing on a lawsuit brought against the maker of the check was also harmless, and, as no exception was taken, no question for review is presented. Indeed, such papers were not even marked for identification and printed in the record, so that their relation to the issue involved in this action could be ascertained. While the dismissal of the complaint was justified, the judgment of dismissal should not have been upon the merits. The record does not show that any such ruling was made.

The judgment should therefore be modified, by striking therefrom the words "upon the merits," and, as so modified, affirmed, without costs of this appeal to either party.

GILMARTIN v. VAN HORN.

(Supreme Court, Appellate Term. November 29, 1907.)

CONTRACTS—FAILURE OF CONSIDERATION.

Plaintiff and D. sold their tailoring establishment to defendant, together with all their stock of goods, good will, and accounts. They represented that the accounts of two persons which had been collected were still owing to the firm and that part of the firm's goods were in another state. Defendant having refused to pay a claim against the old firm, plaintiff paid it, whereupon he sued defendant therefor, but admitted that the absent goods had never been delivered to defendant, and that their value exceeded the claim sued on, and also failed to deny that he had collected the accounts in question. *Held*, that plaintiff's evidence established a failure of consideration, which was a complete defense to the action.

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by John J. Gilmartin against Herbert E. Van Horn. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Reno R. Billingham, for appellant.

Mervyn Wolff, for respondent.

LEVENTRITT, J. The defense was sustained by proof uncon-
verted and unimpeachable, yet the plaintiff has judgment. A brief review of the testimony will lead to the conclusion that the judgment is the result of mistake and oversight.

Prior to July 21, 1906, the plaintiff and one Dewell composed the firm of Gilmartin & Dewell, engaged in business as custom tailors. On that day they entered into a written agreement with the defendant by which they sold and bound themselves to deliver to him their tailoring establishment, "together with all the stock of goods belonging to said firm, wherever situated, and all accounts now due or to

grow due to said firm, together with the good will of said business." In consideration therefor the defendant assumed and agreed to pay all the existing indebtedness of the firm. At the time of the sale the entire stock of goods belonging to the firm was not in their place of business in this city, but a very considerable portion thereof was, as represented by the plaintiff and his partner, in Pennsylvania. Before the agreement was executed the parties went over the firm books with a view to ascertaining its accounts receivable. Among other debtors, those books disclosed that one Coe owed the firm \$25, and one Saunders owed \$22, and the plaintiff and his partner told the defendant that those accounts were open and formed a part of the assets which would be assigned. Among the creditors of the firm at the time of the sale was one David, whose demand the defendant refused to honor, whereupon David sued the plaintiff and Dewell, and recovered a judgment for \$69.79, which the plaintiff paid.

Alleging that the defendant's failure to discharge David's claim constituted a breach of his agreement to pay the firm debts, the plaintiff brought this action to recover the \$69.79. The defense was that the consideration for the defendant's assumption of the liabilities failed to an extent largely in excess of the plaintiff's claim, by reason of the fact that the Pennsylvania merchandise had never been delivered, and that the accounts against Coe and Saunders had no existence, having been collected by the plaintiff. Upon the plaintiff's examination he admitted that the Pennsylvania goods never came into the defendant's possession, and that their value far exceeded \$69.79, and, either by direct admission or by failure to deny, he conceded that he had collected the Coe and Saunders accounts.

The plaintiff rested his case on his own testimony, and, while he established his cause of action, he at the same time established the defense. Although not requisite to his right to a judgment, the defendant introduced the testimony of himself and of Dewell, the plaintiff's former partner. Their examination throughout, both direct and cross, only tended to emphasize the facts supporting the failure of consideration for which the defendant contended. Under the circumstances disclosed there is no evidence to weigh; but the case resolves itself into a refusal of the trial justice to recognize a defense, not only abundantly proven, but admitted. The judgment appealed from must be reversed.

Judgment reversed, and new trial ordered, with costs to appellant to abide event. All concur.

FRANK v. CONNOR.

(Supreme Court, Appellate Term. November 20, 1907.)

BROKERS—COMMISSIONS—WHEN EARNED.

A real estate broker, employed to procure a purchaser of premises for \$8,000 in cash and assumption of two mortgages, one having two years to run and the other payable in installments extending over a period of seven years, procured a purchaser who agreed with the owner for the purchase of the premises and to pay \$7,900 in cash and to assume the mortgages as described. The mortgages matured a year earlier than had

been represented by the owner. The purchaser insisted on a formal contract embodying the terms agreed on, and the owner refused to execute such a contract. The purchaser was able to complete the purchase. *Held*, that the broker was entitled to his commission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 94-96.]

Appeal from City Court of New York, Trial Term.

Action by Morris Frank against Nathan Connor. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Benjamin Reass, for appellant.

Amend & Amend, for respondent.

LEVENTRITT, J. This is the ordinary action for broker's commission on the sale of real estate. The allegations of the complaint are in effect that the defendant employed the plaintiff to procure a purchaser for the premises No. 316 Delancy street, in this city, "upon specified terms and conditions," and agreed to pay him \$400 in the event of his success; that thereafter he rendered services which resulted in the procuring of a responsible person to buy on the terms and conditions prescribed, and yet the defendant refused to pay the agreed commission.

Upon the trial of the issues raised by a general denial interposed by the defendant, the plaintiff, in addition to his own testimony, introduced that of a person who was associated with him in the transaction, and that of the proposed purchaser and of his attorney. Their evidence showed that on the 10th of May, 1906, the defendant employed the plaintiff to sell the premises in question at \$40,000, provided the purchaser would pay \$8,000 in cash and would assume existing incumbrances, which consisted of a first mortgage for \$23,000, having two years to run, and a second mortgage for \$9,000, payable in installments extending over a period of seven years; that the defendant promised to pay him "1 per cent., \$400," if he procured such a purchaser; that eight days later he introduced to the defendant one Bockar as a prospective purchaser, and that after bargaining the defendant agreed to sell and Bockar to buy the property for \$39,900, to pay \$7,900 in cash, and to assume the mortgages as described; that thereupon Bockar paid a deposit of \$75 to the defendant, who acknowledged receipt in a memorandum wherein were recited the agreed purchase price and the details of the mortgages as stated; that on the afternoon of the same day all parties interested met for the purpose of drafting and executing a formal contract, when it was discovered that each of the mortgages matured a year earlier than had been represented by the defendant; that Bockar expressed his willingness to execute and deliver a contract embodying the terms which had been agreed upon, but the defendant refused, refunded the \$75, and destroyed the receipt which had been given therefor; that Bockar was able to complete the purchase; and that no part of the commission had been paid, though demanded. With this testimony before the court, a motion to dismiss was granted for failure of proof.

We have been unable to discover wherein the proof failed. It embraced all the elements essential to establish the plaintiff's right to recover—employment; the production of a purchaser, who was ready, willing, and able to enter into an enforceable contract in accordance with all the terms and conditions imposed by the defendant; and omission to pay the agreed brokerage. The nonexecution of a formal contract cannot defeat the plaintiff. He did all that was required of him—all that was necessary to the earning of his compensation. That the transaction was not consummated was due entirely to the refusal of the defendant to execute a contract containing the terms upon which he and the prospective purchaser had previously agreed. This situation was brought about through the defendant's misrepresentations, and he cannot shift the consequences of his act. *Seidman v. Rauner*, 51 Misc. Rep. 10, 99 N. Y. Supp. 862.

Judgment reversed, and new trial ordered, with costs to appellant to abide event. All concur.

(56 Misc. Rep. 500.)

GARNER v. FORTY-SECOND ST., M. & ST. N. AVE. RY. CO.

(Supreme Court, Appellate Term. November 29, 1907.)

CARRIERS—STREET RAILROADS—INJURY TO PASSENGER—NEGLIGENCE.

After a street car had slackened its speed to enable plaintiff to alight, she arose and went to the rear platform, where she stood holding the guard rail. The car was then moving very slowly, and without coming to a stop suddenly increased its speed, with a jerk to such a degree as to throw plaintiff into the street. *Held*, that the railway company was negligent, and liable for the injuries plaintiff sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1205.]

Appeal from Municipal Court, Borough of Manhattan, Twelfth District.

Action by Lillian H. Garner against the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway Company. From a Municipal Court judgment for plaintiff, defendant appeals. Affirmed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

James L. Quackenbush, for appellant.

Walter S. Newhouse, for respondent.

LEVENTRITT, J. The plaintiff boarded one of the defendant's north-bound cars to go to 114th street. When the car passed 113th street the plaintiff signaled the conductor to stop. Thereupon the conductor rang the bell and the car slowed down as it approached the southerly side of 114th street. As the car slackened its speed, the plaintiff arose from her seat and went to the rear platform. At that time the car was moving very slowly, and had come nearly to a standstill. The plaintiff stood on the platform, holding the guard rail with her hand. While in this position, and before she had made any movement to alight, the speed of the car was suddenly increased to such a degree as to throw the plaintiff into the street. The evidence of the plaintiff and her witnesses was not controverted.

It is conceded that the plaintiff was justified in standing on the rear platform in readiness to alight. But the defendant argues that there was no negligence on its part, and seeks to support the argument by citing cases of persons injured by the violent jerking of a car in starting or stopping. The decisions in these cases, however, proceed upon the theory that a jerk may necessarily attend the starting and the stopping of a car. That is not the situation here presented, as the car had slowed down preparatory to stopping, and the plaintiff was justified in assuming that the speed would be gradually reduced until the car came to a standstill. This distinction is clearly pointed out in the case of *Crow v. Metropolitan Street Ry. Co.*, 70 App. Div. 202, 75 N. Y. Supp. 377 (affirmed 174 N. Y. 539, 66 N. E. 1106), in this department; the facts being similar to those disclosed in the case at bar. There the court, by McLaughlin, J., say:

"We have, therefore, evidence from which the jury might have found that after the plaintiff had indicated her desire to get off the car, and after the signal had been given by the conductor to the motorman to stop the car for that purpose, and in obedience to that signal the motorman had slackened the speed of the car preparatory to stopping it, and while the plaintiff was preparing to get off, the speed of the car, without notice to the plaintiff, was greatly increased, and by reason thereof she was thrown to the street and injured; and, if such facts had been found by them, then they might well have found that the defendant had not performed its full duty to the plaintiff. After the car had commenced to slow up at her request, she had a right to prepare to leave the car; and she also had a right to assume that the condition existing at that time would be continued until the car had been stopped and she had been afforded an opportunity to get off."

The judgment must be affirmed. All concur.

LEIBOVITZ v. UTOPIA LAND CO.

(Supreme Court, Appellate Term, November 29, 1907.)

1. PLEADING—SET-OFF AND COUNTERCLAIM.

Where, though defendant pleads "for a * * * distinct defense * * * and as a counterclaim," no demand for affirmative relief is prayed, plaintiff is relieved from the necessity of replying, and defendant should not be required to separate his pleading into defense and counterclaim.

2. SAME—DEFINITENESS.

Where an affirmative defense may apply to either of two agreements pleaded by plaintiff, plaintiff is entitled to have the answer made more definite and certain.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1173-1196.]

Appeal from City Court of New York, Special Term.

Action by David Leibovitz against the Utopia Land Company. From an order requiring defendant to make its answer more definite and certain, and to separate a paragraph thereof into alleged defense and counterclaim, defendant appeals. Order modified.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Wasserman & Jacobus, for appellant.
Paul Gross (Herman Kahn, of counsel), for respondent.

LEVENTRITT, J. We think the order appealed from should be modified by relieving the defendant from separating paragraph 11 into alleged defense and counterclaim. Although the defendant pleads "for a * * * distinct defense * * * and as a counterclaim," no demand for affirmative relief is prayed. This will relieve the plaintiff from the necessity of replying. *Acer v. Hotchkiss*, 97 N. Y. 395; *American Guild v. Damon*, 186 N. Y. 360, 78 N. E. 1081. It clearly appears that it is intended to set up an offset in diminution of plaintiff's recovery, and no duplicity is apparent. *Cable Flax Mills v. Early*, 72 App. Div. 213, 76 N. Y. Supp. 191.

In other respects the order should stand. The affirmative defense is indefinite and uncertain, in that it may apply to either of two agreements pleaded by the plaintiff—one an original contract in writing, and the other a further contract in modification or substitution thereof. As the plea could apply to either, the plaintiff was entitled to call on the defendant for greater definiteness and certainty.

The order should be modified accordingly, without costs to either party. All concur.

(56 Misc. Rep. 586.)

ISAACS v. TERRY & TENCH CO.

(Supreme Court, Appellate Term. November 29, 1907.)

1. SALES—BREACH OF EXECUTORY CONTRACT—REMEDIES OF BUYER.

A seller, on the buyer's breach of an executory contract of sale, may store the property for the buyer and sue for the price, or may sell the property as agent for the buyer and recover any deficiency, or may keep the property as his own and recover the difference between the contract and the market price.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 943-946.]

2. ELECTION OF REMEDIES—INCONSISTENT REMEDIES—BREACH OF EXECUTORY CONTRACT OF SALE BY BUYER.

The remedies of a seller on the buyer's breach of an executory contract of sale, consisting of storing the property for the buyer and suing for the price, or selling it as agent and recovering the deficiency, or keeping the property and recovering the difference between the contract and market price, are not concurrent; and a seller who has elected to pursue one remedy cannot thereafter adopt a different one, and an attempt to recover the difference between the contract and market price bars an action for the difference between the contract price and the price realized on a sale as agent of the buyer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Election of Remedies, §§ 8, 4.]

3. SALES—BREACH OF EXECUTORY CONTRACT—COMPLAINT.

Where a complaint in an action by a seller for the buyer's breach of an executory contract of sale states a good cause of action, and will support a recovery for the price, or for any deficiency on a sale as agent for the buyer, or for the difference between the contract and the market price, proof that the seller sold the goods as agent of the buyer and that the sale resulted in a deficiency is competent, and authorizes a recovery for the deficiency.

4. PLEADING—MOTIONS TO MAKE MORE DEFINITE AND CERTAIN—BILL OF PARTICULARS.

Where a complaint in an action by a seller for the buyer's breach of an executory contract of sale authorizes a recovery either of the price, or the deficiency on a sale as agent of the buyer, or the difference between the contract and market price, the buyer may compel the seller to elect his measure of damage by moving to have the complaint made definite and certain or by compelling the filing of a bill of particulars.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1173-1198.]

5. APPEAL—RECORD—QUESTIONS REVIEWABLE.

Where the record of a former action by a seller for a breach by the buyer of an executory contract of sale is not before the court, the question whether the evidence at the former trial constituted an election by the seller to recover the difference between the contract and market price cannot be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2911-2915.]

Appeal from City Court of New York, Trial Term.

Action by Herman Isaacs against the Terry & Tench Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See 103 N. Y. Supp. 103.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

John C. Wait, for appellant.

Herbert J. Hindes, for respondent.

LEVENTRITT, J. Reduced to its lowest terms, the complaint alleges that the defendant agreed to purchase and the plaintiff to sell a certain quantity of iron beams at a specified price; that the plaintiff performed all the conditions on his part, and was ready to deliver the beams; but that the defendant refused to accept them, "to the damage of the plaintiff in the sum of \$1,449." The plaintiff had a recovery of \$900, being the difference between the contract price and the sum for which he sold the goods.

The only serious ground of reversal urged is that the plaintiff has heretofore elected to keep the property as his own, and that he could not, therefore, treat the beams as belonging to the defendant, sell them as its agent, and recover the difference between the contract price and the price realized. It is too well settled to require discussion that a vendor, upon the breach of an executory contract of sale, has three remedies: (1) He may store the property for the buyer and sue for the purchase price. (2) He may sell the property as agent for the vendee and recover any deficiency resulting. (3) He may keep the property as his own and recover the difference between the contract price and the market price at the time and place of delivery. Van Brocklen v. Smeallie, 140 N. Y. 70, 79, 35 N. E. 415; Hayden v. Demets, 53 N. Y. 426; Mason v. Decker, 72 N. Y. 595, 28 Am. Rep. 190. It is also established that these several remedies are not concurrent, and that, having elected to pursue one remedy, the vendor may not thereafter adopt a different one. Bridgford v. Crocker, 60 N. Y. 627; Gray v. Cent. R. R. of N. J., 82 Hun, 523, 31 N. Y. Supp. 704.]

It is claimed in the case at bar that on a previous trial, resulting in a judgment in favor of the plaintiff, which was reversed on appeal, the plaintiff recovered on proof showing the difference between the contract and the market price. If that were clearly established, there would be merit in the defendant's appeal. Any affirmative binding act showing that the plaintiff elected to treat the goods as his own, as he necessarily does when he seeks to recover the difference between contract and market price, is inconsistent with an assertion of title in the defendant which is involved in suing for the difference between the contract price and that realized on a sale as agent for the defendant.

The difficulty with defendant's position, however, is that there is no evidence in the record showing the election. The complaint as drawn states a good cause of action for breach of contract, and would support a recovery on any of the three theories. *Abb. Br. on Pl. § 826*, and cases cited; *Duryea v. Rayner*, 11 Misc. Rep. 294, 32 N. Y. Supp. 247. The defendant could have compelled the plaintiff to elect his measure of damage by moving to have the complaint made definite and certain or seeking a bill of particulars. On the complaint the proof of damage was competent. The record on the prior trial is not now before us, and hence we cannot pass on the question whether the evidence there adduced constituted an election.)

The judgment must be affirmed, with costs. All concur.

(121 App. Div. 378.)

ARGUS CO. v. HOTCHKISS et al.

(Supreme Court, Appellate Division, Third Department. September 26, 1907.)

1. ATTORNEY AND CLIENT—LIABILITY FOR EXPENSES.

An attorney's negotiation for work to be done in a lawsuit is the act of an agent for a known principal, and for the expense thereof he does not become personally responsible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 88.]

2. SAME.

Whether or not at the time of making a contract by counsel for printing a case in a divorce suit he disclosed the nature of the cause and his interest therein, yet the case when sent to the printer is a fair notice that the suit is one for divorce and a purely personal action, in which counsel could only be interested as such.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 38.]

3. SAME.

The statement by counsel, in negotiating for the printing of a case, that "he was personally interested to have it done cheap and wanted to know what price," cannot be construed as a promise to pay therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 88.]

Chester and Cochrane, JJ., dissenting.

Appeal from Special Term, Albany County.

Action by the Argus Company against Henry D. Hotchkiss and another. From a judgment for plaintiff, and an order denying defendants a new trial, they appeal. Reversed, and new trial granted.

The action is brought to recover the charges for printing a case upon appeal in the action of Halsted v. Halsted, 106 N. Y. Supp. —. The defendant Hotchkiss and William McMutrie Speer were both members of the constitutional convention which met in Albany in 1894. Speer was at that time the vice president of the plaintiff company. Both Hotchkiss and Speer were attorneys at law, although Speer was not at that time practicing the profession. In a conversation during the summer of 1894 Hotchkiss told Speer that he had a large case that was to be printed, and "that he was personally interested to have it done cheap and wanted to know what price." Other conversations followed about the size of the case and the price of the printing of it. It was agreed that the plaintiff company would print the case for 70 cents per page. Thereafter the case was sent to the Argus Company and was printed by them. The total cost of the printing amounted to \$1,207. Of this \$350 had been paid by the plaintiff in the case which was printed, to wit, Charles S. Halsted. The defendants were counsel, but not attorneys, for the defendant in the case of Halsted v. Halsted, which was an action for divorce. In the trial court the plaintiff recovered judgment for the balance of the bill remaining unpaid. From the judgment entered upon the verdict of the jury, and from an order denying the defendants' motion for a new trial, this appeal has been taken.

Argued before SMITH, P. J., and CHESTER, KELLOGG, COCHRANE, and SEWELL, JJ.

Richard B. Aldcroftt, Jr. (William S. Maddox, of counsel), for appellants.

Amasa J. Parker, Jr., for respondent.

SMITH, P. J. It was recognized upon the trial of the action and is undoubted law that an attorney's negotiation for work to be done in a lawsuit is the act of an agent for a known principal, and for the expense of that service the agent does not become personally responsible. *Bonyng v. Field*, 81 N. Y. 159; *Judson v. Gray*, 11 N. Y. 408-411; *Covell v. Hart*, 14 Hun, 252; *Middledith Co. v. College of Dentistry*, 31 Misc. Rep. 259, 64 N. Y. Supp. 140; *Tyrrel v. Hammerstein*, 33 Misc. Rep. 505, 67 N. Y. Supp. 717. Whether or not at the time of the making of the contract for the printing of the case defendant Hotchkiss revealed to Mr. Speer the nature of the case and the nature of his interest therein, when the case was sent to the printer it was a fair notice that the action was one for divorce, a purely personal action, in which the defendants could only be interested as attorneys or counsel. It was not a case involving property rights, in which the defendants might have a property interest which would make probable their entering into a personal obligation for the payment of these fees. Mr. Speer must have known, as all lawyers know, that in this class of cases usually the husband provides for the expenses of the litigation on behalf of the wife. In case of failure by the husband to pay the same, neither the attorney nor the counsel of the wife incurs any personal liability for the expenses of a lawsuit, unless by special contract. The question is not only what, in fact, Mr. Speer understood from the conversation with Mr. Hotchkiss, but what inferences he had the natural right to draw therefrom, considering the fact, as it appeared to him when the copy was furnished him, that the action in which the papers were to be printed was purely a personal action between third parties for divorce. The mere procurement of the printing of a case by counsel certainly does not

create personal liability. Nor can the statement by Hotchkiss of a personal interest that the work be done cheaply be construed to be a special promise to pay a debt for which he would not otherwise be liable. I am unable to find any words which would import any intention on the part of Hotchkiss, and certainly not on the part of Maddox, to be personally liable for this debt. The judgment seems to me, therefore, wholly unsupported by the evidence, and, with the order, should be reversed, and a new trial granted, with costs to appellant to abide the event.

Judgment and order reversed, and new trial granted, with costs to appellant to abide event.

SEWELL, J., concurs. KELLOGG, J., concurs in result. CHES-TER and COCHRANE, JJ., dissent.

(56 Misc. Rep. 164.)

ÆTNA LIFE INS. CO. v. NORTH STAR MINES CO.

(Supreme Court, Special Term, New York County. October, 1907.)

1. INSURANCE—LIABILITY INSURANCE—ACTION FOR PREMIUMS—COUNTERCLAIM.

In an action to recover premiums under a liability insurance policy, an answer setting up a counterclaim for insurance for injuries to plaintiff's employes is subject to demurrer, where it does not set out the insurance contract, nor facts from which the court may infer that such a contract was entered into.

2. PLEADING—DEMURRER TO COUNTERCLAIM.

A demurrer to a counterclaim does not bring up defects in the original complaint, but is to be determined on the sufficiency of the counterclaim.

Action by the Ætna Life Insurance Company against the North Star Mines Company. Demurrer to counterclaim sustained, with leave to amend.

See 106 N. Y. Supp. 545.

E. Sidney Berry, for plaintiff.

Joseph H. Choate, Jr., for defendant.

BISCHOFF, J. The action is brought to recover a certain premium alleged to be due upon four policies of liability insurance; and the answer, after denying certain averments of the complaint, sets up two counterclaims. The second counterclaim is, apparently, based upon some provisions of two of the policies, whereby the defendant deems itself entitled to collect insurance for injuries to its employes, "as trustee" for the injured persons. A demurrer is interposed to this counterclaim for insufficiency in substance, and also upon the ground that it is not a counterclaim of the character specified in section 501 of the Code of Civil Procedure, in that the cause of action upon which it is based did not accrue to the defendant in its individual capacity, but, at best, as trustee, which is not the capacity in which it is sued in this action. I must hold that the allegations of the counterclaim are not sufficient; and, no right of recovery being set forth, the question

as to the character of the claim under section 501 of the Code becomes immaterial.

Except so far as may be found in paragraphs 1, 4, and 5 of the answer, which are repeated as a part of the counterclaim, nothing is stated which indicates that any contract whatever was entered into between these parties, as a matter of substantial fact. The body of the counterclaim is devoted to the statement that injuries were sustained by the employes, and contains no reference to the agreement other than that the defendant demanded payment of the sums which "under the terms of the said policies this plaintiff had agreed to pay." Here there is nothing but the bare conclusion that the plaintiff had "agreed" to pay something by the terms of the "said policies"; and this is, obviously, no averment that a contract had been entered into. Turning to the first, fourth, and fifth paragraphs of the answer, stated to be real-eged as part of the counterclaim, there is found in paragraph 1 simply a denial that the policies were in force during the periods stated in the complaint. Paragraph 4 contains merely a denial that any sum is due to the plaintiff for premiums, and paragraph 5 states that:

"Under the terms of the said contract of liability insurance alleged in paragraph 3 of the complaint, * * * the plaintiff agreed to insure the defendant as trustee for the employes enumerated in the schedules attached to said policies, against bodily injuries," etc.

A counterclaim must be complete in itself, and it has been held that the mere reference to preceding paragraphs of a pleading does not suffice to incorporate the matter so referred to as part of the new statement. *Wallace v. Jones*, 68 App. Div. 191, 74 N. Y. Supp. 116. But, if the first, fourth, and fifth paragraphs of this answer are read into the counterclaim, still the defect of substance is not cured. Certainly the first and fourth paragraphs set forth no agreement, and the fifth paragraph, while referring to certain contracts alleged in the third paragraph of the complaint, does not admit the averments of the latter, nor incorporate them as a part of the answer. At best, there is the statement that "under the terms" of certain instruments the plaintiff "agreed" to insure the defendant for certain purposes; but this is only a conclusion of law, which the demurrer does not admit. The fact of the making of an enforceable agreement involves the meeting of the minds of the parties for some consideration; and the averments of the pleading must, directly or by reasonable inference, disclose the presence of a consideration. *Burnet v. Bisco*, 4 Johns. 235; *Baylies' Code Pl. 135, § 20*; *Bliss, Code Pl. § 268*. Here there is not only a failure to state facts from which the court may infer that an actual agreement was entered into, but by the first paragraph of the answer, incorporated in the counterclaim, the defendant denies that the policies, which alone are referred to, were in force during the appropriate period. It is true that this denial is with reference to a conclusion of law, but it serves to harmonize with the generally insufficient character of the counterclaim in its omission of necessary substantive allegations.

But the defendant contends, if the counterclaim be insufficient, still the demurrer should be overruled because the complaint is defective in matter of substance. Without passing upon the question of the

sufficiency of the complaint, it is enough to say that the rule that a demurrer reaches the first bad pleading does not apply to a demurrer interposed to a counterclaim. Where there is a demurrer to a defense, the demurrer may reach back to the complaint to which the defense is interposed; but a counterclaim is in the nature of a cross-action, and, having no relation to the issue raised upon the averments of the complaint, the sufficiency of the cross-demand is to be determined as an independent matter. The rule is well stated in the case of *Anderson Building, etc., Co. v. Thompson*, 88 Ind. 405, as follows:

"A cross-complaint or counterclaim is not a defense to the plaintiff's action; but it is a cross-action by the defendant against the plaintiff, and it must state facts sufficient to constitute a cause of action, or it must be held bad on a demurrer thereto, for want of facts, whether the original complaint be good or bad. In other words, it cannot be said that a bad cross-complaint or counterclaim is good enough merely because the original complaint does not state facts sufficient to constitute a cause of action. A demurrer to a cross-complaint or counterclaim, for the want of sufficient facts therein, does not search the record, as would such demurrer to an answer, and fasten upon an insufficient complaint."

The question was also considered in *Wheeler v. Curtis*, 11 Wend. 653, with the same result. Similarly, a demurrer to an answer in abatement does not search the record, as has been held, because such an answer is not addressed to the complaint (*Shaw v. Dutcher*, 19 Wend. 216; *Goldsmith v. Chipps*, 154 Ind. 28, 55 N. E. 855); a characteristic which is quite as forceful in the instance of a demurrer to a counterclaim. To permit the defendant, upon a demurrer to his insufficient counterclaim, to attack the complaint, the averments of which are elsewhere in his answer placed in issue, would be to permit him, in effect, to answer and demur to the same pleading; and it is this circumstance which has been deemed a sufficient reason for limiting the general rule that a demurrer searches the record to cases other than those where the demurrer is aimed at a cross-demand. See 6 Encyc. Pl. & Pr. 332; *Wheeler v. Curtis*, supra; *Miller v. Maxwell*, 16 Wend. 23. This counterclaim is not designated as a defense; hence the possible question of its sufficiency as such, because of the incorporation of denials, is not involved, and, for the reasons stated, I must hold that it is insufficient in substance.

Demurrer for insufficiency sustained, with costs, with leave to the defendant to amend upon payment of costs within 20 days.

Demurrer sustained, with costs, with leave to defendant to amend upon payment of costs within 20 days.

(56 Misc. Rep. 477.)

BLUMBERG v. STERLING BRONZE CO.

(Supreme Court, Appellate Term. November 29, 1907.)

1. BROKERS—ACTIONS FOR COMMISSIONS—INSTRUCTIONS—STARTING NEGOTIATIONS.

In an action for commissions for securing a certain order for lighting fixtures, where plaintiff claimed that a revocation of the agreement was made in bad faith by defendant to avoid paying the commission, and subsequent to the revocation the contracts were secured by defendant, an

instruction that if the contracts were the result of negotiations started by plaintiff he should recover was erroneous, since it was necessary that he should have been the procuring cause of the sale, and merely starting the negotiations was not enough.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 69.]

2. TRIAL—ERRORS CURED—INSTRUCTIONS.

The error in the charge was not cured by a subsequent charge that in order to recover plaintiff must prove by a preponderance of the evidence that it was through his efforts and influence that defendant obtained the order, since at most the latter instruction created a confusion, which permitted the jury to apply conflicting principles of law at their discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 705-718.]

3. SAME—PORTION OF INSTRUCTION REQUESTED.

The fact that an objectionable instruction is but part of the main request to charge is unavailing, where the objectionable portion is unrelated to the remainder and is clearly stated in the disjunctive as a separate and distinct principle.

Appeal from City Court of New York, Trial Term.

Action by Alexander J. Blumberg against the Sterling Bronze Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Simpson, Werner & Cardozo, for appellant.

Wales F. Severance, for respondent.

LEVENTRITT, J. In March, 1905, the defendant employed the plaintiff as its agent to effect the sale of certain lighting fixtures for use in the new store of B. Altman & Co., then in process of construction. The contract of employment is represented by two letters, which passed between the parties and which read as follows:

"March 28, 1905.

"Mr. A. J. Blumberg, No. 91 Wall Street, New York City—Dear Sir: If through your efforts and influence we obtain the order for the lighting fixtures required for the new store of B. Altman & Co., we will agree to pay you a commission of seven and one-half (7½%) per cent. on the net amount of the contract, providing same is secured on our standard prices. If it should be necessary for us to reduce these prices in order to secure the work, it is understood that the amount of your commission will be proportionately reduced. Said commission to be paid to you pro rata as payments for fixtures are received from B. Altman & Co.

"Yours truly,

"To A. J. Blumberg. (B. W.)"

Sterling Bronze Company.

"New York, March 28, 1905.

"Sterling Bronze Company, Nos. 107-113 West 25th Street, City—Gentlemen: Your agreement of March 28th regarding the contract for the lighting fixtures for the new store of Messrs. B. Altman & Co., is hereby accepted. All prior agreements are void. Yours truly,

"(A. J. B.)

A. J. Blumberg."

In January, 1906, the agreement was canceled by the defendant in writing as follows:

"January 24, 1906.

"Mr. A. J. Blumberg, 91 Wall Street, New York—My Dear Mr. Blumberg: We have dropped the Altman fixtures proposition entirely. Mr. Grey, who

was attending to this matter for us, is no longer in our employ. Therefore we are doing nothing further regarding the fixtures, and thought it best to advise you, as the agreement we had with you is now canceled. Hoping to see you some time in the near future, I am yours very truly,

"F. W. T. Sterling Bronze Company,
F. W. Tolley."

Thereafter negotiations were resumed between the defendant and B. Altman & Co., which resulted in the defendant being awarded the contracts. Upon a refusal of his demand for commissions the plaintiff brought this action. The plaintiff alleged performance of the contract of employment, and tried his case upon the theory that the revocation of the agreement by the defendant was in bad faith and with the intent to deprive him of his commissions and thereby reap the benefit of his labor at a time when that labor was about to prove effectual.

Irrespective of the uncertainty of the plaintiff's proof of performance, we deem it necessary on this appeal to refer only to an exception which brings up the propriety of a request charged by the learned trial justice. The case was submitted to the jury upon the theory of performance outlined in the complaint, and the jury were left to determine whether the plaintiff was the procuring cause of the sale to Altman & Co. At the conclusion of a charge to which no criticism could be made the court at the request of the plaintiff charged as follows:

"If the jury believe that the contracts between the defendant and B. Altman & Co. were the result of negotiations started by this plaintiff, the plaintiff is entitled to a verdict."

This we think was erroneous. It matters not that the plaintiff may have started negotiations which resulted in a sale, if he was not the procuring cause of the sale. *Donovan v. Weed*, 182 N. Y. 43, 74 N. E. 563. In that case a request to charge similar to the one here under consideration was declared to be erroneous, and the principle there enunciated was founded on the decision in *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441, where the court, by Finch, J., say:

"If the broker has already planted the seed, which afterwards grows, and they take the fruits of it, he is entitled to a commission, not because they could not revoke the authority, but because the question is whether what he has already done, whether the crop he has already sown, comes up and ripens. * * * And in such events it matters not that after his (the broker's) failure, and the termination of his agency, what he has done proves of use to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met. He may have created impressions which, under later and more favorable circumstances, naturally lead to and materially assist in the consummation of a sale. He may have planted the very seeds from which others reap the harvest. But all that gives him no claim."

The vice in this portion of the charge was not cured by a subsequent charge at the defendant's request that:

"In order to recover in this action the plaintiff must prove by a preponderance of evidence that it was through his efforts and influence that the defendant obtained the order for the lighting fixtures required for the new store of B. Altman & Co."

At most the latter created a confusion, which permitted the jury to apply conflicting principles of law at their discretion. The fact that the portion of the charge referred to is but a part of the main request to charge is unavailing, since the objectionable paragraph is unrelated to the remainder of the request, and is clearly stated in the disjunctive as a separate and distinct principle. It follows that the error committed by the learned justice calls for a new trial.

Judgment reversed, and new trial ordered, with costs to appellant to abide event. All concur.

(56 Misc. Rep. 594.) •

LEKAS et al. v. SCHWARTZ.

(Supreme Court, Appellate Term. November 29, 1907.)

1. SALES—PERFORMANCE OF CONTRACT—TENDER.

Where the conduct of a buyer of goods is equivalent to notice to the other party that he will not comply with the contract on his part, a tender by the other party is not necessary as a condition precedent to a recovery for breach of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1087.]

2. SAME—BREACH—MEASURE OF DAMAGES.

Where personal property was sold, of which only part was delivered, and the buyer refused to take the remainder, the seller was entitled to hold the undelivered part for the buyer and sue for the whole purchase price, or to hold them for his own use and sue for the difference between the contract price and the market value at the time and place of delivery.

3. SAME—QUESTIONS FOR JURY.

In an action for breach of contract for the sale of goods, evidence considered, and *held* sufficient to take to the jury the question of the market value of the goods at the time and place of delivery.

4. SAME.

In an action for breach of contract of sale of goods, evidence considered, and *held* sufficient to take to the jury the question as to whether the buyer refused to accept.

5. SAME—SALE BY SAMPLE.

In an action for breach of contract of sale of goods, evidence considered, and *held* sufficient to take to the jury the question of whether the goods sold were damaged and not according to sample.

6. TRIAL—TAKING CASE FROM JURY.

Where, in any view of the evidence, a verdict might have properly been rendered for the plaintiff, or if there were questions of fact which might have been determined for plaintiff, and which, if determined in his favor, would have entitled him to recover, the case should not be taken from the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 320.]

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by George Lekas and another against Charles Schwartz. From a judgment for defendant, plaintiffs appeal. Reversed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Henry Hoelljes, for appellants.

Albert A. Hovell, for respondent.

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GILDERSLEEVE, P. J. The action was tried before the court with a jury, and the complaint was dismissed. Plaintiffs appeal. On or before December 24, 1906, defendant called at plaintiffs' store and examined five or six cases of figs, which he found in good condition, and on December 24, 1906, he made the following contract in writing, viz.:

"This is to certify I have this 24th day of December, 1906, bought from Messrs. Lekas & Drivas [plaintiffs], 17 Roosevelt St., city, 100 cases of string figs at 5¼¢ per pound, to be delivered at my store, 87 Ludlow St., from to-day until the 15th of February, 1907, value of which to be paid 10 days after delivery of the goods."

Plaintiffs' testimony shows substantially this state of facts, viz.: Thirty cases were delivered to defendant, who accepted and paid for the same. Thereafter the defendant called at plaintiffs' place, and stated that he would not take any more figs because they were damaged. Plaintiffs' bookkeeper replied:

"We will change them for you. You have signed the contract, and you must take the figs."

The defendant said:

"You try to sell the figs, and, if you can, sell the balance of them."

Defendant took some figs out of a case in plaintiffs' store and said:

"I can't use any more of your figs. They are damaged."

This statement was true as to these particular figs, as the figs which defendant showed plaintiffs' bookkeeper had been damaged by being kept in a hot cellar; but whether these were some of the figs which had been sold to defendant does not appear. Defendant said he could not use any more figs like those; that they must be according to sample. The remaining 70 cases were never delivered, because defendant never gave any order for them, the bookkeeper says. The market value of figs on February 15, 1906, had fallen from 5¾ cents a pound, which was also the contract price, to 3½ cents a pound, making the difference on the 70 cases amount to \$118.12, according to plaintiffs' testimony. One of the plaintiffs states that the figs were sold on sample, and that the samples shown defendant were good figs, and fair samples of the rest, but that defendant did not examine all of the 100 cases, but only 5 or 6 of them. Some time in January, 1906, plaintiff went to defendant's store and asked him:

"Shall I send you the balance of the figs?"

Defendant replied:

"I don't want them. They don't look very good. They are damaged. I don't like the quality."

He said he would not take them at the price; that he had bought them elsewhere at 4½ cents to 4¼ cents. A fig dealer named Calogeras swears he examined samples from the 100 cases sold to defendant by plaintiffs and that they were good figs. He picked out five boxes at random from the lot for examination. The defendant denies the fall in market value of figs, as claimed by plaintiffs, and swears that the figs were damaged and of poor quality. He also de-

nies that plaintiffs ever offered to send the remaining 70 cases of figs, and claims that he never refused to accept the balance, if the figs were according to sample. Another witness was called by defendant to show that plaintiffs' evidence as to the market value of the figs on February 15, 1906, was incorrect. At the end of the whole case defendant moved to dismiss the complaint, and plaintiffs asked to have the issues submitted to the jury. The court refused to grant the plaintiffs' motion, and dismissed the complaint.

It seems to us that the plaintiff made out a *prima facie* case, and that the issues of fact raised by the conflict of proof should have been left to the jury to decide. The main argument in support of the dismissal of the complaint is the failure to show a tender of the goods to the defendant on or before February 15, 1906. The rule is that, in cases where by the terms of the contract the acts of the parties are to be concurrent, it is the duty of one who seeks to maintain the action for breach of contract, either by way of damages for the nonperformance or for the recovery of money paid thereon, not only to be ready and willing to perform on his part, but he must demand performance from the other party; but the qualifications to this rule are to be found in cases where the necessity of a formal tender or demand is obviated by the acts of the party sought to be charged, as by his express refusal in advance to comply with the terms of the contract in that respect, or where it appears that he has placed himself in a position in which performance is impossible. *Ziehen v. Smith*, 148 N. Y. 558-561, 42 N. E. 1080. Where the acts or declarations of a party are equivalent to notice to the other party that he does not intend to comply with the terms of the contract on his part and perform the contract, a tender by the first party is not necessary. *Cornell v. Fox*, 95 App. Div. 73, 88 N. Y. Supp. 432; *Cornwell v. Haight*, 21 N. Y. 462; *Stokes v. Mackay*, 147 N. Y. 235, 41 N. E. 496. The plaintiffs say, as we have seen, that the defendant told them in January that he would not take the figs, and plaintiffs' bookkeeper swears that defendant told him the same thing, although the bookkeeper offered to have the figs changed if defendant objected to the particular lot sold. So far as defendant denies a refusal to accept the figs, an issue of fact is raised that should have been submitted to the jury.

Whether or not the figs sold were damaged and not according to sample was also a question of fact for the jury. The fact that plaintiffs kept the 70 cases does not deprive them of their right of action; for, when the vendee of personal property under an executory contract of sale refuses to complete his purchase, the vendor may keep the articles for him and sue for the entire purchase price, or he may keep the property as his own and sue for the difference between the contract price and the market value of the goods at the time and place of delivery. *Ackerman v. Rubens*, 167 N. Y. 408, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728; *Moore v. Potter*, 155 N. Y. 486, 50 N. E. 271, 63 Am. St. Rep. 692. The plaintiffs adopted the latter remedy, and the difference in the estimates of plaintiffs and defendant as to the market value was another question of fact for the jury. The rule is that if in any view of the evidence a verdict might have properly been rendered for the plaintiff, or if there were questions of fact which

might have been determined for plaintiff, and which, if determined in his favor, would have entitled him to recover, the case should not be taken from the jury. *Pratt v. Ins. Co.*, 130 N. Y. 212, 29 N. E. 117; *Greene v. Miller*, 74 Hun, 271, 26 N. Y. Supp. 425.

The judgment must be reversed, and a new trial granted, with costs to appellants to abide the event.

LEVENTRITT and ERLANGER, JJ., concur in the result.

(56 Misc. Rep. 579.)

EPSTEIN et al. v. COHEN et al.

(Supreme Court, Appellate Term. November 29, 1907.)

1. PLEADING—ISSUES, PROOF, AND VARIANCE.

A plaintiff can recover only *secundum allegata et probata*.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1300.]

2. SAME.

Where a complaint set forth an ordinary contract of bailment, plaintiffs alleging that they gave a horse into the custody of defendants, who promised to return it, but refused to do so, and it was shown that the horse had died, plaintiffs were not entitled to recover on proof of an express promise by defendants to stand good for the horse.

3. APPEAL—AMENDMENTS TO PLEADINGS.

Where plaintiffs failed to prove the cause of action alleged, and proper objections were made by defendants on the trial, and no amendment of the complaint was asked for, a judgment for plaintiffs on a cause of action not alleged could not be sustained on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2621, 2622.]

4. PLEADING—AMENDMENT—CONFORMING PLEADINGS TO PROOF.

After trial the pleadings cannot be conformed to the proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 605.]

Appeal from City Court of New York, Special Term,
Action by Henry Epstein and another against Isaac Cohen and others. Judgment for plaintiffs, and defendants appeal. Reversed.
Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Thomas J. O'Neill, for appellants.
Nathan Tolk, for respondents.

LEVENTRITT, J. This case was tried and submitted to the jury on a theory not sanctioned by the pleadings. As the defendants preserved their rights by proper motions and exceptions, the variance is fatal and calls for a reversal. The complaint alleges:

"That on or about the 14th day of September, 1900, the plaintiffs * * * at the request of the defendants * * * gave into the care and custody of these defendants a certain mare, which these defendants promised and agreed to return in the evening of the said date; * * * that the defendants have not returned * * * the said mare, although the plaintiffs demanded same from them, * * * and failed, neglected, and refused to return the said mare."

The answer, in addition to a general denial, sets up as a separate defense that the defendants hired the horse from the plaintiffs, and that it died during the period of hiring without any negligence on their part.

Phillip Freedman, one of the plaintiffs, testified as to the occurrences on the day of hiring:

"At the time Mr. Rich got the horse, I said to him, 'I cannot give you that horse, because it is a buggy horse,' and he did trucking business, and he could not stand hard work. He said: 'I will take it.' He said: 'My firm will stand good for the horse in case anything happens to the horse.'"

Defendants moved to strike out the answer as incompetent under the pleadings and as setting out a guaranty. Plaintiffs' counsel stated: "I waive the tort and sue on the contract." Whereupon the defendants renewed the motion to strike out on the ground that the contract testified to was not pleaded. The exception taken to the denial of the motion raises the question on appeal.

The plaintiffs rested squarely on the alleged contract to save them harmless. Similar testimony to that cited was given elsewhere in the record; and the court in submitting the case to the jury specifically charged that if the jury believed the evidence of the plaintiff that the defendants made an express promise to stand good for the horse, and used it other than as a buggy horse, liability would attach to the defendants. The pleading sets forth an ordinary contract of bailment. If there was any waiver of a tort and an election to sue in contract, that election was made by the complaint itself. That a plaintiff can recover only *secundum allegata et probata* is still a fundamental rule. *Brightson v. Claflin Co.*, 180 N. Y. 76, 81, 72 N. E. 920; *Southwick v. First National Bank of Memphis*, 84 N. Y. 420; *Absalon v. Sickinger*, 102 App. Div. 383, 92 N. Y. Supp. 601. "If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary." *Brightson v. Claflin Co.*, *supra*.

The defendants tendered a distinct issue as to the contract of bailment. They claimed to be relieved of liability under that special contract by setting up the death of the horse without any fault on their part. On the trial the plaintiffs seek to charge them with a different and more onerous special contract, wherein the liability assumed approximates that of insurer. The plaintiffs having failed to prove the cause of action set up in the complaint, and proper objections having been made on the trial, and no amendment of the pleading having been asked for, the judgment in plaintiffs' favor on a cause of action not alleged cannot be sustained on appeal, nor after trial can the pleadings be conformed to the proof. *Northam v. Dutchess Co. Mut. Ins. Co.*, 177 N. Y. 73, 69 N. E. 222; *Korn v. Weir* (Sup.) 88 N. Y. Supp. 976.

Judgment reversed, and new trial ordered, with costs to appellants to abide event. All concur.

(122 App. Div. 477.)

BRENNAN v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, Second Department. November 29, 1907.)

STATUTES—PARTIAL INVALIDITY—EFFECT.

The unconstitutionality of Laws 1901, p. 595, c. 466, amending the original Greater New York charter in so far as it authorized the election of city magistrates in the borough of Brooklyn and provided for the appointment of police clerks, did not invalidate so much of section 1396a as fixed the salary of such clerks in the First division and in the borough of Brooklyn at \$2,500, and in the boroughs of Queens and Richmond at \$2,000; such provision being entirely separable from the invalid portions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 58-66.]

Appeal from Municipal Court of New York.

Action by Michael Brennan against the city of New York. From a Municipal Court judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before WOODWARD, JENKS, HOOKER, GAYNOR, and RICH, JJ.

Thomas F. Noonan (Theodore Connoly, on the brief), for appellant.
Wm. Allaire Shortt, for respondent.

GAYNOR, J. The first charter of the new city of New York (passed in 1897) divided the city into two divisions for magistrates' courts, the first comprising the boroughs of Manhattan and the Bronx and the second the remaining three boroughs of Brooklyn, Queens and Richmond. Laws 1897, p. 495, c. 378, § 1390 et seq. It provided for the appointment of the magistrates by the mayor, and for the appointment of police clerks in each division (i. e., clerks of the magistrates' courts) with a salary of \$2,500 a year by the magistrates of that division as a board. Sections 1391, 1400.

In 1901 the charter was revised throughout by a new act embracing every provision of the old that was continued, and complete in itself. It left the appointment of magistrates and police clerks in the first division unchanged, but provided for the election of the magistrates of the second division, and that each magistrate there should appoint one police clerk to succeed the old police clerks, enacting of the latter that "their different positions be deemed abolished." Laws 1901, p. 593, c. 466, § 1394. The same section which provided for such appointment of police clerks by each magistrate then provided as follows (section 1396a):

"The salary of each police clerk in the first division and in the borough of Brooklyn, shall be twenty-five hundred dollars per annum, payable monthly, and the salary of each assistant clerk in the borough of Brooklyn shall not exceed two thousand dollars per annum, and in the boroughs of Queens and Richmond said clerks' salaries shall be two thousand dollars per year, payable monthly."

The courts declared this scheme of election of magistrates in the Second district unconstitutional (*People v. Dooley*, 171 N. Y. 74, 63 N. E. 815), and the provision abolishing the position of the old police clerks and providing for the appointment of successors by each magistrate was necessarily carried down with it, for it was entangled with

it, and could not be disconnected from it, as we afterwards held in an application for a writ of mandamus to compel a magistrate to appoint a police clerk, instead of such clerks being appointed by the board of magistrates. *Matter of the Application of Bux*, 113 App. Div. 920, 100 N. Y. Supp. 1108.

But the provision fixing the salaries of police clerks is not so connected. It is not entwined with the intention of the scheme for the election of magistrates and the appointment of police clerks by the elected magistrates; it is neither warp nor woof of it, but is entirely separate therefrom, and can be carried out without any reference to it. It is not confined to the Second division, as the said scheme was, but prescribes the salaries for police clerks throughout the entire city, in the First division as well as in the Second where the mischief of the unconstitutional legislation arose. It scales such salaries, making them lower in the boroughs of Queens and Richmond than in the two boroughs of the First division and the borough of Brooklyn. It manifests a general intention in respect of such salaries throughout the city independent of the said unconstitutional provisions which were local to a part of the city. This will appear all the plainer when we also keep in mind that the said charter act of 1901 was a general revision of the first charter, complete in itself, and had to provide somewhere for the salaries of police clerks and did so only by the said provision. That such provision is in the same section which provides for the appointment of the police clerks by the magistrates acting singly does not matter. Its independence and separability in the legislative intention are just as manifest there as though it were a separate section. And we cannot say that the Legislature would not have passed it if it had not passed the unconstitutional provisions, which is a test. Indeed, the contrary is manifest, i. e., that the revisers and legislators had the distinct and independent purpose of establishing these salaries throughout the city, and would have done so anyhow for they had to. *Cooley's Const. Lim.* (7th Ed.) p. 246; *People ex rel. Fowler v. Bull*, 46 N. Y. 57, 7 Am. Rep. 302; *People ex rel. City of Rochester v. Briggs*, 50 N. Y. 553; *People ex rel. Ryan v. Green*, 58 N. Y. 295; *Matter of Village of Middletown*, 82 N. Y. 196; *People ex rel. v. Kenney*, 96 N. Y. 294; *Duryee v. Mayor*, 96 N. Y. 477; *Skaneateles W. W. Co. v. Village of Skaneateles*, 161 N. Y. 154, 55 N. E. 562, 46 L. R. A. 687. No statute or part of a statute may be declared unconstitutional by the courts if there be any reasonable theory on which it can stand.

The judgment should be reversed.

Judgment of the Municipal Court reversed, and new trial ordered; costs to abide the event. All concur.

(122 App. Div. 435.)

KEENAN v. KEENAN et al.

(Supreme Court, Appellate Division, Second Department. November 29, 1907.)

PERPETUITIES—SUSPENSION OF POWER OF ALIENATION—TRUSTS—VALIDITY.

Testator devised land to his executor in trust, to hold for the benefit of testator's son for five years and to pay the son from the income a stated sum per month. The will further provided that if the son should die without issue the property devised for his benefit should go to testator's surviving children. *Held*, that the trust was valid; the devise not suspending the power of alienation for more than two lives in being, since the trust was to terminate on the death of the son.

Appeal from Special Term, Kings County.

Action by Elizabeth Keenan against Thomas Keenan, interpleaded with Frank Reilly, individually and as executor, and others. From the judgment, plaintiff and certain of defendants appeal. Affirmed.

Argued before JENKS, HOOKER, GAYNOR, RICH, and MILLER, JJ.

R. M. Cahoon, for appellant Keenan.

James P. Judge, for other appellants.

Lewis C. Grover, for respondent Frank Reilly.

Thomas E. Pearsall, for respondent Garrett Reilly.

HOOKER, J. The plaintiff and certain defendants appeal from a judgment dismissing the plaintiff's complaint. The action is brought under section 1537 of the Code of Civil Procedure for the partition of certain real property owned by the deceased at the time of his death. The fourth paragraph of his will, which purports to create a trust, is attacked by the plaintiff, and the case turns upon the question whether or not the trust is valid. If so, the plaintiff is not entitled to any relief.

Paragraph 4 of the will, the effect of which is in dispute, is as follows:

"I give and devise to my executor the three pieces of real estate situate on Carroll street in said borough known by the numbers 18 (eighteen), 49 (forty-nine) and 51 (fifty-one), in trust to hold for the benefit of my said son, Garrett, for the term of five years and pay him from the income forty dollars (\$40) per month, and holding the remainder in trust for his benefit in the future, and keeping the property in fair condition free from arrears of taxes and assessments. If at the end of that period it shall be found that my son, Garrett, has abstained from intoxicating drink during the same, the executor may turn over the property to him, with the surplus of income; otherwise he is to continue to hold the same as in his judgment it shall seem proper to do so."

Paragraph 6 of the will is as follows:

"I give, devise and bequeath the residue of my estate, if any there be, to my two sons and daughter, and in case my son, Garrett, shall die without issue, the real estate devised for his benefit shall go to my surviving son and my daughter equally."

In addition to the properties mentioned in these paragraphs of the will, the deceased left the contents of his stable to his son Garrett Reilly; a house to his daughter, Elizabeth Keenan, this plaintiff, sub-

ject to a lien thereon in favor of her children; a house in trust for the children of a deceased child; and certain household furniture to his daughter, this plaintiff.

The plaintiff contends that the attempted devise in the fourth paragraph of the will, for the benefit of the son Garrett, is void, because it suspends the power of alienation for more than two lives in being at the time of the creation of the trust. It is to be observed that the trustee is directed to hold the property for five years for the benefit of the son Garrett, and pay him from the income the sum of \$40 per month. If the will merely directed that the property be held in trust for a term of years, the trust would doubtless be void, as offending against the statutes of perpetuities; for a trust which is to continue for a definite number of years, during which the power of alienation is suspended, may readily be for a longer period than two lives in being. *Kalish v. Kalish*, 166 N. Y. 368, 59 N. E. 917; *Brown v. Quintard*, 177 N. Y. 75, 69 N. E. 225; *Hagemeyer v. Saulpaugh*, 97 App. Div. 535, 90 N. Y. Supp. 228; *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938. It seems, however, that it was not the intent of the testator absolutely to suspend the power of alienation of these properties for a period of five years. It is true that the executor was to hold them for five years, but this is for the purpose of paying part of the income to the son Garrett; and inasmuch as such payment could not be made after Garrett's death, the trust must, of course, cease upon that occurrence, whether it should fall before or after the end of the five year period. And this scheme is somewhat emphasized by the provision in the sixth paragraph that, if the son Garrett shall die without issue, the real estate devised for his benefit shall go to the surviving son and daughter of the testator equally. The trust was, therefore, valid. The judgment merely dismisses the complaint, and it does not seem orderly that we discuss other questions in relation to the alleged unlawful accumulation, for they do not appear to be raised by the record.

We conclude that the judgment is right, and it must be affirmed, with costs. All concur.

(122 App. Div. 473.)

BEATTIE v. BURT et ux.

(Supreme Court, Appellate Division, Second Department. November 29, 1907.)

SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—INABILITY TO PERFORM.

In an action for the specific performance of a contract by a husband and wife to convey land, proof that the husband authorized a broker to sell it, who made the contract with plaintiff, in the absence of like authority from the wife, is insufficient, since the husband alone could not convey the land, and, where there is inability to perform, specific performance will not be decreed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 33.]

Hooker, J., dissenting.

Appeal from Special Term, Kings County.

Action by Matthew Beattie against Willis B. Burt and wife. From a judgment of dismissal, plaintiff appeals. Affirmed.

Argued before JENKS, HOOKER, RICH, MILLER, and GAYNOR, JJ.

Thomas H. McKee, for appellant.
Ackerly & Miles, for respondents.

GAYNOR, J. This is a suit by the purchaser for specific performance of a contract to sell real estate. The complaint alleges that the defendants are man and wife, and that they are the owners in fee of the land in question, but whether by the entireties or as tenants in common is not alleged. The answer does not deny this allegation. The complaint alleges that the defendants made a written contract of sale of the land to the plaintiff, and that they refuse to perform. The allegation of the contract is denied by the answer. The contract when put in evidence proved to be by one Donnocker to sell the land to the plaintiff. It does not mention the defendants or purport to bind them. The plaintiff introduced oral evidence, however, tending to show that the husband authorized Donnocker to sell the land as broker. There was no evidence that the wife gave him any authority. At the close of the plaintiff's evidence the court therefore dismissed the complaint as to the wife on her motion. It then dismissed the complaint as to the husband on his motion. This was not error. The complaint was for the specific performance of a contract by the husband and the wife to convey the land, and there was a failure of proof of such a contract. The contract proved was that of the husband alone to convey the land. It was impossible for him to convey it; he could only convey his undivided share; and the rule in a case of inability to perform is that specific performance will not be decreed. Pomeroy on Specific Performance, § 293.

As no point is made of the failure of the learned trial judge to make findings of fact that question of practice need not be considered.

The judgment should be affirmed.

Judgment affirmed, with costs. All concur, except HOOKER, J., who dissents.

HOOKER, J. (dissenting). The action is for the specific performance of a contract for the sale of real property. After the plaintiff's evidence had been received, the defendant Kittie A. Burt, the wife of her codefendant moved for the dismissal of the complaint as to her. The motion was granted, and the plaintiff excepted. The defendant Willis B. Burt then made a similar motion as to himself, which was granted, and the plaintiff excepted. The trial was had on the third and tenth days of November, 1906, and judgment was entered dismissing the complaint, upon a decision which recited that the trial had been had and that at the conclusion of the plaintiff's case motions for dismissal of the complaint as against the several defendants "having been granted, for a failure of proof, I find and decide, as conclusions of law that the defendants, Willis B. Burt and Kittie A. Burt, are entitled to judgment against the plaintiff, Matthew Beattie, dismissing the complaint herein, with costs, and I order and direct judgment accordingly." The decision contains no findings of fact. Un-

der the provisions of section 1021 of the Code, no findings of fact were necessary.

One Donnocker, a real estate dealer and acquainted with the defendant Willis B. Burt, some time before the contract sued upon was executed, engaged in a conversation with him in respect to the sale of the property in question. Donnocker testified that Burt told him that he was going away, but that his son Henry "was here, and whatever I said to him was the same as if I had said it to him, and that whatever Henry said was the same as him; that he would leave Henry there in his place." The son Henry authorized Donnocker to sell the property for a certain price and upon certain terms, and later Donnocker, in his own name, entered into a written contract with the plaintiff for the sale of the property in question; price and terms being specified and the time for the performance of the contract. In this writing Burt, the owner of the premises, was not mentioned. The plaintiff paid \$1,000 to Donnocker at the time of the execution of the instrument, part of which was paid to Henry Burt, the son, by Donnocker as part of the purchase price of the premises. Two days after the payment by Donnocker, Henry deposited it in his father's account in the bank. Henry at once advised his father what had been done and of the deposit, and the latter allowed the matter to remain for some weeks, as his son had arranged it. Later, the defendant Willis B. Burt, changing his mind in respect to his desire to sell, sought to return to Donnocker what had been received, but Donnocker refused to accept the return of those moneys. At the time mentioned in the contract when the balance of the purchase price should be paid, the plaintiff sought to find the defendant Willis B. Burt at his home, but, failing, tendered to Henry Burt, who refused to complete the sale, saying that his father had changed his mind and that the unfortunate outcome of the transaction was beyond his control, for he had had authority from his father to negotiate the sale but had nothing to show for it.

The direction of the court that the complaint be dismissed as to the defendant Willis B. Burt was error. The evidence as we have outlined it was clearly sufficient to show that Donnocker had authority to sell the property, and as such he possessed authority to sign a contract. *Haydock v. Stow*, 40 N. Y. 363, 368, and cases cited. That the name of the defendant Willis B. Burt was not mentioned in the contract is of no importance. The plaintiff's ignorance at the time of the execution of the contract of Burt's ownership presents a situation of the simplest form of the liability of an undisclosed principal for the act of his agent; and, the agency of Donnocker being established, the plaintiff's cause of action against the principal was perfect. As to the defendant Willis B. Burt, the judgment should therefore be reversed.

As to the defendant Kittie A. Burt, the situation is somewhat different. She did not authorize Donnocker, in so many words, to act as her agent, nor does it appear that she authorized her son Henry to arrange the matter for her. It seems that the only interest she has in the property is her inchoate right of dower; but she could not, of course, be deprived of this by her husband's contract, without her

consent. The only evidence connecting her with the transaction is the testimony of the witness Donnocker as follows:

"I had a talk with Willis B. Burt in his house in the year 1905, when Mrs. Burt, the defendant, was present. I went to the house, and said to Mr. Burt that I had called to look the house over, so that I could explain it and describe it to prospective purchasers. Mr. and Mrs. Burt and myself went through the house, I think every room, and looked it over. Mrs. Burt was present when I told this to Mr. Burt. I do not recall what Mrs. Burt said. She said something about her house not being just as slick as she would wish it. I cannot say word for word what she said. She said, when she went away from the house, she only expected to stay a little while, a few weeks; that was the year before, I think; that she had left things just as they were; that they expected to stay in New Hampshire, and did not have it looking as nice as she would like to have it."

All that is to be fairly inferred from this testimony is that Mrs. Burt was actually present and showed the house to Donnocker, at a time when Donnocker told Burt that he had called to look the house over, so that he could explain it and describe it to prospective purchasers. This statement of Donnocker to Burt could as well have been understood by Mrs. Burt to have contemplated the presenting by Donnocker of an offer for the premises, as of an arrangement that Donnocker himself was to effect the sale, and in the absence of further proof of Donnocker's agency for Mrs. Burt, the evidence is not sufficient to bind her to the contract with the plaintiff. Hence the ruling of the learned court upon the trial, dismissing the complaint as to Mrs. Burt, was correct.

The judgment as to the defendant Kittie A. Burt must therefore be affirmed, with costs; and as to the defendant Willis B. Burt it must be reversed, and a new trial granted, costs to abide the event.

(122 App. Div. 490.)

BRAND v. NAGLE

(Supreme Court, Appellate Division, Second Department. November 29, 1907.)

1. BROKERS—RIGHT TO COMMISSION—PRINCIPAL'S REFUSAL TO COMPLETE CONTRACT.

Defendant employed plaintiff to procure a purchaser for certain real property at a specified price. Plaintiff secured a purchaser at that price, and defendant received a payment down, and signed a memorandum expressing the conditions of the agreement as to the terms and time of signing the formal contract; but at the agreed time she refused to sign the contract because the purchaser would not pay the water tax, which had then become a lien on the property. *Held*, that plaintiff was entitled to his commission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 94-96.]

2. SAME—ACTIONS—ABILITY OF PURCHASER—NECESSITY OF PROOF.

In an action for a commission for procuring a purchaser for real property, where it appeared that defendant accepted the prospective purchaser, with whom she made an agreement as to the terms and time of signing a formal contract, plaintiff is not required to prove financial ability of the purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 105.]

Miller, J., dissenting.

Appeal from Municipal Court, Borough of Brooklyn, Second District.

Action by George Brand against Mary E. Nagle. From a judgment of dismissal, plaintiff appeals. Reversed, and new trial ordered.

Argued before JENKS, HOOKER, RICH, MILLER, and GAYNOR, JJ.

Charles S. Aronstam, for appellant.

John H. Steenwerth, for respondent.

RICH, J. The plaintiff appeals from a judgment dismissing his complaint at the close of his evidence on a trial in the Municipal Court. The defendant employed plaintiff to procure a purchaser for real property owned by her in Brooklyn for \$9,200, agreeing to pay him for his services \$100. Subsequently she reduced the sale price to \$9,100, the same commission to be paid if a purchaser was procured. On March 15, 1907, the plaintiff brought the defendant and a prospective purchaser together, and a satisfactory agreement was made between them for the sale of the property for \$9,100. The vendee paid \$25, and the defendant signed and delivered the following memorandum:

"March 15, 1907.

"Received from Mrs. Burr the sum of \$25, being part payment on house 723 Halsey St.; the purchase price being \$9,100. Contract to be signed March 16, 1907, when \$275 more is to be paid. Title to be passed May 1, 1907, when balance above a \$3,000 mortgage is to be paid in cash.

"Mary E. Nagle."

After the delivery of this paper, plaintiff prepared a contract conforming with the terms of the memorandum, with which both parties expressed their satisfaction. A discussion arose, however, as to who should pay the water tax, which was a lien upon the property. Defendant refused to sign the contract, and the sale was not consummated. The contract was in strict accord with the memorandum; and the plaintiff, having procured a purchaser ready and willing to comply with the terms of the agreement made, to sign the contract and pay the \$275 required and agreed to be paid upon its execution, he was entitled to his commission if the purchaser was able to perform; and the defendant could not, by changing her mind as to the time when title should pass, relieve herself from liability. The minds of the vendor and vendee had met upon all of the material elements of the sale, including the day on which title should pass; and the fact that upon such day the water tax would become a lien upon the property, and its payment required by her to place her in a position where she could consummate her contract, did not take from the plaintiff the right to payment of the commission he had earned. *Martin v. Wermann*, 107 App. Div. 482, 95 N. Y. Supp. 284; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441. "If the customer is ready and willing at a specified time and place to enter into an enforceable contract embodying the terms agreed upon, assuming that he is able to carry it out, the principal cannot defeat a broker's claim to commissions by refusing to join in the execution." *Seidman v.*

Rauner, 51 Misc. Rep. 10, 99 N. Y. Supp. 862. The authorities cited by the respondent are not in point. They are cases where the purchaser, and not the owner, defaulted, with the exception of *Haase v. Schneider*, 112 App. Div. 336, 98 N. Y. Supp. 587, the decision in which does not apply to the case at bar, because it rests upon the fact that no time for passing title had been agreed upon preliminarily, and when that question came up at the time of the execution of the contract the parties were unable to agree, and the court properly held that, the minds of the parties never having met, the broker had not shown himself entitled to commissions.

The defendant having accepted the prospective purchaser produced by the plaintiff, the latter was not required to prove financial ability upon the trial as a condition precedent to recovery. The defendant's refusal to perform the agreement which she had entered into with Mrs. Burr was not placed upon the ground that the latter was financially unable to perform her proposed contract. Having accepted the purchaser produced by plaintiff, and agreed with her for the sale of the property, the defendant refused to perform because Mrs. Burr would not pay existing taxes upon the property in addition to the agreed-on purchase price. The question of the financial ability of the prospective purchaser is not involved.

The judgment of the Municipal Court must be reversed, and a new trial ordered; costs to abide the event. All concur, except MILLER, J., who dissents on the ground that no enforceable contract was made, and hence the broker had to show the financial responsibility of the proposed purchaser.

SIEGMEISTER et al. v. LISPENARD REALTY CO.

(Supreme Court, Appellate Term. November 29, 1907.)

1. **BILLS AND NOTES—CHECKS—HOLDERS IN DUE COURSE.**

A check was given contractors to pay off their men, on the supposition that the architect's certificate had been obtained. On discovery that the certificate had in fact been refused, payment on the check was stopped. On the evening of the same day the payees negotiated the check to plaintiffs, who had previously cashed checks for the payees, but had no definite knowledge as to their financial responsibility. The payees did not pay off their men and abandoned the work. *Held*, that the plaintiffs were holders in due course, within the meaning of sections 91, 95, 96, of the negotiable instrument law (Laws 1897, p. 732, c. 612).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 819.]

2. **EVIDENCE—WEIGHT AND SUFFICIENCY.**

The evidence of a party to an action is conclusive, and his credibility is not presented as a question of fact, where his testimony is not contradicted by direct evidence or by legitimate inference therefrom, and is neither opposed to the probabilities nor in its nature surprising or suspicious.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2438.]

3. **BILLS AND NOTES—CHECKS—BONA FIDE HOLDERS—EVIDENCE.**

On an issue as to the good-faith purchase of a check, evidence that the purchaser of the check filed a petition in bankruptcy two months after the purchase is immaterial and outside the issue.

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Barnet Siegmeister and others against the Lispenard Realty Company on a check. From a judgment for defendant, plaintiffs appeal. Reversed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Henry S. Schimmel, for appellants.

Gratz Nathan, for respondent.

ERLANGER, J. There is no substantial dispute as to the facts in this case. The defendant entered into a contract with the firm of Kalt & Zwerling to do the carpenter work on a building in course of erection. The contract provided that payment should be made as the work progressed, and upon the certificate of one Keister, the architect. On October 17, 1906, one Wilson, the president of the defendant company, was at the building, and either Kalt or Zwerling asked him for a check for \$480, saying that he wanted to pay off his men. In the belief that the architect's certificate had been obtained, Wilson drew his check for that amount, payable to the order of Kalt & Zwerling and gave it to one of said firm. Within a few minutes afterwards Wilson learned that a certificate had been refused or withdrawn from the contractors by the architect. Thereupon Wilson immediately demanded the return of the check, which was refused. Payment of the check was stopped. On the evening of the same day, Zwerling, one of the payees of the check, called at the plaintiffs' place of business and asked one of them to cash it, saying he wanted to pay off his men. The plaintiffs were in the hardware business, and had previously cashed checks for Kalt & Zwerling, and had sold them hardware on account, although they had no definite knowledge as to their financial responsibility. They gave Zwerling \$420 in cash that night, and the remaining \$60 the next morning, and upon presenting the check at the bank discovered that payment thereon had been stopped. They then demanded from the payees the money, and were told by them that they could not pay it. It also appears that the payees of the check failed to pay their men and abandoned their work upon the building at or about this time. Plaintiffs then brought this action against defendant, and from a judgment in defendant's favor they appeal.

That portion of the negotiable instrument law (Laws 1897, p. 719, c. 612) applicable to the foregoing facts is contained in sections 91, 94, 95, 96, 97, and 98, which read as follows:

"Sec. 91. A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face. (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such were the fact. (3) That he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

"Sec. 94. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any sig-

nature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates in breach of faith, or under such circumstances as amount to a fraud.

"Sec. 95. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith.

"Sec. 96. A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

"Sec. 97. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to the latter.

"Sec. 98. Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. * * *

The position taken by the respondent is that, upon the facts shown and the law applicable thereto, it devolved upon the plaintiffs to show affirmatively "that they acquired the title as a holder in due course"; and it is urged that they have not sustained the burden cast upon them of so doing. On the other hand, the appellants claim that they are well within the provisions of sections 91, 95, and 96 above quoted. The testimony of Wilson, the defendant's president, is to the effect that the contractors performed some work upon the building at the time the check was given, but the amount thereof does not appear, and that the architect's certificate had been given and withdrawn because it was claimed the work was not properly done. It cannot, therefore, fairly be said that the check was given wholly without consideration, and whether or not fraud is predicable upon such a state of facts need not be considered. I am of the opinion that the plaintiffs showed themselves to be holders of the check in due course.

One of the plaintiffs, who cashed the check, testified that he had not the slightest knowledge as to how the payees obtained it, that he had known them about two years, that the application to him was made before he closed his place of business in the evening, that he knew the defendant company, and he detailed fully and fairly the circumstances under which the check was cashed. His testimony was uncontradicted, and all of it was consistent with good faith, and showed a payment of full consideration without knowledge of any infirmity attached to its giving. No good reason for rejecting his testimony appears, and it has repeatedly been held that "the evidence of a party to an action is conclusive, and his credibility is not presented as a question of fact, where his testimony is not contradicted by direct evidence, nor by any legitimate inference therefrom, and is neither opposed to the probabilities nor in its nature surprising or suspicious." *Second Nat. Bank v. Weston*, 172 N. Y. 250, 64 N. E. 949.

Upon the trial, when one of the plaintiffs was being cross-examined by the defendant's attorney, he was asked:

"Q. There were bankruptcy proceedings against you since then, wasn't they?
A. No, sir; there was a petition filed."

This was objected to by plaintiffs' counsel. Upon being asked by the court the object of this line of examination, the defendant's counsel said:

"My object is to show, what I expect to show, that the circumstances under which these plaintiffs claim to have cashed the check were such as, if he really did cash it, led him or should have led him to be cautious in regard to the transaction. Your honor, the rule of law is in this case that I am entitled to go very fully into all the circumstances in connection with the cashing of this check."

The counsel then elicited from the witness that it was on December 18, 1906, that the petition in bankruptcy was filed, and that no schedule of debts or list of assets were ever filed or made out. Nothing further was asked upon that subject. Plaintiffs' counsel then moved to strike out this testimony as being incompetent, irrelevant, and immaterial. This motion was denied, and an exception taken. The motion should have been granted, and the refusal was error. It would require a long stretch of the imagination to hold that the filing of a petition in bankruptcy by the plaintiffs on December 18th was of the slightest relevancy or materiality to the issues in this action, or tended in any way to cast suspicion upon the bona fides of the plaintiffs in cashing the check on October 17, 1906.

The judgment must be reversed, and a new trial ordered, with costs to appellants to abide the event.

GILDERSLEEVE, P. J., concurs. LEVENTRITT, J., concurs in result.

(56 Misc. Rep. 460.)

BERNSTEIN et al. v. McCahill.

(Supreme Court, Appellate Term. November 29, 1907.)

1. EXECUTION—SUPPLEMENTARY PROCEEDINGS—EXAMINATION OF DEBTOR—DISOBEDIENCE OF ORDER.

In a proceeding to punish a judgment debtor for contempt in failing to appear for examination in supplementary proceedings, evidence held insufficient to show disobedience of the order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 1201.]

2. CONTEMPT—PUNISHMENT—INDEMNITY.

Under Code Civ. Proc. § 2284, providing for the imposition of a fine against a person in contempt to indemnify the aggrieved party for loss or injury, a fine cannot be imposed as indemnity only, without proof of actual loss or injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 260.]

Appeal from City Court of New York, Special Term.

Action by Benjamin Bernstein and Harry Bernstein against John W. McCahill. From an order adjudging defendant guilty of contempt, he appeals. Reversed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

107 N.Y.S.—11

Epstein Bros., for appellant.

Engel, Engel & Oppenheimer (Adolph Engel, of counsel), for respondents.

ERLANGER, J. The moving affidavits show that, after the debtor was partially examined, various adjournments were had at his request upon his promise to pay the judgment, and that, instead of appearing on the adjourned day, he fled from the jurisdiction of the court. The debtor in his answering affidavit alleges that he attended at court at least six times for examination, and on each occasion the proceedings were adjourned, but not at his request, as charged; that he was examined at length and signed his deposition; that he requested at the time that his examination be closed, and was informed by Mr. Engel "that he had no further questions to ask," but desired to adjourn the proceedings "for the purpose of examining other witnesses"; that through his counsel the attorneys for the creditors were informed that he would appear for examination at any time designated, but they refused further to proceed. He denies that he fled from the jurisdiction of the court, and showed that he was employed by a company whose principal office was in Boston, Mass., where he was obliged to go; that the creditors were transacting business with his employer; that since June, 1905, he was in the city more than a dozen times; and that one of the creditors had actually seen him at work in the New York office of his employer, and could readily have ascertained his whereabouts. All these statements were unchallenged, and must be assumed to be true. The court fined the debtor \$200, to be paid within 30 days, and, when paid, to be "in full satisfaction of the judgment, costs, and all proceedings herein." If the fine is not paid, a commitment is to issue.

No claim was made that the debtor violated the injunction contained in the order first served upon him, nor is there in the record an atom of proof to show that the creditors suffered "actual loss or injury" because of the alleged misconduct. The moving affidavit charges "that the debtor by his own acts has impaired and impeded, prejudiced, and defeated the rights and remedies" of the creditors; but the record is examined in vain for any legal proof to support the charge. Under section 2284 of the Code the court upon proper evidence may impose a fine by way of indemnity for the "actual loss or injury established, and in addition a fine by way of punishment not exceeding the sum of \$250, besides costs and expenses." The order recites, following the language of the affidavit, that the rights of the creditors have been "hindered, delayed, impaired, impeded, and prejudiced"; but this is a mere conclusion, unsupported by competent evidentiary facts. It is apparent from the form of the order that the fine was imposed by way of indemnity solely, and is therefore "devoid of all legal foundation." *Fallbrook Coal Co. v. Hoecksher*, 42 Hun, 534, 535. As the fine upon the facts submitted was not imposed by way of punishment, it cannot be reduced to meet the alleged offense charged to have been committed. *Id.*

But the question of a fine in this proceeding is hardly involved. The debtor's defense shows that he was guilty of no misconduct

whatsoever. He was ready at any time, subject to call on the part of the attorneys for the creditors to be examined, and, furthermore, he asserts that when he signed his deposition he was informed "that no further questions would be asked of him, and that the adjournment was taken for the purpose of examining witnesses." None of these facts was disputed. It is not apparent, therefore, under the circumstances, upon what theory a fine was imposed at all. The law has justly provided a means to assist creditors in the collection of their judgments from unwilling and at times unscrupulous debtors; but it has never sanctioned their punishment by the use of its process as a means to an end. Judgments are not to be collected by the imprisonment of debtors upon evidence such as was presented here; but, if by their conduct it is made to appear that the order of the court has been either disobeyed or defied, then the law should be invoked to punish the offenders.

The order must be reversed, with costs and disbursements. All concur.

(56 Misc. Rep. 445.)

PABST BREWING CO. v. RAPID SAFETY FILTER CO. et al.

(Supreme Court, Appellate Term. November 29, 1907.)

1. REPLEVIN—VERDICT—FINDING OF VALUE OF PROPERTY—CONCLUSIVENESS.

Code Civ. Proc. § 1728, provides that the verdict in replevin must fix the damages, if any, of the prevailing party, and where it awards a chattel which has been replevied and afterwards delivered by the sheriff to the unsuccessful party, the verdict, except in certain instances, must fix the value of the chattel at the time of the trial. *Held*, that where, in such a case, the jury fixed the value of the chattel at \$1,000, it would be conclusively presumed that such was its value at the time of the trial.

2. SAME—JUDGMENT—PERFORMANCE—SURRENDER OF CHATTEL.

Where, in replevin to recover an automobile of the value of \$1,000, plaintiff replevied it and retained possession to the time of the trial, and, the jury having found for defendant and assessed the value of the automobile at \$1,000, judgment was entered that defendant recover possession, and, if possession was not surrendered, that it recover the value as found, plaintiff's tender of the automobile in the condition it was in at the time of the trial constituted full satisfaction of the judgment, regardless of any depreciation in value intermediate the wrongful taking and the trial.

3. SAME—DETENTION—DAMAGES.

Code Civ. Proc. § 1722, provides that, where plaintiff recovers a chattel which was injured or otherwise depreciated in value while in defendant's possession under such circumstances that plaintiff might recover damages for the injury or depreciation in an action brought against the defendant therefor, it may recover the same damages in a replevin action. *Held*, that damages for the detention of a chattel recoverable in replevin include loss arising from depreciation in value during the period of its detention, and are therefore recoverable only in the replevin action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 305.]

4. JUDGMENT—RES JUDICATA.

In replevin, a verdict for defendant fixed the value of the chattel at the time of the trial at the same amount claimed as the value at the time it was replevied, and the judgment directed a return or payment of such value. *Held*, that the verdict carried a finding that there was no depreciation in value between the replevin and the trial, and the judgment was

therefore res judicata against defendant's claim for such alleged depreciation.

[Ed. Nota.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1256.]

Appeal from Special Term.

Action of replevin by the Pabst Brewing Company against the Rapid Safety Filter Company and another, in which defendant Rapid Safety Filter Company recovered judgment for possession of the property replevied by plaintiff. 54 Misc. Rep. 305, 105 N. Y. Supp. 962. From an order of the New York City Court directing said defendant to execute and deliver to plaintiff a certificate of satisfaction of the judgment, and in default thereof that the clerk of the court satisfy the same, said defendant appeals. Affirmed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Myron H. Oppenheim (Louis J. Vorhaus and Joseph Fischer, of counsel), for appellant.

Mayer & Gilbert (A. S. Gilbert, of counsel), for respondent.

ERLANGER, J. This action was brought about May 20, 1904, to recover the possession of an automobile delivery wagon, or for the sum of \$1,000 in case possession thereof could not be given to the plaintiff, and for the sum of \$1,000 damages; the plaintiff alleging that the defendant the Rapid Safety Filter Company wrongfully gave possession of the said automobile to its codefendant, the Mobile Storage & Repair Company, for the purpose of being repaired. Plaintiff also alleged that the wagon was of the value of \$1,000, but by reason of the wrongful detention by the defendant it depreciated in value to the extent of \$1,000. The answer denied the material allegations of the complaint. After the commencement of the action plaintiff replevied the wagon, which remained in its possession down to the time of the trial. The case was tried on the 1st of April, 1907, and the jury found a verdict in favor of the defendant the Rapid Safety Filter Company, awarding to it possession of the chattel, and assessed its value at \$1,000. The judgment entered adjudged that the said defendant recover from the plaintiff the possession of the chattel described in the complaint, and that in case possession of the said property is not delivered to the said defendant it recover from the plaintiff the sum of \$1,000, the value of the said chattel as found by the jury. On the entry of the judgment plaintiff paid the costs and served upon the defendant the Rapid Safety Filter Company a notice to the effect:

"Please let me know where you desire this chattel delivered. In the event of your failure to advise us, * * * we will store the same at your expense and risk, and subject to your order."

No execution having been issued, plaintiff placed the wagon in a storage warehouse subject to the order of the said defendant, and, as it claims, delivered the storage receipt to defendant's attorney. The defendant refusing to give a certificate of the satisfaction of the judgment, a motion was made to compel its execution, in order that

the judgment might be satisfied of record. In opposition to the motion the filter company contended that on May 7, 1907, it inspected the wagon and found that there were missing one lamp, one complete set of batteries, four battery trays, two lamp brackets, one gong, one brake shoe, one electric controller, one controller lever, one starting switch, and considerable portions of the wiring which were present when the machine was replevied, and that the paint and varnish were scratched, marred, and defaced, and the vehicle in other respects injured, so that its value was not greater than \$100. The court below granted the motion, and from that order this appeal was taken.

Whatever conflict there may be in the affidavits concerning the alleged depreciation in value of the chattel in suit intermediate its replevin by the plaintiff and the trial, it is clear that the chattel was in the same condition at the time of its tender to the defendant the Rapid Safety Filter Company pursuant to the commands of the judgment as it was at the time of the trial. In an action of replevin the verdict must fix the damages, if any, of the prevailing party, and, where it awards to the prevailing party a chattel which has been replevied and afterwards delivered by the sheriff to the unsuccessful party, the verdict must also (except in cases not material to this question) fix the value of the chattel at the time of the trial. Section 1726, Code Civ. Proc. The jury having fixed the value of the chattel at \$1,000, it is conclusively presumed that such was its value at the time of the trial. *Allen v. Fox*, 51 N. Y. 562, at page 564, 10 Am. Rep. 641. We are therefore concluded by the judgment as to the value of the chattel at that time.

Under the judgment the plaintiff had the alternative of either paying such value or surrendering the chattel. When the unsuccessful party in an action of replevin surrenders the chattel described in the judgment, he fully complies therewith. If there has been a depreciation in value while the chattel remained in the possession or under the control of the unsuccessful party, the prevailing party may recover damages for such injury or depreciation. Section 1722, Code Civ. Proc. If the property has depreciated "intermediate the wrongful taking and the trial, still the prevailing party is obliged to take it, if he can obtain it, and he is indemnified for the depreciation by the damages assessed to him." *Allen v. Fox*, 51 N. Y. 565, 10 Am. Rep. 641. Damages for detention includes loss arising from depreciation in value during the period of its detention. *Brewster v. Silliman*, 38 N. Y. 423. Damages to the chattel while in the possession of the officer acting under the replevin writ must be recovered in the action of replevin, and no action can be brought therefor subsequently, as the matter has become *res adjudicata*. *Ritchie v. Talcott*, 10 Misc. Rep. 412-414, 31 N. Y. Supp. 196.

The case of *Kingsley v. Sauer*, 17 Misc. Rep. 544, 41 N. Y. Supp. 248, cited by the appellant does not apply. In that case plaintiff recovered judgment for 7 tons and 180 cubic feet of hay, and the defendant used a portion of the hay and simply tendered the balance, which the plaintiff refused to accept. If this action had been brought for the recovery of two automobile wagons, and the defendant had

tendered one only, that case would have been more in point. It is not claimed by the appellant in its opposing affidavits that at the time the action was brought and the chattel replevied it exceeded in value the sum of \$1,000. The jury having found that the value of the chattel at the time of the trial was \$1,000, the verdict carries with it the finding that there was no depreciation in value intermediate the replevin of the chattel and the trial, and, the chattel being in the same condition at the time it was tendered to the prevailing party as at the time of trial, plaintiff complied with the directions of the judgment, and was entitled to the order which was made.

The order should be affirmed, with \$10 costs and disbursements.

GILDERSLEEVE, J., concurs. LEVENTRITT, J., taking no part.

(56 Misc. Rep. 208.)

TREMENHEERE v. CHAPIN et al.

(Supreme Court, Special Term, New York County. October, 1907.)

WILLS—TRUSTS—TRUSTEES.

A wife devised the bulk of her estate in trust for the benefit of her husband and two daughters, with remainder over on his death, one-half to her daughter O. absolutely, and one-half to the executrices, or the survivor of them, in trust for the other daughter. The husband was appointed executor and the two daughters executrices and trustees. Held to create two trusts, the first of which falls on the death of the husband, and where testatrix by a codicil after his death appoints an executor and trustee in his place, with the same powers granted to her husband, the appointment is limited to that of executor only.

Action by Jessie R. Tremenheere against Cornelia G. Chapin and others to construe a will. Judgment rendered.

Herbert Parsons, for plaintiff.

Henry Thompson, for defendants Chapin and others.

Carleton S. Cooke, guardian ad litem, for infant defendants.

BISCHOFF, J. Catherine M. Andrews died on the 13th day of August, 1905, leaving a substantial estate. By her will, dated May 11, 1901, she disposed of the bulk of her property by creating a trust for the benefit of her husband and two daughters, with remainder upon death of her husband, one-half to her daughter Cornelia G. Chapin, absolutely, and one-half "to the executrices, or the survivor of them," in trust for her other daughter, Jessie R. Tremenheere. Certain contingencies as to survivorship and succession were provided for, but these do not affect the question presented in this action. The testatrix appointed her husband "executor and trustee" and her two daughters above referred to "executrices and trustees," with power in such as should survive and qualify to name a substitute for such as might die or be disqualified. The husband of the testatrix, George P. Andrews, for many years a valued member of this court, died May 24, 1902; and the testatrix was survived by the two daughters named in her will. On June 10, 1902, a few days after the death of Judge

Andrews, the testatrix executed a codicil to her will containing, as the sole matter of substance, the following:

"First. Whereas by my said will I appointed my late husband, George P. Andrews, one of the executors and trustees thereof; and, he having since died, I now nominate, constitute and appoint my friend John H. Judge executor and trustee in the place of my late husband, George P. Andrews, giving and granting unto him all the powers and authority given and granted unto my said husband as executor and trustee. Second. I hereby ratify and confirm my said will in every respect so far as the same is consistent with this codicil."

The question before me is whether Mr. Judge, the "executor and trustee" named in this codicil, became one of the trustees of the trust for the benefit of the plaintiff created by the tenth clause of the will, or whether, notwithstanding the codicil, "the executrices, or the survivor of them," upon whom alone by the tenth clause the trust devolved, were to act as trustees to the exclusion of this new "executor and trustee."

With the death of Judge Andrews and the consequent failure of the first trust, limited upon his life, there remained but one trust in contemplation when the codicil was executed—the trust for the life of the plaintiff as provided for in the tenth clause of the will; but this trust was to take effect upon his death, or upon the death of the testatrix if he should predecease her, and, in harmony with this situation, the will limited the execution of the trust to the "executrices, or the survivor of them," since so far the general and later inclusion of Judge Andrews as "executor and trustee" could have had no application to this particular trust. Thus we have no uncertainty that the testatrix appreciated the fact that her husband was not to act as trustee of this trust, and the contention that she had not expected his death during her life, and appointed Mr. Judge to act as "trustee" with the "executrices" to meet this unlooked-for circumstance, disregards the fact that the testatrix had provided for this very contingency in her will, and still confided the execution of the trust solely to her daughters. To say that the testatrix intended that the "executor and trustee," appointed in the place of Judge Andrews and with "the powers and authority given and granted" to the latter "as such executor and trustee," should join in the execution of the trust for the plaintiff, requires the court to assume that she had forgotten not merely the formal words of her will, but the broad situation itself in which the trust was to have its being. The death of Judge Andrews, recited in the codicil as the reason for the new appointment, while presenting a situation which touched the personnel of the executors, was, as I have noted, no unlooked-for thing in the matter of this trust; and, in view of the actual and express limitation of the new appointee's powers as the powers which were to have been exercised by Judge Andrews, it is impossible to spell out an intention to appoint him co-trustee of that trust without disregarding, not only the plain language used in the codicil, but the very presumption of law that the testatrix, when executing the codicil, knew, at least in their general import, the contents of her will. The use of the word "trustee" in the appointment by the codicil is thus so limited by the

further description of the appointment that it cannot be taken in the strict meaning which would apply it to an express trust; and, indeed, the designation "executor and trustee," which is employed in this codicil, is found to be used in the will in relation to duties which are only those of an executor—an informality which, in its consistent carrying out, does much to explain this question of intention. The evidence of surrounding circumstances, which I have received because of the ambiguity suggested by the use of the word "trustee," in connection with the words of substitution and limitation, is not of a character such as would aid the defendants' contention.

It appears that the two daughters were of full maturity, and, presumably, as well able to manage the estate when the codicil was executed as they were at the date of the will, in the assumption of the testatrix. That Mr. Judge enjoyed the friendship and confidence of Judge Andrews and was known to Mrs. Andrews to be well qualified to assume such duties as might fall to a trustee of this trust are circumstances which would harmonize with an intention to prefer him for some position of confidence, whether that of executor or trustee, but afford no indication that the appointment was of one particular character. I must hold, therefore, that this codicil fails to express an intention to empower the "executor and trustee" therein named to act as trustee of the trust created by the tenth clause of the will, and that the appointment was as executor only.

Form of decision and judgment may be presented on notice of settlement.

Judgment accordingly.

(122 App. Div. 483.)

HIGBIE v. BOARD OF EDUCATION OF CITY OF NEW YORK.

(Supreme Court, Appellate Division, Second Department. November 29, 1907.)

1. MUNICIPAL CORPORATIONS—TORTS—DUTIES ABSOLUTELY IMPOSED—RESPONDEAT SUPERIOR—LIABILITY OF MUNICIPAL CORPORATION.

The doctrine of respondeat superior applies to municipal or governmental corporations in respect to duties put upon them, even though a municipal corporation may not be liable for acts or omissions of officers who by statutory direction have only duties which belong to the administration of the state government.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Municipal Corporations, § 1569.]

2. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—EMPLOYEES OF MUNICIPAL CORPORATION.

Plaintiff was employed by the board of education of a city as a cleaner in a schoolhouse under the janitor thereof, and in cleaning the water-closets with a liquid mixture, given him by the janitor for that purpose, his hands were burned. *Held*, the negligence, if any, was that of a fellow servant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Master and Servant, § 450.]

Appeal from Trial Term, Queens County.

Action by Daniel Higbie against the board of education of the city of New York. From a judgment of dismissal, plaintiff appeals. Affirmed.

Argued before WOODWARD, JENKS, HOOKER, RICH, and GAYNOR, JJ.

James C. Van Siden, for appellant.

Theodore Connoly (Royal E. T. Riggs, on the brief), for respondent.

GAYNOR, J. The complaint was dismissed on the opening on the ground, it is said, that the defendant is not liable for the negligent acts or omissions of its employés—that the rule of respondeat superior does not apply to it. The case stated by counsel was that the plaintiff was employed by the defendant as a cleaner in a school-house under the janitor thereof; that the janitor gave him a pail of mixture of water and some other liquid and told him to clean the water-closets with it, and that in using it it burned his hands. The complaint says the liquid mixed with the water was some kind of an acid, and the negligence charged therein is that the defendant did not give the plaintiff proper warning and instructions in respect of the mixture.

The doctrine of respondeat superior applies to municipal or governmental corporations in respect of duties put upon them. Cases like *Maxmilian v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468, *Ham v. Mayor*, 70 N. Y. 459, *Donovan v. Board of Education*, 85 N. Y. 117, and *Bassett v. Fish*, 75 N. Y. 303, are not to the contrary when read with discrimination. They merely hold that a municipal corporation is not liable for the acts or omissions of officers who though appointed by it or by the mayor or some other officer of it by statutory direction have only duties which belong to the administration of the state government to perform, such as in public education, the public charities, the police, the prevention and extinction of fires, and the like, and which are not put upon the corporation, instead of duties put upon the corporation itself by statute. In *Bassett v. Fish*, 75 N. Y. 303, it was held that the trustees of a school district were not liable for negligence for a hole in the schoolhouse floor, for the reason that the board of education of the district was a full body corporate, and liable for such negligence, the duty of taking care of the school house being put upon it by the statute, and it being therefore liable for the negligent acts or omissions of its officers or agents, which the trustees were. That the rule of respondeat superior does not apply to a public officer in respect of the negligent acts or omissions of persons employed or appointed by him to assist in the performance of his duties, as was decided in *Donovan v. McAlpin*, 85 N. Y. 185, 39 Am. Rep. 649, does not gainsay that such rule does apply to a municipal or governmental corporation in respect of its duties (*Bieling v. City of Brooklyn*, 120 N. Y. 98, 24 N. E. 389). If it be said that there is no logical foundation for such a distinction, it suffices that the distinction exists by controlling authority, and against that logic has to give way for the time being in the law. The headnote to the report of the case of *Wahrman v. Board of Education*, 187 N. Y. 331, 80 N. E. 192, does not state that a municipal or governmental corporation is not subject to the rule of respondeat superior, and the opinion read with discrimination, and in connection with the cases

it cites, does not require us to so hold in the face of all the explicit authority to the contrary. Indeed, cases based on the contrary are tried in our courts daily and upheld on appeal.

But in this case if there was any negligence it was that of a fellow servant in putting too much of the acid in the water. The mixing of water and acids for the cleaning of sinks and water-closets is a common thing by servants in households.

The judgment should be affirmed.

Judgment affirmed, with costs. All concur; JENKS, J., in result.

(122 App. Div. 437.)

HODGE v. APPELLES.

(Supreme Court, Appellate Division, Second Department. November 29, 1907.)

1. BROKERS—SALES AFFECTED BY OWNER—COMMISSIONS—LIABILITY.

A real estate broker is not entitled to commissions for procuring a purchaser, where the owner sold the premises before the broker produced his customer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 85–89.]

2. SAME.

In an action to recover commissions as real estate broker, *held*, that the owner was not liable; there being insufficient evidence of employment, and no evidence that plaintiff brought the owner and the customer to an agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 116–120.]

Appeal from Trial Term.

Action by William J. Hodge against Augustus L. Appelles. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Reversed, and new trial granted.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and MILLER, JJ.

Jacob Gordon, for appellant.

Henry A. Blumenthal, for respondent.

WOODWARD, J. The action is brought upon an assigned claim to recover brokerage commissions in the sum of \$420. The plaintiff alleges that in the month of December, 1905, one Julius Weiss, a real estate broker, hearing that the property No. 341 East Sixth street, in the borough of Manhattan, city of New York, was for sale for the sum of \$42,000, saw a certain Mr. Popper, told him of the house, and took him to see it; that the aforesaid Weiss then went to the office of the defendant, told him he was a broker, and asked him concerning the property, which the defendant offered to sell for \$42,000, \$8,000 to be in cash; that the defendant agreed to wait for the said Weiss while he went for a prospective purchaser; that he saw his client, Mr. Popper, who went back with him to the defendant's office; and that he was then told by the defendant that they were "too late, the house is sold." According to the testimony of Weiss, Popper thereupon of-

ferred \$500 more for the property, which offer Weiss communicated to the defendant, who said:

"See me to-morrow. * * * I will try to back out. * * * We will try to arrange the deal to-morrow."

This conversation the defendant denies. A few days afterwards the defendant told Weiss that the house was sold, and that Popper had bought it through another broker. Weiss thereupon claimed his commission, which the defendant refused to pay him. The defendant's answer is a general denial, but the specific fact that the premises were sold to Popper for \$42,000 about three hours after Weiss had brought Popper to the defendant's office is undisputed.

It was shown that several other brokers had listed this property for sale, and that one of these, Hornsteen, had, while Weiss went after his man, wired the defendant that he had a purchaser, who afterwards proved to be Popper. And since the defendant told Weiss, when later he appeared with his customer, that the house had been sold, and since, also, there is no evidence of bad faith on the part of the defendant, who seems to have had no knowledge that Popper, the purchaser, was the self-same customer of the two competing brokers, I fail to see how the defendant can be held liable to the plaintiff for his commission. As Hornsteen, the broker who consummated the sale, testified that he had been paid, it would be manifestly unjust to compel the defendant to pay twice for the same service. As was said in *Ettinghoff v. Horowitz*, 115 App. Div. 571, 100 N. Y. Supp. 1002, the owner "may sell the premises at any time and to any customer who is willing to buy upon his terms, and commissions may not be collected for customers produced after the premises have been sold."

Furthermore, as there is here no evidence of employment, nor that the plaintiff's assignor, Weiss, brought the defendant and his customer, Popper, to an agreement, the verdict is plainly erroneous and should not stand. In *Haase v. Schneider*, 112 App. Div. 336, 98 N. Y. Supp. 587, the court, referring to the right of the broker to commissions, said that the parties must first be "brought to an agreement, not alone as to the price, but as to terms of exchange, the time of taking title, and all the incidents of the transaction. The minds of the parties must meet in a contract, the details of which are worked out and understood between them." Similar to the above is the case at bar, and, as the plaintiff failed to consummate an agreement between the parties, he has no right to the commission.

The judgment and order appealed from should be reversed, and a new trial granted; costs to abide the event. All concur, except HIRSCHBERG, P. J., not voting.

(122 App. Div. 485.)

LANG v. MINCK.

(Supreme Court, Appellate Division, Second Department. November 29, 1907.)

1. CONTRACTS—BREACH—ACTIONS—EVIDENCE.

In an action for breach of contract to pay for a secret formula for making artificial champagne, "not distinguishable from, and equal in test, appearance, and quality to, real champagne," the testimony of plaintiff that she had made champagne according to the formula and that it had always turned out right was not sufficient, without proof that the formula was what it was alleged to be, to authorize a judgment for damages.

2. APPEAL—REVIEW.

The question whether the verdict is contrary to and unsupported by the evidence comes up on a motion to set aside the verdict and for a new trial.

Hooker, J., dissenting.

Appeal from Kings County Court.

Action by Kathi Lang against Julius Minck. From a judgment for plaintiff, and from an order denying a motion on the minutes for a new trial, defendant appeals. Reversed.

Argued before WOODWARD, HOOKER, GAYNOR, RICH, and MILLER, JJ.

Thomas F. Magner (Nathan Ballin, on the brief), for appellant.

August P. Wagener, for respondent.

GAYNOR, J. The plaintiff did not make out a case, and the motion to dismiss should have been granted. The allegations of the complaint may well excite credulity, which is all the more reason why care should have been taken to see that evidence of them was given before they should be decided to be true.

The complaint is (without regard to verbiage and immaterial allegations) that the plaintiff agreed to deliver to the defendant a secret formula or receipt for making artificial champagne, "not distinguishable from, and equal in taste, appearance and quality to real champagne," and teach and impart to him the art, skill and secret of making the same, in consideration of which the defendant agreed to pay her \$1,000, provided that on a trial under the plaintiff's direction the result should be such champagne; that the plaintiff gave the defendant the said secret and receipt for making such champagne, "enumerating and describing the articles, ingredients, compounds and parts in which the same were used and mixed," etc., but he refused to receive her instructions, or have the trial of the result under her directions, but tried himself and failed. The prayer was for damages for breach of the contract. The answer is a general denial. The verdict was for \$1,000 damages. There was no evidence that the plaintiff's formula or receipt would produce artificial champagne "not distinguishable from, and equal in taste, appearance and quality to real champagne." She testified that she had made it in France, and that "it always turned out right." That is a mere loose conclusion. It might have been right, of its kind, but was it equal to real champagne "in taste, appearance and quality," and not distinguishable

from it? If it was, it was the same as the real article, for taste, appearance and quality is all there is of it, and one possessing the secret of it would do the greatest foolishness ever known by giving such secret away for \$1,000. Without proof that the formula was what it is alleged to be, there was no basis for damages. If it were anything less, the plaintiff broke the contract when she delivered it, and if it were not it is most astonishing that she delivered it at all. If some of the article had been produced on the trial, the judge and jury might have got at least some notion whether it was the same "in taste, appearance and quality" as genuine champagne.

If the motion to dismiss be scant, still the question of the verdict being contrary to evidence and unsupported, comes up on the motion to set aside the verdict and for a new trial.

The judgment and order should be reversed.

Judgment and order of the County Court of Kings county reversed, and new trial ordered; costs to abide the event. All concur, except HOOKER, J., who dissents.

(122 App. Div. 440.)

In re FROELICH'S ESTATE.

(Supreme Court, Appellate Division, Second Department. November 29, 1907.)

1. WILLS—CONSTRUCTION—INTENTION OF TESTATOR.

In construing a will, all its clauses and provisions must be read together in determining the intent of the testator, and the intent so gathered controls.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 953, 956.]

2. SAME—TESTAMENTARY TRUSTS—TRUST TO CONTINUE BUSINESS—RENTAL VALUE OF PREMISES.

A will gave the residue of testator's property in trust to take charge of his real estate, "collect the rents and income thereof," etc., specifying various trusts, among them to take charge of his stove fixtures business and foundry, etc., and everything connected with said business, and to continue the business until his youngest child should reach majority, or as long as the net profits of the business should yield a designated profit. *Held*, that the foundry was a necessary incident of the business to be used by the trustees, and they were not required to charge the business with the rental value thereof.

3. JUDGMENT—RES JUDICATA—JUDGMENT CONSTRUING WILL—MATTERS CONCLUDED.

A judgment in an action to construe a will, which adjudges that a trust created by a will for the conduct of testator's business, including a foundry, is valid, but which does not decide any question as to whether the trustees in the conduct of the business should be chargeable with rent of the foundry, is not *res judicata* on the question of the liability of a substituted trustee for such rent, nor is he estopped by the allowance by the court of accounts of former trustees, which showed that they paid rent for the foundry.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1254-1258.]

4. ESTOPPEL—EQUITABLE ESTOPPEL—PREJUDICE.

The fact that trustees, empowered under a will to take charge of testator's business, including a foundry, paid rent for the foundry, and that their accounts for such payments were allowed by the court, does not

estop a substituted trustee from taking the position that rent should not be paid as against one who has not been induced to act to her prejudice by receiving the rents for former years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 144, 145.]

5. TRUSTS—LIABILITY FOR LOSS.

A will authorizing trustees to continue testator's business until his youngest child shall reach majority, or as long as the net profits shall yield a specified profit, makes it the duty of the trustees to close out the business when it becomes apparent that it will not earn the profit specified; but reasonable latitude must be allowed them in determining whether or not the business is capable of making the profit, and, in the absence of negligence or mismanagement, the trustees cannot be personally charged with a loss occurring during the time they conducted the business.

6. EXECUTORS—COMPENSATION—CONTINUING BUSINESS OF TESTATOR.

An executor is ordinarily confined to the commissions prescribed by the statute, and, where the business of the testator is continued under authority contained in the will, the services rendered in continuing it are deemed part of the duties of his office, and he cannot receive therefor any other than the compensation allowed by law, though an executor rendering special services beyond the general duties is entitled to additional compensation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 2117-2124.]

7. TRUSTS—TRUSTEES—COMPENSATION—CONTINUING BUSINESS.

Where a will authorizes trustees to continue testator's business, providing that out of the profits of the business a specified per cent. shall be paid to the trustees as compensation for their services in the management of the business, which per cent. shall be in addition to the commissions allowed by law, the trustees are not entitled to compensation in addition to the lawful commissions and the specified per cent.

Appeal from Surrogate's Court, Kings County.

Proceeding for judicial settlement of the account of Charles Froelich, substituted trustee of trusts created under the will of Andrew Froelich, deceased. From a decree of the surrogate (100 N. Y. Supp. 436), Mrs. Wolf appeals. Modified and affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, GAYNOR, RICH, and MILLER, JJ.

Joseph M. Gazzam, for appellant.
James Troy, for respondent.

WOODWARD, J. The testator's will was probated by the surrogate of Kings county in the year 1886. By the third clause of the will a trust was created. It reads as follows:

"Third. I give, devise, and bequeath all the rest residue and remainder of my property, real and personal and mixed of what nature and kind soever and whatever the same may be at the time of my death to my friend Lewis S. Goebel and to my brother Philip Froelich in trust nevertheless to take charge of my real estate, collect the rents and income thereof, and out of the same pay all taxes, assessments, water rents, insurance, premiums and all moneys necessary to keep the buildings upon the said real estate in good repair and condition.

"And upon the further trust to pay over one-half of the net rents, and income of my said real estate to my wife Caroline Froelich quarter yearly for the support and maintenance of herself and my minor children and in lieu of dower.

"And upon the further trust to apply the remaining one-half of said net rents and income to the payment of any mortgage or mortgages that may be liens upon said real estate.

"And upon the further trust after the payment of all mortgages upon said real estate to invest the said one-half of said net rents and income upon bond and mortgage upon unincumbered real estate in the City of New York or Brooklyn for the benefit of my children.

"And upon the further trust to take charge of my stove fixtures and stove trimming business in the city of New York, city of Newark, New Jersey, and foundry in the city of Brooklyn together with all the stock of goods on hand, material, fixtures, machinery patterns, tools, implements and appurtenances; also all book accounts outstanding claims and in short every thing connected with my said business.

"And upon the further trust to continue the said business and carry on the same and to continue to carry on the same until my youngest child shall arrive at the age of twenty-one years, or as long as the net profits of said business shall yield ten per cent. upon an investment of fifty thousand dollars.

"And upon the further trust to sell and discontinue said business whenever my said executors and trustees shall deem it for the best interest of said estate so to do.

"And upon the further trust to retain out of the net profits of said business the sum of ten per cent. of such net profits as compensation to my executors and trustees for their services in the management of the said business. Said sum of ten per cent. to be in addition to the lawful commissions allowed them as executors and trustees.

"And upon the further trust to invest the net profits and income from said business, after deducting the said ten per cent. compensation to said executors and trustees upon bond and mortgage upon unincumbered real estate in the city of New York or Brooklyn or to deposit the same in some savings bank or banks of good standing in the city of New York or Brooklyn, for the benefit of my children.

"And upon the further trust to convert all my personal property not above mentioned into money and to invest the same for the benefit of my said children in the same manner as any other moneys are to be invested as above provided.

"And upon the further trust to pay and advance to each of my children as they respectively arrive at the age of twenty-one years or as they respectively marry, the sum of three thousand dollars.

"And upon the further trust immediately upon the arrival of my youngest child at the age of twenty-one years in case my said wife shall not then be living to divide all my estate real and personal and the accumulations of interest equally among my children, share and share alike after deducting all advances made as above provided to any of my children, so that each of my children shall have and receive an equal share of my estate. Should my said wife be living at the time my youngest child arrives at the age of twenty-one years then it is my will and pleasure that no division of my estate shall be made until after the death of my said wife."

The testator left considerable real estate, consisting of houses and lots, and also a foundry in the city of Brooklyn. At the time of his death the testator was engaged in conducting a general stove-trimming business and used this foundry in connection with such business. The accounting trustee, under the power and authority of the trust clause of the will, continued the testator's business, and used the foundry for the same purposes as the testator. The appellant insists the trustee should have charged the business with rent for use of the foundry, and that Caroline Wolf, the widow of the testator, was entitled to receive one-half the net rents derived from the foundry property as part of her one-half of the net rents of the real estate. It is contended that the foundry property is to be treated exactly like all

the other real estate left by the testator, and after the payment of the expenses of maintenance one-half the net rent under the provisions of the trust clause of the will should be paid to the widow for life. The accounting trustee insists that under the will he is not required to pay to himself any rent for the use of the foundry. It appears to have been the practice for years for the predecessors of the present trustee to charge the business with rent for the use of this foundry, one-half of which was paid the widow. For a time after the substitution of the respondent as trustee he also followed that practice, but subsequently declined to further do so upon the advice that the business was not legally liable therefor. The question is, therefore, sharply presented as to the proper construction of the trust clause in that respect.

In construing a will, all its clauses and provisions must be read together in determining the intent of the testator, and that intent so gathered must control. *Goebel v. Wolf*, 113 N. Y. 405, 21 N. E. 388, 10 Am. St. Rep. 464. What is said by the testator in the earlier parts of the trust clause must be considered in connection with the subsequent clause relating to the continuance of the business. We think the general language of the earlier part of the clause, in which the testator directs his trustees to take charge of his real estate, "collect the rents and income thereof," etc., is qualified and modified by the later direction to his trustees to take charge of his stove fixtures and stove-trimming business "and foundry in the city of Brooklyn, * * * and in short everything connected with my said business," and continue said business in the manner directed. There is no specific direction for the business to pay rent. The foundry was a necessary incident to that business, and most intimately connected therewith. The fixtures and other property in it would have been of little use, except when used in connection with it. It was the clear intention of the testator that this foundry was to be treated as a part of the investment of the business, and to be used by the trustees in the future conduct of the business as a necessary incident to it. It was not to be rented to third parties, but to be used by the trustees themselves, and, in the absence of any specific direction that they should charge the business with its rental value, we think they cannot be required so to do. The question is simply one of construction, and we believe the argument is all in favor of the position taken by the respondent in this regard. If this is the proper construction, it is no answer that in prior years rent had in fact been allowed. We see nothing in those acts estopping the trustee from now insisting on the proper construction of the will.

It is contended by the appellant that the judgment construing the provisions of this will previously rendered (*Goebel v. Wolf*, 113 N. Y. 405, 21 N. E. 388, 10 Am. St. Rep. 464) makes the question here involved *res adjudicata*, especially when taken in connection with the former accountings of prior trustees, in which their accounts crediting themselves and charging the appellant with rent of the foundry property were passed and approved. The counsel for the appellant relies on the case of *Thorn v. De Breteuil*, 179 N. Y. 64, 71 N. E. 470, as sustaining this contention. We have examined the record in the case of *Goebel v. Wolf*, *supra*, and we can find nothing in that

case which in our opinion precludes or estops this court from maintaining and enforcing the views now entertained and above expressed upon the question of the rental of the foundry. The findings and judgment made in the action to construe the will simply adjudge the trust created by the will as to the real estate and for the conduct of the testator's business valid, and makes certain other findings in no way relating to the questions here involved. The decree does not purport to find or decide any question as to whether or not the trustees in the conduct of the business should pay rent to themselves for the use of the foundry property. That question does not appear to have been directly or inferentially involved in this disposition of the action for a construction of the will. It is true, too, that the predecessors of the present trustee paid rent for the foundry property, and their accounts for such payments were allowed and passed. We cannot see, however, that those decrees settling trustees' accounts estop the present trustee from taking his present position that rent should not be paid. The appellant has not acted or been in any way induced to act to her prejudice by receiving the benefit of rents for former years. She simply received more than she was legally entitled. This ought not to estop the substituted trustee from asserting that the practice followed by his predecessors was wrong and should be discontinued. Especially is this true where the respondent's predecessor in office was Mrs. Wolf, the appellant here, and the accounts rendered were her own accounts. We find nothing in *Thorn v. De Breteuil* in conflict with this conclusion, where a prior adjudication had been expressly made covering the point brought into dispute for a second time, and where executors and trustees had in good faith acted upon the judicial construction put upon the will under consideration.

The trustee's account shows that the business conducted under the trust clause in the will showed a net loss of \$2,286.48, and the appellant contends the trustee should have discontinued the business, and is personally chargeable with the loss which occurred during his administration. The provisions of the will under which the business was continued authorized the trustees "to continue the said business and carry on the same and to continue to carry on the same until my youngest child shall arrive at the age of twenty-one years, or as long as the net profits of said business shall yield ten per cent. upon an investment of fifty thousand dollars." We think the fair construction of this clause made it the duty of the trustees to close out the business when it became apparent that the business would not earn the 10 per cent. profit specified. At the same time reasonable latitude should be allowed the trustee in determining whether or not the business was capable of making the 10 per cent. profit anticipated. It is common experience that many kinds of business may encounter temporary and unexpected losses, and may perhaps for a given year even run at a loss, when in fact the business as a whole may prove profitable. The trustees, in view of this common experience, would be justified, in our judgment, in continuing the business for sufficient length of time until it could be determined, by an honest effort to make the business a success, whether the business as a whole is a paying one. We have examined the record in this case, and cannot

discover in it sufficient to justify the court in finding that the trustee under the circumstances was required sooner to discontinue the business. We do not think the evidence would justify the court in charging him personally for the losses suffered. There is no evidence of any negligence or mismanagement of the business on the part of the trustee; while, on the other hand, there is some evidence that the failure to realize profits was in part due to a competition in business organized and carried on with the approval, if not the active co-operation, of the appellant. There is no little justice in the contention that under such circumstances the contestant ought not to charge the substituted trustee with a personal liability for the comparatively small loss the business conducted by him sustained.

It is contended that error was committed in allowing the trustee for moneys drawn from the business and paid himself as "salary" for managing the business, aggregating \$4,840. It appears that prior to the trustee's appointment as substituted trustee in 1901, and while his mother (now Mrs. Wolf), the appellant in this case, was acting as trustee, John M. Wolf, the present husband of the former trustee, was employed at a salary as superintendent and manager of the business, and was paid for such services a salary even larger than that subsequently received by the respondent. Wolf left the business, and without an active head to look after its details, and this respondent, who had been also employed in the business and was more or less familiar with it, was appointed trustee in the place and stead of his mother, who resigned. From that time on he devoted his time and attention to its conduct, and rendered substantially the same services as formerly given by Wolf, and withdrew from the business a weekly salary for the same. It would seem that from every consideration of justice and equity the trustee should under such circumstances be paid a compensation commensurate with the services rendered, and little sympathy can be had for one objecting to its allowance. Nevertheless we have been unable to find authority for its allowance without violating the well-recognized rules and principles of law which govern such cases. The will expressly provides for and authorizes the retention "out of the net profits of said business the sum of ten per cent. of such net profits as compensation to my executors and trustees for their services in the management of the said business. Said sum of ten per cent. to be in addition to the lawful commissions allowed them as executors and trustees."

We are aware that in certain special and peculiar cases, where an executor or trustee renders to the estate he represents special services outside and beyond his general duties as executor or trustee, proper allowances have been made for their payment over and above the commissions allowed by law, as where a former manager was appointed temporary administrator during a contest over the probate of a will, and was directed to temporarily carry on the decedent's business (*Matter of Moriarity*, 27 Misc. Rep. 161, 58 N. Y. Supp. 380), or where one of several executors by agreement with the widow and heirs rendered services for nine years, not only in collecting rents, but by manual labor in keeping the trust property in repair (*Matter of*

McCord, 2 App. Div. 324, 37 N. Y. Supp. 852), or where a skilled machinist at the request of the heirs continues a manufacturing business of the testator, rendering services therein for which he was peculiarly fitted by his mechanical training (Matter of Braunsdorf, 13 Misc. Rep. 666, 35 N. Y. Supp. 298), or where, a testator leaving five farms, one of the executors, at the request of the others, including the widow, took charge of the real estate for some 15 years (Lent v. Howard, 89 N. Y. 169). In each of the above cases the services rendered were quite outside the duties imposed upon the executor or trustee by the instrument or order under which they acted, and in some cases the services were rendered under a special arrangement with the interested parties. In this case the will under which the respondent acted expressly provided for the compensation to be paid the trustee for the management of the business, and it is impossible to say that such services as were rendered were outside the duties imposed upon him by that instrument. An administrator or executor is ordinarily confined to the fees or commissions prescribed by the statute, and, if the business of the decedent be continued under authority contained in the will, the services rendered by the executor in continuing it are deemed part of the duties of his office, and he cannot receive therefor any other than the compensation allowed by law. Clausen v. Puvogel, 114 App. Div. 455, 459, 100 N. Y. Supp. 49; Matter of Hayden, 54 Hun, 197, 7 N. Y. Supp. 313, affirmed 125 N. Y. 776, 27 N. E. 409; Matter of Dummett, 38 Misc. Rep. 477, 77 N. Y. Supp. 1118; Collier v. Munn, 41 N. Y. 143. The enforcement of the general rule in this case works a hardship; but the rule is a salutary one, and one which this court cannot disregard.

We see no reason for disturbing the findings of the Surrogate as to certain expenses incurred in the business, and covered by small sums drawn from the business from time to time.

The decree appealed from should be modified in the manner above indicated.

Decree of the Surrogate's Court of Kings county modified in accordance with opinion of WOODWARD, J., and, as modified, affirmed, without costs. GAYNOR, RICH, and MILLER, JJ., concur. HIRSCHBERG, P. J., not voting.

(56 Misc. Rep. 505.)

MUSICA v. AMALFITANO.

(Supreme Court, Appellate Term. November 29, 1907.)

1. COURTS—MUNICIPAL COURTS—JURISDICTION—CORRECTION OF JUDGMENT.

A Municipal Court justice has no authority to amend a judgment, unless made at the close of the trial or on a two days' notice of motion, as required by Municipal Court Act, Laws 1902, p. 1563, c. 580, § 254.

2. APPEAL—JUDGMENT—MODIFICATION—JURISDICTION.

Where plaintiff appeals from a judgment in his favor, and from an order vacating an order amending the same by inserting a clause providing for the arrest and imprisonment of defendant, the appellate court has jurisdiction to insert such provision, if the facts disclosed justify the issuance of such process against defendant.

3. TROVER AND CONVERSION—JUDGMENT—ARREST OF DEFENDANT.

Where plaintiff in trover proved a sale to defendant under a written agreement binding defendant to hold the merchandise in trust until the note for the price was paid, but allowing defendant to sell the merchandise and pay the proceeds to plaintiff, that the note had not been paid, and that the merchandise had not been returned on demand, and defendant testified that he had sold all the merchandise and had not received any of the proceeds therefor, plaintiff, on recovering judgment, was not entitled, under Municipal Court Act, Laws 1902, p. 1562, c. 580, § 251, to a provision therein authorizing the arrest and imprisonment of defendant, having failed to show a conversion.

Appeal from Municipal Court, Borough of Manhattan, Thirteenth District.

Action by Antonio Musica against Vito Amalfitano. From a judgment granting insufficient relief, and from an order vacating an order modifying the judgment, plaintiff appeals. Affirmed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Carter & Haskell, for appellant.

Giuseppe L. Maggio, for respondent.

LEVENTRITT, J. The action is for conversion. A verified complaint was served with the summons, and on the return day the defendant pleaded a general denial. The trial which followed was concluded on the 2d of May, 1907. On the 14th of May the trial justice rendered the usual money judgment in favor of the plaintiff, without stating therein that the defendant was subject to arrest and imprisonment. Upon discovering this omission, the plaintiff's attorneys three days later made an ex parte application to the trial justice for an amendment of the judgment by the insertion of such a provision, and on the 20th of May the justice amended the judgment accordingly. When the defendant learned that the amendment had been made, he obtained an order to show cause, based upon affidavits, why the inserted provision should not be stricken out and the judgment restored to its original form. On the hearing of the motion the plaintiff submitted a counter affidavit. The motion was granted, the original judgment was restored, and the defendant, who had theretofore been taken into custody under a body execution, was discharged. The appeal under consideration was thereafter taken from the vacatur of the order of modification, and also from the judgment in so far as it did not provide for the arrest of the defendant.

The justice was powerless to make the amendment, because it was made neither at the close of the trial nor upon two days' notice of motion, as required by section 254 of the Municipal Court act (Laws 1902, p. 1563, c. 580). He could not, upon the application of either party, without formal notice to the other, make an order amending or modifying the judgment. *Ryan v. Brown*, 51 Misc. Rep. 67, 99 N. Y. Supp. 868; *Barron v. Feist*, 51 Misc. Rep. 589, 101 N. Y. Supp. 72; *Lackner v. American Clothing Co.*, 112 App. Div. 438, 98 N. Y. Supp. 376. The justice had no alternative, therefore, except to undo his unauthorized act by making the order appealed from.

The appeal from the judgment, however, brings up for review the omission to add the indorsement which would entitle the plaintiff to a body execution under section 251 of the Municipal Court act. If the facts disclosed on the trial were such as to justify the issuance of that process, we could modify the judgment by directing the insertion of the words: "Defendant liable to arrest and imprisonment on execution." *Ostrom v. Sapolsky*, 49 Misc. Rep. 610, 96 N. Y. Supp. 1070. The plaintiff alleged a cause of action in conversion, and proved the sale and delivery to the defendant of certain merchandise under an agreement in these words:

"Received from A. Musica, of New York, the merchandise specified in the invoice dated Dec. 20/06, Jan. 9/14/30/07, and shipped from ———, marks and numbers being A. M. 258 Bx Maccaroni, 82 Bx Maccaroni, 1 case cheese, 5 bales fish, 1 drum fish; and in consideration thereof I agree to hold said merchandise on storage as his property, in trust, until the notes given or to be given as the purchase money of said merchandise under a credit issued to me and any other indebtedness to said A. Musica shall have been paid or satisfactorily provided for. It is understood that I shall be at liberty to sell the said merchandise and hand the proceeds, when received, to said A. Musica as security for due provisions for said acceptances and indebtedness, and also that I shall keep the same insured against fire, payable, in case of loss, to said A. Musica, who is not to be chargeable with any expense thereon. The intention of this arrangement is to protect and preserve unimpaired the title of said A. Musica to said merchandise.

"[Signed]

Vito Amalfitano."

He further testified that the note referred to in the agreement had not been paid and that the merchandise had not been returned upon demand. He did not show, however, either that the goods were in defendant's possession or that they had been sold and any proceeds received. Since, under the agreement, one of these conditions was an element essential to the proof of conversion, the plaintiff failed to establish the cause of action pleaded. Furthermore, the defendant testified that he had sold all the merchandise and that he had not received any of the proceeds therefor. Under these circumstances the plaintiff was entitled merely to a judgment in the form rendered by the learned trial justice.

The judgment and order appealed from must be affirmed. All concur.

(56 Misc. Rep. 468.)

SCULLY v. WOLFF.

(Supreme Court, Appellate Term. November 29, 1907.)

PLEADING—ANSWER—SUFFICIENCY OF DENIAL.

Where the complaint in a personal injury action alleged that on a specified day plaintiff, while lawfully passing along a street abutting upon defendant's premises, struck boards projecting from such premises, and was violently thrown to the ground through defendant's negligence, an answer denying any knowledge or information sufficient to form a belief as to the truth or falsity of such allegations was sufficient, and it was error to exclude evidence bearing upon the issues thus raised.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 245-248.]

Appeal from City Court of New York.

Action by Margaret Scully against Henry L. Wolff. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Carl Schurz Petrasch, for appellant.

Sidney H. Stuart, for respondent.

LEVENTRITT, J. This action was founded on negligence charged against the defendant. The complaint alleged his ownership of certain premises on 104th street and Third avenue, that he carelessly and negligently maintained those premises by permitting two boards to project beyond the stoop line into the street, and, in paragraph 3:

"That on the 20th day of July, 1903, the plaintiff, while lawfully passing along said street and avenue, and without any negligence on her part, and solely because of the negligence and carelessness of the defendant, as aforesaid, was struck on the feet and caught by said boards, and violently thrown to the ground."

In his answer the defendant admitted his ownership of the premises, and in paragraph 2 denied "any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in the paragraph of the complaint numbered 3." The defendant was not permitted on the trial to introduce any evidence bearing upon his freedom from negligence; the court holding that the defendant's denial of the allegations of paragraph 3 of the complaint was insufficient and ineffectual to controvert the allegations of that paragraph. The defendant was therefore compelled to rest his case upon the plaintiff's evidence, which practically reduced the trial to an assessment of damage. The jury returned a verdict for the plaintiff, and from the judgment entered thereon this appeal is taken.

The defendant's exceptions bring up the sufficiency of the answer for our consideration. We are of the opinion that the construction placed by the trial court upon the denial in paragraph 2 was erroneous, that this denial raised an issue as to the allegations of the complaint to which it was directed, and that the evidence offered thereunder should have been received. A defendant, called upon to answer a complaint, stands in one of five positions with respect to the allegations thereof. He either (1) knows them to be true; (2) knows them to be false; (3) has sufficient information to believe them true; (4) has sufficient information to believe them false; or (5) he has not sufficient knowledge or information to form a belief either way. The Code provides that the defendant's answer shall contain:

"A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief."

This provision does not prescribe any particular form of denial of the allegations of the complaint. It is sufficient if the denial is "such as to at once apprise the parties and the court of the matter controverted." *Thompson v. Wittkop*, 184 N. Y. 117, 120, 76 N. E.

1081. It was held in *Robert Gere Bank v. Inman*, 51 Hun, 97, 5 N. Y. Supp. 457, affirmed on opinion below 115 N. Y. 650, 21 N. E. 118, that a denial of knowledge or information sufficient to form a belief as to the truth of an allegation is authorized by the Code, and that form of denial has been adopted as the proper one by some text-writers. *Abbott's Forms of Pleading*, pp. 1496, 1497. The addition of the words "or falsity" cannot be said to differentiate the form of denial in the present pleading from that which has been generally adopted and has received the stamp of judicial sanction. All that may be said of the effect of the added words is that they have enabled the defendant to define more clearly the position he has chosen to adopt. He not only denies the possession of sufficient knowledge or information to form a belief as to the truth of the plaintiff's allegations, but extends his lack of such knowledge and information to the falsity of those allegations. In other words, he finds himself in the fifth position outlined, and has no knowledge or information sufficient to form a belief either way. A denial in the form approved in *Robert Gere Bank v. Inman*, supra, raises an issue respecting, and puts the plaintiff to his proof to establish, the truth of his allegations. The denial in the form here used raises the same issue and calls upon the plaintiff to present the same proof. The denial of knowledge or information as to falsity could not in any sense restrict, limit, or qualify the denial of such knowledge or information as to the truth. Under no possible theory could the use of those words be construed as destroying the effectiveness of the denial.

The respondent cites *Collins v. North Side Publishing Co.*, 1 Misc. Rep. 211, 20 N. Y. Supp. 892, as holding that a denial of knowledge or information sufficient to form a belief as to the truth of all the other allegations of the complaint did not raise an issue. That case, however, is not an authority for the respondent's contention. There the answer was criticised, not as to the form of the denial with respect to the use of the word "truth," but because its form was conjunctive. The respondent further relies upon the rule, stated in *Clark v. Dillon*, 97 N. Y. 370, that ambiguity should always be resolved against the pleader. In the later case of *Coatsworth v. Lehigh Valley R. Co.*, 156 N. Y. 451, 457, 51 N. E. 303, the court say:

"Under the more recent authorities, pleadings are not to be construed strictly against the pleader, but averments which sufficiently point out the nature of the pleader's claims are sufficient, if under them he would be entitled to give the necessary evidence to establish his cause of action. *Rochester Railway Co. v. Robinson*, 133 N. Y. 242, 246, 30 N. E. 1008."

This departure from the old rule which prevailed with reference to the construction of pleadings gave rise to some judicial discussion as to whether it overruled the principle enunciated in *Clark v. Dillon*, which was not referred to in the *Coatsworth Case*, and it has been stated that, while the new rule is applicable where the sufficiency of the allegations of a pleading to constitute a cause of action or defense was involved, it has no application to the construction of an alleged denial. But in *Thompson v. Wittkop*, supra, where the denial was of "all the allegations contained in folios 4 and 5 of said com-

plaint, except as hereinafter expressly specifically admitted or otherwise alleged, denied, and controverted," the court, by Haight, J., say:

"While we have examined all the authorities cited by counsel in this case bearing upon the question, we shall not here allude to them or attempt to harmonize them, further than to state that we have found none which we regard as controlling upon this court. Before the Code pleadings were strictly construed against the pleader, but under the Code they 'must be liberally construed with a view to substantial justice between the parties.' Code Civ. Proc. § 519. * * * The form used by the defendant in this case is not to be commended. It is about as cumbersome as any that could well be devised, and has often been severely criticised by the courts. The original folios upon a complaint are almost always changed in the record made up for review, and consequently it then becomes impossible for the appellate court to determine the matter controverted. In many cases the form of denial used might be so indefinite and uncertain as to leave a doubt as to the allegations of the complaint intended to be put at issue; but in such cases we doubt the propriety of treating the denial as a nullity, and thereby depriving the party of his right to trial or to amend his pleadings. We think the better practice is to move to have the pleading made more definite and certain. * * * We therefore are of the opinion that the pleading in this case, as construed by the trial court, afforded 'substantial justice between the parties.'"

There is, therefore, no longer any room for doubt that the rule of reasonable compliance is applicable to the form as well as to the sufficiency of a pleading. In *Bodine v. White* (Sup.) 98 N. Y. Supp. 232, where the form of denial was, "Defendant, answering the complaint of the plaintiff herein, denies the same," the language of Mr. Justice Scott, writing for this court, is pertinent:

"The purpose of denials in an answer is to advise the plaintiff just what allegations of the complaint are intended to be put in issue. In matters of form the pleading must be liberally construed, so as to carry into effect the intent of the pleader. The general denial sought to be set up in the first paragraph of the answer in this case, although carelessly and inartificially drawn, indicates with sufficient clearness the pleader's intention to put all the allegations of the complaint in issue, and is therefore a compliance with section 500 of the Code."

We have discussed these authorities, not because the pleading under consideration is ambiguous, but in order to show the development of the modern rule governing the construction of pleadings. Here there is no ambiguity, and not only is the purpose of the pleader clear, but the form of his denial is, both upon principle and authority, proof against criticism or attack. Therefore the defendant should have been permitted to introduce evidence bearing upon the issues raised by paragraph 2 of his answer, and the exclusion by the trial court of the evidence directed to those issues constituted error, which calls for a new trial.

Judgment reversed, and new trial ordered, with costs to appellant to abide event. All concur.

(122 App. Div. 492.)

CONNOLLY et al. v. CONNOLLY et al.

(Supreme Court, Appellate Division, Second Department. November 29, 1907.)

TRUSTS—RELEASE OF INCOME—TERMINATION—STATUTES.

LAWS 1897, p. 508, c. 417, § 3, provided that a beneficiary in a trust for the receipt of income of personalty, who was also entitled to a remainder in the whole or part of the principal fund, might release his interest in the income and thereby terminate the trust. Testator bequeathed the residue of his estate to his wife for life, remainder to his executor, in trust to divide such remainder into five equal parts and apply the income of each part to one of testator's five children, with power to dispose of the principal of one-fifth part of the estate to each of such children. The probate decree, by consent of all parties, construed the will to mean that none of the children should have the right or power to dispose of so much of the estate as was adjudged to be held in trust for such child. *Held* that, construing such decree to relate only to the power to assign during the lifetime of the beneficiary, so that each child had power of appointment respecting the share of which he was entitled to the income for life, the existence of the unexecuted power of appointment did not interfere with the vesting of the remainder limited on the trust estate, as expressly provided by Real Property Law, Laws 1896, p. 564, c. 547, § 31, so that each beneficiary was entitled to release to himself his interest in the income of his share and thereby terminate the trust.

Submission of controversy on agreed statement of facts, as authorized by Code Civ. Proc. § 1279, between William A. Connolly and another and Daniel Connolly, individually and as trustee of the last will of Patrick Connolly, deceased, and others. Judgment for plaintiffs.

Argued before WOODWARD, JENKS, HOOKER, RICH, and MILLER, JJ.

John J. Fitzgerald, for plaintiffs.

William D. Veeder, for defendants.

MILLER, J. This is a submitted controversy. Patrick Connolly died December 18, 1898, leaving a last will and testament, made October 27, 1897, containing, among others, the following provisions:

"Third. I give, devise bequeath all the rest, residue and remainder of my estate to my beloved wife Catharine for and during her natural life.

"Fourth. On the decease of my wife Catharine I give, bequeath and devise my estate as follows: I direct my executor to convert all my estate into personalty and to take the same into the possession of my said executor, which I hereby give and bequeath to him upon the following trusts: To apply and divide the income of said estate equally for the benefit of my children during their life with power of disposition to each of my children of one-fifth thereof, it being my intention that my executor and trustee, Daniel Connolly, shall divide my estate into five equal parts on the decease of my wife, Catharine, and to apply the income of one said fifth parts to my son Daniel during his life with power of the disposition of the principal of a one-fifth part to him and also the same power of application of the income and disposition of principal of one-fifth part of my estate to each of my children Thomas, William and Catharine Connolly and Mary Ellen McDonnell, respectively."

The testator's estate consisted solely of personalty. By the consent and with the acquiescence of all parties the will was construed

by the decree admitting it to probate. The following is the material provision of said decree, viz.:

"And it is further adjudged and decreed that the testator meant and intended that none of said children aforesaid, namely, Daniel, Thomas, William, and Catharine Connolly and Mary Ellen McDonnell, should have the right or power to dispose of so much of the said estate as is adjudged to be held in trust as aforesaid for such child."

The testator was survived by his wife and said five children. The widow died intestate March 15, 1900. On August 29, 1906, said children executed assignments so as to vest in each all the right, title, and interest of the others in and to the one-fifth part of the estate of which each was respectively entitled to the income during his life, and then each released to himself, as the person entitled to the remainder, his interest in the income of said fifth part; and the plaintiffs now ask that the trustee pay over to them their respective shares, on the theory that the trust estate has terminated and become merged in the remainders, pursuant to Laws 1897, p. 508, c. 417, § 3.

The contention of the plaintiffs is that the testator failed to dispose of the residue of the trust estates created by him, and that such residue vested in his next of kin as of the time of his death; while the trustee contends that there was no intestacy, and that he would not be protected in the event of the exercise of the power of disposition.

The provision of said section 3, c. 417, p. 508, of the Laws of 1897, which allowed a beneficiary in a trust for the receipt of the income of personal property, who was also entitled to a remainder in the whole or a part of the principal funds so held in trust, to release his interest in said income and thereby to terminate the trust, was repealed by chapter 87, p. 239, of the Laws of 1903; but said repealing act contained the following provision, viz.:

"Sec. 2. The provisions of this act shall not impair or affect any rights existing at the date of its passage; but the act hereby amended shall have the same force and effect with respect to such existing right as though this amendatory act had not been passed."

It is not disputed that, if the plaintiffs had the right to terminate the trust prior to the passage of said chapter 87 of the Laws of 1903, said right was saved by section 2, quoted supra. In effect the testator created five separate trusts, and gave each of his children the whole income of one. If, therefore, each had an absolute and indefeasible title to the whole or a part of the remainder, not subject to be divested or to diminution, he had the right to terminate the trust. See *Matter of United States Trust Co.*, 175 N. Y. 304, 67 N. E. 614; *Cook v. Straiton*, 41 Misc. Rep. 206, 83 N. Y. Supp. 964, affirmed on opinion below 96 App. Div. 625, 89 N. Y. Supp. 1102. We must determine, therefore, the nature of the plaintiffs' interests in the undisposed of remainders.

According to the literal wording of the provision of the decree construing the will, quoted supra, the life beneficiaries had no power under the will to dispose of said remainders. If that is deemed to be the construction adopted by said decree, the language of the will assuming to confer the power of disposition must be disregarded, and

in that case there can be no doubt that the next of kin of the testator took vested remainders as of the time of his death. Both sides to this controversy assume, however, that the provision of said decree construing the will only related to the power to assign in the lifetime of the beneficiary, and hence that each had the power of appointment by will respecting the share of which he was entitled to the income for life. We will therefore treat said decree as having that effect, without deciding that it does have. The testator's next of kin, therefore, took either vested or contingent remainders. The fact that the five children were also beneficiaries of the trusts created for their respective lives is no obstacle to their taking vested remainders, limited upon said trust estate. *Doane v. Mercantile Trust Co.*, 160 N. Y. 494, and cases cited on page 499, 55 N. E. 296. Nor does the existence of an unexecuted power of appointment interfere with the vesting of the remainder. *Doe v. Martin*, 4 T. R. 39-65; *Smith v. Lord Camelford*, 2 Ves. Jr. 697; *Sandford v. Blake*, 45 N. J. Eq. 248, 17 Atl. 812; *Grosvenor v. Bowen*, 15 R. I. 549, 10 Atl. 589; *Root v. Stuyvesant*, 18 Wend. 257-268.

Section 31 of the real property law (Laws 1896, p. 564, c. 547) provides:

"The existence of an unexecuted power of appointment does not prevent the vesting of a future estate, limited in default of the execution of the power."

So far as this question is concerned, it cannot matter that the remainders are not created by the will, but arise by operation of law. In default of the execution of the power of appointment there would certainly be intestacy, and the next of kin, who happen in this case to be the beneficiaries, would take precisely as though the will had in terms limited remainders to them in default of the execution of said powers. There is no uncertainty, either as to the persons to whom or the event upon which the remainders are limited. See section 30 of the real property law (Laws 1896, p. 564, c. 547). The persons who take are the next of kin of the testator, and the event on which the remainders are by operation of law limited is the determination of the precedent estates, and, as we have seen *supra*, said life beneficiaries may take remainders vested in interest which can only vest in possession in their heirs or next of kin, their devisees, legatees, grantees, or assigns. The only possible effect, therefore, of the power of disposition conferred by the will, is to render it possible for the remaindermen to divest their own interest by the execution of said power; but it seems clear that the power is merged in or absorbed by the greater estate. Having vested remainders, they have the absolute power of disposition thereof, and their estate is not cut down by the superfluous provision of a will purporting to confer a power. Chancellor Kent said (referring to the English cases) that the weight of authority is in favor of the conclusion that such a power may subsist with and qualify the fee, although the good sense and reason of the thing is the other way, but that provision is made by the New York Revised Statutes for the extinguishment of the power in such case. 4 Kent's Com. 349. And see section 131 of the real property law; also *Grosvenor v. Bowen*, *supra*. It comes to this, then, that

under the law as it was at the time of the making of this will, and of the death of the testator and of his widow, the beneficiaries of the trusts created by him had the right to take the entire estate, notwithstanding his intention to the contrary. He could have prevented this by bequeathing remainders limited in default of the execution of the power of appointment.

The plaintiffs should have judgment in accordance with the terms of the submission. All concur.

PEOPLE ex rel. ALTHAUSE v. GIROUX CONSOL. MINES CO.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. **MANDAMUS—CORPORATIONS—STOCKHOLDERS—RIGHT TO INSPECT BOOKS.**

Stock Corporation Law, Laws 1892, p. 1840, c. 688, § 53, as amended by Laws 1897, p. 314, c. 384, § 8, requiring every foreign stock corporation, having an office for the transaction of business in the state, to keep therein a stock book, which shall be open daily during business hours for the inspection of its stockholders and judgment creditors, etc., does not specifically confer the right to make extracts from such stock book; and where it affirmatively appears that an application for inspection is not made in good faith, for the protection of the applicant's interest in the corporation, but that his only purpose is to obtain a mailing list to use for circularizing purposes in selling stocks of other corporations in connection with his business as a broker, a writ of mandamus will not issue to aid him.

2. **SAME—DISCRETION OF COURT.**

There is no express provision of law authorizing the issuance of a writ of mandamus to enforce the right of a stockholder to inspect the stock book of a foreign corporation, conferred by Stock Corporation Law, Laws 1892, p. 1840, c. 688, § 53, as amended by Laws 1897, p. 314, c. 384, § 3; and, when application is made under that section, whether the writ will issue rests in the sound discretion of the court.

Houghton, J., dissenting.

Appeal from Special Term.

Mandamus by the people, on the relation of Walter Althause, to compel the Giroux Consolidated Mines Company to allow the inspection of its stock book. From an order directing a peremptory writ, defendant appeals. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, HOUGHTON, and SCOTT, JJ.

Holmes V. M. Dennis, Jr., for appellant.

James A. Allen, for respondent.

McLAUGHLIN, J. This appeal is from an order directing that a peremptory writ of mandamus issue commanding the appellant, its officers, directors, agents, and servants, and each of them, forthwith to exhibit to the relator at its office in the city of New York the stock book of the appellant, and to allow the relator, during business hours at such office, to inspect and make extracts from such book, and to copy therefrom, if he so desires, the names and places of residence of its stockholders and the number of shares of stock

held by them respectively. The appellant is a foreign corporation organized under the laws of the state of Delaware. It never applied for a license to do business within the state of New York, and in fact does no business in this state, except that it maintains an office in the city of New York for the convenience of its stockholders in transferring stock and also for the convenience of certain of its officers. Its entire capital stock consists of 1,000,000 shares, of the par value of \$5 each. The relator on the 25th of March, 1907, had transferred to him 10 shares of such stock, and two days later he appeared at the office of the corporation in the city of New York and informed the person in charge that he was the owner of a certain certificate, which he then exhibited, and demanded permission to inspect the stock book and make extracts therefrom. The person in charge of the office informed him that the stock book was open at all times for the inspection of stockholders, but that he would like to take advice as to whether extracts could be made from it. The relator thereupon left, and returned the following day, when the same information was given him. A short time thereafter he brought two actions in the Municipal Court of the City of New York to recover the penalty provided in section 53 of the stock corporation law (Laws 1892, p. 1840, c. 688, as amended by Laws 1897, p. 314, c. 384, § 3)—one against the corporation, and the other against the secretary personally. In each of these actions he was unsuccessful; the complaints being dismissed upon the ground that he was endeavoring to make use of the right of inspection for an ulterior purpose.

On the 6th of May, 1907, he again appeared at the office of the corporation in the city of New York and made a similar demand. The stock book was produced for his inspection and he made numerous extracts therefrom; but, when the person in charge of the office became convinced he intended to make a complete transcript of the book, he took it away. On the following day he again appeared and made a similar demand, and he was then informed that he could inspect the book, and, if there were any points upon which he desired specific information, he could make reasonable extracts from it, but that, unless he gave some good reason for his purpose in doing so, he would not be permitted to make a complete transcript. He thereupon left the office, and within a few days thereafter brought two other actions—one against the corporation, and the other against the secretary—to recover the penalty provided in section 53 of the stock corporation law. In one of these actions his object in desiring to make the extracts was established by his own testimony. He testified that he was a broker, but had no office; that he had been in the business of offering stocks in various corporations for sale for several years, and that was still his business; that he wanted a complete list of the stockholders of the appellant to use for circularizing purposes in the sale of stocks in other companies in which he was interested, and that was the only purpose for which he wanted it. In an affidavit made by him, used on the motion, he stated that he desired to inspect and make extracts from the stock book, so that he could communicate with the stockholders by mail with respect to

negotiating loans upon their stock as collateral security, and also with respect to dealing in the stock, as well as stocks of other companies. It also appeared from papers used upon the motion that the corporation notified him, in writing, prior to the institution of this proceeding, that the stock book was open for his inspection, and, if he would state in writing his reason for wanting to make extracts, he would be permitted to make the same, if, in the judgment of the directors of the corporation, his reasons were not inimical to the rights of the stockholders.

Upon the foregoing facts I am of the opinion that the application for a peremptory writ of mandamus should have been denied. It is to be noted that the statute does not contain any provision as to making extracts from the stock book. The language of the statute is:

"Such stock book shall be open daily during business hours, for the inspection of its stockholders and judgment creditors, and any officer of the state authorized by law to investigate the affairs of any such corporation."

The omission of a provision in this section as to making extracts is somewhat significant, when the section is read in connection with the one relating to the inspection of a stock book of a domestic corporation. That section (29) provides:

"The stock book of every such corporation shall be open daily, during at least three business hours for the inspection of its stockholders and judgment creditors, who may make extracts therefrom."

The statute, therefore, under which the relator claimed the right to make extracts, did not confer upon him specifically such right; but, if it be assumed that the right of inspection which the statute did give him carried with it the right to make such extracts as would enable him to retain the information disclosed by the inspection (*People ex rel. Lorge v. Consolidated National Bank*, 105 App. Div. 409, 94 N. Y. Supp. 173), then the application should have been denied, because it affirmatively appears that his desire to make extracts was for an ulterior purpose and in no way connected with his interest in the corporation itself or its management. There is no express provision of law authorizing the issuance of a writ of mandamus to enforce the provisions of section 53 of the stock corporation law, and, when application is made under that section, whether such writ will issue rests in the sound discretion of the court to which the application is made. *Matter of Steinway*, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461. When the court can see from the facts presented, or it can fairly be inferred therefrom, that the application is not made in good faith for the protection of the applicant's interest in the corporation, but for some ulterior or improper purpose, then the writ should be refused. *Taylor v. Citizens' Nat. Bank*, 117 App. Div. 348, 101 N. Y. Supp. 1039. Here, it is perfectly apparent that the application is not made in good faith, but for an ulterior purpose. The relator seeks to make extracts from the stock book, not for the purpose of protecting his interest in the corporation, but to further his own personal interest in matters in no way connected with the corporation or its management.

The order appealed from, therefore, should be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs.

INGRAHAM and SCOTT, JJ., concur. PATTERSON, P. J., concurs in result. HOUGHTON, J., dissents.

(56 Misc. Rep. 508.)

ALTHAUSE v. GIROUX.

SAME v. GIROUX CONSOL. MINES CO.

(Supreme Court, Appellate Term. November 29, 1907.)

1. CORPORATIONS—STOCKHOLDERS—RIGHT TO INSPECT RECORDS.

Under Stock Corporation Law, Laws 1892, p. 1840, c. 688, § 53, providing that the transfer agent of a foreign corporation shall during usual business hours exhibit to a stockholder, when required by him, the transfer book and a list of stockholders of the corporation, if in his power to do so, a stockholder is entitled to make a detailed copy of the list of stockholders, in the absence of a showing that the purpose for which the inspection was sought was illegitimate or ulterior.

2. SAME—BASIS OF RIGHT.

The right to inspect the general books of a corporation is founded on the common law, and rests in the discretion of the court, while the right to inspect the stock book is statutory and absolute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 685.]

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

Actions by Walter Althause against Guy E. Giroux and against the Giroux Consolidated Mines Company. Judgments for defendants, and plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

James A. Allen, for appellant.

Dennis & Buhler, for respondents.

LEVENTRITT, J. These appeals may be considered together, as the evidence introduced was the same in both cases. The plaintiff sued the defendant company and the individual defendant, who was its secretary, to recover two several penalties of \$250 each under section 53 of the stock corporation law (Laws 1892, p. 1840, c. 688), which provides:

"The transfer agent in this state of any foreign corporation whether such agent shall be a corporation or a natural person, shall, at all times during the usual hours of transacting business, exhibit to any stockholder of such corporation, when required by him, the transfer book, and a list of the stockholders thereof, if in his power to do so, and for every violation of the provisions of this section, such agent, or any officer or clerk of such agent, shall forfeit the sum of two hundred and fifty dollars, to be recovered by the person to whom such refusal was made."

The only point at issue is whether the plaintiff had, in addition to the right of inspection given by the statute, the right to make such

extracts from the stock book as he saw fit. It is clearly established by admission or competent proof that the defendant is a foreign corporation, other than a moneyed or railroad corporation, having an office for the transaction of business in this state; that the plaintiff is a stockholder owning 10 shares of stock; that on the 28th day of March, 1907, he made due oral and written demand during business hours to inspect and make extracts from the stock book; and that the right to inspect was conceded and that to make extracts was denied. The defendant, according to the testimony of its officer, offered to allow "minor extracts" to be taken, but refused to permit a detailed copy of the list of the stockholders to be made. Judgment below went for the defendant.

We are of the opinion that this was error. There is nothing, in these records at least, to show that the purpose for which the inspection was sought was illegitimate or ulterior. In his written demand the plaintiff, in affidavit form, swore that his purpose was not inimical to the corporation, and in the absence of some more substantial evidence we should not be justified in ignoring the mandatory direction of the statute. There is a clear distinction between the right to inspect the general books of a corporation, which is founded on a common-law basis, the granting or withholding of which rests in the sound discretion of the court (*Matter of Steinway*, 159 N. Y. 264, 53 N. E. 1103, 45 L. R. A. 461; *People ex rel. Callanan v. K.*, etc., R. R. Co., 106 App. Div. 350, 94 N. Y. Supp. 555; *Matter of Coats*, 75 App. Div. 567, 78 N. Y. Supp. 429), and the right to inspect the stock book, which is founded on statute and is absolute (*People ex rel. Clason v. Nassau Ferry Co.*, 86 Hun, 128, 33 N. Y. Supp. 244). It has been affirmatively held that the word "inspection," as used in section 53 of the stock corporation law, was broad enough to authorize the making of extracts. *Fay v. Coughlin-Sanford Switch Co.*, 47 Misc. Rep. 687, 94 N. Y. Supp. 628; *People ex rel. Lorge v. Consol. Nat. Bank*, 105 App. Div. 409, 94 N. Y. Supp. 173. Thus, in the *Lorge Case*, the Appellate Division of this department reversed an order denying a peremptory writ of mandamus to a stockholder of a national bank located in the state of New York, who sought an inspection for the purpose of making a list of the stockholders. The clear import of that decision is that under federal and state statutes—under section 5210 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 3498], as well as under section 29 of our stock corporation law, referring to domestic corporations, and under section 53, referring to foreign corporations—the right to make extracts is included in that of inspection. "The right of inspection, therefore, carries with it the right to make such extracts from the books as will enable the shareholder to retain the information disclosed by the inspection. Doubtless the court has power to withhold an inspection for an illegitimate purpose, and may regulate the time when the inspection shall be made. But where it is sought for a legitimate purpose, and the application is made during business hours, the right to such inspection is mandatory." It has been held in the third department that the motives of a stockholder in inspecting the stock

book alone are immaterial. *People ex rel. Callanan v. K., etc., R. R. Co., supra.* But this statement would seem to be too broad under the rule of the *Lorge Case*. It rests on a decision of this department in *People ex rel. Gunst v. Goldstein*, 37 App. Div. 550, 56 N. Y. Supp. 306, which, however, is not authority for the proposition; the court in that case merely holding that the motives of a president of a corporation were immaterial, as he was entitled to an inspection as a matter of right by virtue of his office.

In the cases at bar there is nothing impugning the plaintiff's motives to the extent of showing illegitimacy of purpose. It is claimed that he became a stockholder within 10 days of his demand. But in the case of *Fay v. Coughlin-Sanford Switch Co., supra*, which was also an action for a penalty arising under the same section, this court affirmed a judgment where the plaintiff had become a stockholder only the day previous to his demand for an inspection. In the *Fay Case* the decision turned in part on the right to make extracts, and even were there no other authority we should regard it as controlling.

Judgment reversed, and new trial ordered, with costs to appellant to abide event. All concur.

(56 Misc. Rep. 511.)

ALTHAUSE V. GIROUX.

SAME V. GIROUX CONSOL. MINES CO.

(Supreme Court, Appellate Term. November 29, 1907.)

CORPORATIONS—STOCKHOLDERS—RIGHT TO INSPECT RECORDS—PENALTY FOR REFUSAL.

In an action by a stockholder to recover the penalty prescribed by Stock Corporation Law, Laws 1892, p. 1840, c. 688, § 53, requiring the transfer agent of a foreign corporation to permit stockholders to inspect certain of its records, for a refusal of a corporation to allow him to make a complete transcript of its stock book, it appeared that plaintiff had previously brought other actions against the company and its secretary for the same penalty, and without waiting for a decision had repeated his demand for an inspection, and that he had in the four months preceding the institution of these suits brought 14 different actions against other companies for a like penalty. Plaintiff admitted that he desired a list of the stockholders for circularizing stocks in other companies in which he was interested. *Held*, that plaintiff was not acting in good faith as a stockholder in his desire to transcribe the records, and that he was not entitled to recover for the refusal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 674-685.]

Appeal from Municipal Court, Borough of the Bronx, Second District.

Actions by Walter Althause against Guy E. Giroux and against the Giroux Consolidated Mines Company. Judgments for plaintiff, and defendants appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Dennis & Buhler, for appellant.

James A. Allen, for respondent.

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LEVENTRITT, J. These appeals may be considered together, as the evidence introduced was the same in both cases. They arise out of a refusal of a second demand made by the plaintiff for an inspection and permission to make extracts of the defendant company's stock book. The law applicable has been sufficiently set out and applied in *Althause v. Giroux* (No. 1) and *Althause v. Giroux Consolidated Mines Co.* (No. 1) 107 N. Y. Supp. 191, decided at this term. On these appeals, however, the records disclose facts which call for the denial of a recovery. In the records in the former cases there was nothing presented which showed any impropriety of purpose. Now it appears that after the plaintiff had brought his first actions against the company and its secretary to recover the several penalties, and after those actions had been tried and were sub judice, the plaintiff renewed his demand for an inspection. The trials in actions numbered 1 were had on May 2d. Without awaiting the court's decision, the plaintiff made a further demand on May 6th. He was permitted on that day to inspect and to make extracts for over an hour. On May 7th he renewed his demand for a further inspection; and, it then appearing that he desired to make a complete transcript of the stock book, his request was refused, unless he should state the purpose for which he sought the transcript. This the plaintiff refused to disclose, stating merely that he did not seek it for a purpose hostile to the interests of the corporation. On the trial the plaintiff admitted on cross-examination that the only reason that a complete list of the stockholders was sought was to facilitate him in circularizing to effect the sale of stock of other companies in which he was interested. It also appeared affirmatively on this trial that the plaintiff had two other actions pending against the same parties (being actions numbered 1 already referred to), and that he had in the four months preceding the institution of these suits brought fourteen different actions against other companies to recover penalties under section 53.

We do not think that the judgments in favor of the plaintiff should be sustained. Plaintiff's purpose was not legitimate, so far as this second inspection was concerned. The issue between the parties was whether the plaintiff was entitled to a limited inspection, or one which permitted the making of unlimited extracts. Plaintiff's right to recover the penalties in the first actions turned on a question of construction. The judgments there would effectually determine his rights. To make a second demand on the eve of a decision of the prior actions indicates that the plaintiff was not actuated by an honest purpose as stockholder. His admission that he sought the list for no object related to the corporate business, and that he had 14 other suits of a similar character pending, make the language used by the Court of Appeals in *Cox v. Paul*, 175 N. Y. 328, 67 N. E. 586, pertinent, although the point at issue in that case was not the same as here. There the court says:

"It is quite inconceivable that under the circumstances the plaintiff should desire, in good faith, to see the stock book from day to day and every day. * * * One action for a penalty will subserve all the purposes of the statute, as well as an action for several. Penal statutes are not passed to enable

parties to make money by accumulating penalties. They are generally passed for the purpose of compelling the performance of some duty, public or private, and ordinarily one penalty will secure the end as effectually as many, especially when the penalty is as large as in this case."

The judgment should be reversed.

Judgment reversed, and new trial ordered, with costs to appellant to abide event. All concur.

(56 Misc. Rep. 465.)

GHERSIN v. THUOR. BLECHNER et al. v. SAME. GOULD et al. v. SAME. COHEN v. SAME.

(Supreme Court, Appellate Term. November 29, 1907.)

1. APPEAL—RIGHT OF REVIEW—"PARTY AGGRIEVED."

A judgment debtor sold real property, and under agreement with the purchaser part of the purchase money was deposited with trustees to hold for 90 days as security for the payment by the vendor of liens on the premises sold. In proceedings supplementary to execution, before the expiration of the 90 days, in which one of the trustees was examined under third party orders, the trustees were ordered to satisfy judgments out of the trust fund. *Held*, that the trustee examined was entitled to appeal under Code Civ. Proc. § 1294, providing that a "party aggrieved" may appeal, etc., except where the order of which he complains was made upon his default, since an unauthorized or illegal disbursement would render him liable to the purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 947-952.]

2. EXECUTION—SUPPLEMENTARY PROCEEDINGS—CONTROVERSY AS TO OWNERSHIP OF PROPERTY.

Where a judgment debtor sold real property, and under agreement with the purchaser part of the purchase money was deposited with trustees as security for payment of liens on the premises, and a substantial dispute arises in a proceeding supplementary to execution between the certain judgment creditors and the trustee, not a party to the proceeding as to the ownership of the fund, its payment to the creditors should not be directed by the court, but they should be remitted to an action through a receiver.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 1157.]

Appeal from City Court of New York, Special Term.

Proceedings supplementary to execution in actions by Morris Gher-sin, Max Blechner and another, William E. Gould and another, and Morris Cohen, judgment creditors, against Harry A. Thuor, judgment debtor. From orders in favor of the judgment creditors, William H. Chorosh, a trustee, appeals. Reversed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Aaronstamm & Chorosh, for appellant.

Julius Blumofe, for respondents.

LEVENTRITT, J. On May 17, 1907, the defendant, the judgment debtor, sold certain premises to one Samuel Abeloff, and pursuant to the agreement under which the transaction was finally consummated the sum of \$20,000 was paid over to William M. Seabury

and William H. Chorosh, as trustees, upon the understanding that of this amount \$2,000 was to remain in their hands for a period of 90 days from May 17th, during which time the defendant agreed to pay any liens which might be filed against the premises. It was further provided that, in the event the defendant failed to satisfy these liens, the trustees were to hold the \$2,000 until such time as the liens should be discharged of record. Of the sum deposited \$1,600 remains in the hands of the trustees. The plaintiffs in these actions recovered judgments against the defendant, which by a strange coincidence aggregate \$1,600. In proceedings supplementary to execution one of the trustees, Seabury, was examined under third party orders. Upon his testimony, showing the deposit of the \$20,000, the payment thereout of \$18,400, and a balance on hand of \$1,600, orders were issued requiring the trustees to show cause why the several judgments of these plaintiffs should not be satisfied out of the funds in their hands. Upon the return day William H. Chorosh appeared and filed an opposing affidavit, setting forth the agreement between the defendant and Abeloff, that the 90 days had not expired, and that liens aggregating \$3,000 had been filed against the premises, had not been discharged, and were then of record. Notwithstanding these facts, the court made orders requiring the trustees to satisfy the several judgments. From these orders, William H. Chorosh appeals.

Two questions are presented: (1) Has the appellant as trustee the right to appeal? And (2) is there merit in the appeal? We answer both in the affirmative.

The respondent argues that Chorosh is not, within the meaning of section 1294 of the Code, "a party aggrieved." We subscribe to a contrary view. The title to the fund in question is in the trustees, and they are directly responsible, in their management and disposition of the moneys, to the beneficiaries under the trust, one of whom is Abeloff, who was not a party to these proceedings. For an unauthorized or illegal disbursement the appellant would be answerable to Abeloff, for whose sole protection the trust fund was created. The orders requiring the appellant to pay the several judgments were absolute and mandatory. If they were unauthorized, and Chorosh obeyed them, he would not be relieved from Abeloff's claim to the full protection of the trust fund. It cannot be said, therefore, that the appellant was not aggrieved by the orders, or that they did not affect his property rights. *Locke v. Mabbett*, 2 Keyes, 457.

The answer to the second question is found in the statement of the legal principle applicable. Where a substantial dispute has arisen with respect to the ownership of a fund in the hands of a third party its payment will not be directed; the judgment creditor being remitted to an action through the medium of a receiver. Here not only is there a substantial dispute, but there is absolutely no proof that the judgment debtor has any present claim upon or right to the trust fund or any part of it.

The orders appealed from are reversed, with costs and disbursements, and the motions denied, with \$10 costs in one proceeding. All concur.

(53 Misc. Rep. 435.)

MARJORI V. WADDINGTON.

(Supreme Court, Appellate Term. November 29, 1907.)

DEPOSITIONS—APPLICATION FOR ORDER—REQUISITES IN GENERAL.

Code Civ. Proc. § 872, requires the affidavit in support of an application for a party's examination to show that his testimony is material and necessary for the party making such application, and General Rules of Practice, rule 82, requires this to be done by a specification of the facts showing that the examination is material and necessary. A tenant sued his landlord for damages by the collapse of the building rented. Upon an affidavit claiming that the landlord's possession and control of the building at the time of the collapse was material and necessary, and setting out facts to support such issue, the tenant procured an order directing the landlord to "be examined on behalf of plaintiff upon the issue in the case." *Held*, that the order should limit the examination to the single issue of possession and control, since an affidavit showing the materiality and necessity of an examination of an adverse party concerning but one of several issues does not justify an order for a general examination.

Appeal from City Court of New York, Special Term.

Action by Giuseppe Marjori against George Waddington. From a refusal to vacate or modify an order for defendant's examination before trial, he appeals. Order modified.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Robinson, Biddle & Ward, for appellant.

Wentworth, Lowenstein & Stern, for respondent.

LEVENTRITT, J. The plaintiff alleges that through the collapse on September 7, 1905, of the building No. 202 Grand street, of which he occupied the third floor, his goods were damaged. He ascribes his loss to the negligence of the defendant. The allegation in the complaint bearing upon the defendant's liability is as follows:

"Upon information and belief, that on or about the 7th day of September, 1905, the defendant was in possession and had control of the real estate and premises known as No. 202 Grand street, borough of Manhattan, city of New York, and received the rents and profits thereof."

By his answer the defendant admits the collapse of the building and the receipt by him of certain rents and profits from the premises; but he denies the other allegations of the complaint. The plaintiff procured an order for the examination of the defendant before trial. This appeal follows a refusal to vacate or modify that order.

The plaintiff's affidavit on which the order was based satisfied all the requirements of the Code (section 872) and the rule (rule 82, General Rules of Practice) regulating the taking of depositions. There is no suggestion of bad faith or of ulterior purpose. Therefore, under the salutary rule which now prevails, the plaintiff acquired the right to an examination. *Watt v. Feltman*, 111 App. Div. 314, 97 N. Y. Supp. 737; *Goldmark v. Electro-Galvanizing Co.*, 111 App. Div. 526, 97 N. Y. Supp. 1078; *McKeand v. Locke*, 115 App. Div. 174, 100 N. Y. Supp. 704; *Turck v. Chisholm*, 53 Misc. Rep.

110, 103 N. Y. Supp. 1095; Hill v. McKane, 115 App. Div. 537, 101 N. Y. Supp. 411; Shonts v. Thomas, 116 App. Div. 854, 102 N. Y. Supp. 324; Istok v. Senderling, 118 App. Div. 162, 103 N. Y. Supp. 13; Donaldson v. Brooklyn Heights R. R. Co., 119 App. Div. 513, 104 N. Y. Supp. 178.

The order, however, is too broad. The Code requires that the affidavit upon which the order rests shall contain the assertion "that the testimony * * * of such person is material and necessary for the party making such application"; and this requirement is amplified by the rule, which compels a justification of that assertion by a specification of "the facts and circumstances which show * * * that the examination of the person is material and necessary." In his affidavit the plaintiff makes no claim that the testimony sought to be adduced is either material or necessary, except as to the single issue—the defendant's "possession and control of the said premises at and prior to September 7, 1905"; and his specification of the facts and circumstances called for by the rule is likewise limited to that one issue. Notwithstanding that the plaintiff did not assert that there was occasion to take the defendant's deposition respecting any other issue, he procured an order which directed that the defendant "be examined on behalf of the plaintiff upon the issue in this action."

Papers which show the materiality and necessity of an examination of an adverse party concerning but one of several issues will not justify an order for a general examination. The Code permits the examination of an adverse party to the extent that the applicant proves such examination to be material and necessary, and not beyond. The order appealed from should therefore be modified, so as to confine the examination to the facts with respect to the defendant's possession and control of the premises No. 202 Grand street at and prior to September 7, 1905.

Order, as so modified, affirmed, with disbursements, but without costs. All concur.

LOWTHER v. SULLIVAN.

(Supreme Court, Appellate Term. November 29, 1907.)

DEPOSITIONS—ORDER FOR COMMISSION—SUFFICIENCY OF AFFIDAVIT.

An affidavit for a commission, made by plaintiff's attorney, which does not give any reason why it was not made by plaintiff, and states merely the conclusion of the affiant as to the materiality of the testimony sought, unsupported by any specification of facts, is insufficient, under Code Civ. Proc. § 887, providing for a commission where it appears by affidavit, on the application of either party, that the witness' testimony is material to the applicant.

Appeal from City Court of New York, Special Term.

Action by Clarence E. Lowther against James E. Sullivan. From an order to issue a commission on interrogatories to examine a witness, defendant appeals. Reversed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

William Klein, for appellant.

Warren, Warren & O'Beirne, for respondent.

LEVENTRITT, J. The plaintiff procured an order to issue a commission on interrogatories to examine one John Stuart at London, England. The affidavit upon which the order is based was made by one of the attorneys for the plaintiff, and the facts therein stated and upon which the court relied in order to predicate its conclusion are as follows:

"That deponent is fully conversant with all the facts in relation to this case, and has full knowledge in reference to the materiality and necessity of all of the witnesses in behalf of the plaintiff herein, and that the said plaintiff has fully and fairly stated the case in said action to this deponent, his counsel, who resides at 108 Central Park West, and has fully and fairly disclosed to him facts which said plaintiff expects to prove by the witness John Stuart, who resides at Savoy Mansions, in the city of London, in the kingdom of Great Britain; that the testimony of said John Stuart is necessary and material to the plaintiff in the prosecution of this action; that the said John Stuart is not within the state of New York, but the said John Stuart is at the Savoy Mansions, in the city of London, England."

We think that under the authorities this affidavit was totally insufficient to justify the order. In the first place, it was made by the plaintiff's attorney, and no reason is given why it was not made by the plaintiff. Furthermore, no facts are presented from which it may be said, under section 887 of the Code, that the testimony sought is material. There is nothing but the conclusion of the affiant, unsupported by any specification of fact. These omissions have been declared to be fatal to an application of this nature, and we must be governed by the principles of practice which have been enunciated (*Fox v. Peacock*, 97 App. Div. 500, 90 N. Y. Supp. 137), and which call for a reversal of the order appealed from.

Order reversed, with \$10 costs, and motion denied. All concur.

(56 Misc. Rep. 587.)

PARKER v. SIMPSON.

(Supreme Court, Appellate Term. November 29, 1907.)

INSURANCE—LIFE POLICY—PREMIUM NOTES—LIABILITY OF INSURED.

The fact that a life policy authorized the company to declare it void for nonpayment of a premium note did not absolve the insured from liability on the note, where the company elected to continue the policy.

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by John Alley Parker against Fred C. Simpson, Jr. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Samuel M. Richardson, for appellant.

Randolph M. Newman, for respondent.

ERLANGER, J. On the 19th of March, 1906, the Union Central Life Insurance Company of Cincinnati, Ohio, duly authorized to transact its business in this state, issued its policy of insurance to the defendant for and during his life, and thereby, upon his death, agreed to pay to his wife, if living, otherwise to the executors, administrators, or assigns of the insured, the sum of \$2,000. The policy recites, among other things, that in consideration of the payment of \$84.32 on its delivery, and of the payment of the premium annually thereafter of \$60.64, beginning on the 30th day of March, 1908, at noon in every year, during the lifetime of the insured, or until 19 such annual premiums shall have been paid, and of the payment, when due, of any and all notes given for premiums or parts of the same, it insures the life of the defendant. The policy was issued subject to a number of conditions—among others, the two following:

“Application for Insurance.

“(1) I agree that any policy which may be issued under this application shall not be valid until the first premium is paid to the company, or its authorized agent, and the receipt therefor countersigned by the agent and delivered during my life.”

“Conditions.

“(1) Payment of Premium. The failure to pay any of the first three years' premiums, or any note, or interest upon the notes, given to the company therefor, on or before the day upon which such premiums, notes, or interest becomes due, shall avoid and nullify this policy, without action on the part of the company or notice to the insured or beneficiary, and all payments made upon this policy shall be deemed earned as premiums during its currency. Any and all notes, with their conditions, which may be given for premiums or loans upon the securing of this policy, are hereby made a part of this contract of insurance.”

Contemporaneously with the issuing and delivery of said policy, on March 19, 1906, there was paid on account of the \$84.32, the first payment mentioned therein, the sum of \$23.86 in cash, and at the same time there was executed and delivered by the defendant to the company his promissory note, dated on that day, whereby he agreed to pay to it, on or before March 30, 1907, the sum of \$60.46, without discount, at the New York office of the company, “being for premium on policy No. 317,798 in said company, due March 30, 1907.” The note contained this additional clause:

“Said policy, including all conditions therein for surrender, or continuance as a paid-up term policy, shall, without notice to any party or parties interested therein, be null and void on the failure to pay this note at maturity, with interest at 6 per cent. per annum.”

When the payment mentioned was made and the note delivered, plaintiff received his policy, together with a receipt for the first premium of \$84.32, subject to the conditions mentioned in the note and receipt. Before the note became due, plaintiff, acting for the company, caused to be sent to the defendant a notice to the effect that the note for premium due on March 30, 1907, would then mature, and that prompt payment thereof “is of vital importance to your insurance.” On March 30, 1907, the defendant did not meet his note, but, instead, wrote a letter to the plaintiff, in which, among other things, he said:

"I have paid for protection up until March 30th of this year, and now return by special messenger, policy No. 817,798, with instructions to cancel same on that date."

Plaintiff promptly, and on the same day, returned the policy, and requested payment of the note in full or in part, as was suggested in a prior letter of the same date. The defendant refused to retain the policy and again returned it to plaintiff. The defendant defaulted in meeting the note, and thereupon this action was brought to recover the amount due thereon. Many defenses are set up in the answer. For example, it is pleaded that plaintiff is not a bona fide holder for value; that the policy lapsed by force of its own terms on March 30, 1907, and that defendant after that date was entitled to none of the benefits thereunder; that because the first premium was not paid the policy never became operative, and that there is a complete failure of consideration; and that plaintiff at no time during the year 1906 was authorized to act as agent, not having procured a license from the Superintendent of Insurance as required by the laws of this state. The defenses were held by the court to be untenable, and plaintiff recovered. Defendant appeals.

From the foregoing facts it is clear that by the contract between the parties nothing was to be paid by way of premium until the 30th of March, 1908, except the balance due on the premium mentioned in the note. The delivery of the policy and receipt for the first year's premium was not only a good and valid consideration for the note, but the defendant was absolutely protected under the terms of the policy, and, had he died during the life of the note, his beneficiary would have become entitled to the amount of the insurance. The contention of the defendant that under the conditions of the policy above referred to, and of the note, the policy lapsed upon the nonpayment of the premiums and voided itself by its own terms, begs the question. The argument must necessarily be predicated upon the theory that either party could declare the contract at an end because one of them reserved the right to do so under certain conditions. If this were true, few contracts containing conditions could be enforced. One of the maxims in the law is that no one shall be permitted to take advantage of his own wrong. This is exactly what was sought to be done here. The defendant breaks his contract, and then claims that because the company could have terminated the policy, but did not elect to do so, he may refuse to pay the sum owing from him. All the conditions above recited, whether in the policy, the note, or the receipt, were for the benefit of the company, and, despite the rigor of the terms, the company had the right to continue the policy in force if it elected to do so. In this case it made its election to continue it. And we can see no way by which the defendant can escape liability. The case may be illustrated by the following example: If A. covenants with B. to perform certain acts, and it is stipulated that for the breach of any of them the contract shall fail, can it be said that A. may deliberately violate the terms of the compact, and thus escape the penalty of such breach? If the answer be in the affirmative, the law would resolve itself into a positive absurdity. The analogy between the case at bar and the illustration is readily apparent. Here

the insurance company determined to keep the policy alive and waived its right to cancel it, and it does not lie in the mouth of defendant to say:

"You shall not or cannot do it, because you have covenanted with me, if I do not pay my note, my policy shall be void."

The defendant further urges upon us that the acceptance of the sum of \$23.86 in cash shows that the policy was "term rated"; that is to say, that it was in force from March 16, 1906, when it was issued, until March 30, 1907, when the note became due. The plaintiff, called as a witness, testified that the 20-year term began to run from March 30, 1907; and it is argued, from that, that the cash payment was for protection up to that time. But nowhere is it shown why the premiums from March 19, 1906, to March 30, 1907, a little over a year but \$23.86, when the annual premium in the policy is fixed at \$84.32, when the annual premium in the policy is fixed at \$84.32. It is denied by plaintiff that the policy was "term rated," so the difference in rate is wholly a matter of conjecture. It may be premium rate of \$84.32 was agreed upon for the first two years consideration of the acceptance of the policy.

The errors complained of by the exclusion of proof are sufficient moment to require us to reverse the judgment. The suggestions sought to be elicited were wholly immaterial to the case. Besides, parol evidence was not competent to vary the terms of the note.

The judgment must be affirmed, with costs.

GILDERSLEEVE, P. J., and LEVENTRITT, J., concur in

(56 Misc. Rep. 541.)

PARKER v. MURPHY.

(Supreme Court, Appellate Term. November 29, 1907.)

INSURANCE—LIFE POLICY—CANCELLATION BY COMPANY—RESCISSION OF ACTION—LIABILITY OF INSURED.

Where a life insurance company elected, with knowledge of facts, to cancel a policy for nonpayment of a premium note, and demanded payment for the proportionate part of the note for the time the insurance was in force, it could not thereafter rescind its action and recover the full amount of the note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 423.]

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by John Alley Parker against Henry A. Murphy. Judgment for plaintiff, and defendant appeals. Modified, and, as modified, affirmed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Samuel M. Richardson, for appellant.

Randolph M. Newman, for respondent.

ERLANGER, J. The facts in this case, with the exception to be hereafter noted, are in all respects similar to those raised in the case

of John Alley Parker v. Fred C. Simpson, Jr. (decided at this term) 107 N. Y. Supp. 199. In that case an appeal was taken from a judgment in plaintiff's favor, which was affirmed by us upon the ground that the insurance company had the right either to lapse the policy for the nonpayment of premiums due thereon, or to continue it in force, and, having elected to continue it, the note sued upon was enforceable. In this action the note given, the policy issued, and the receipt annexed thereto are the same in form; the only difference being in the dates and amounts. The plaintiff herein obtained his policy from the same company, and at the time of receiving it delivered his note to the order of the company, and thereby promised to pay \$99.93 on or before January 15, 1907. When the note matured he refused to pay it, and thereupon this action was brought to recover the amount due thereon. His answer to the complaint sets up all the defenses which were interposed in the Simpson Case, and after a trial of the issues which he tendered he was defeated, and judgment was awarded to the plaintiff for the full amount and costs. From this determination he appeals.

The only new question which we are called upon to decide is whether or not the company exercised its election to lapse defendant's policy before this action was brought, and, if it did so, whether or not it is bound by it. It appears that after the defendant received notice that his premium note would become due on January 15, 1907, he ignored the same, and thereafter some correspondence passed between him and the plaintiff. On February 21, 1907, plaintiff wrote as follows:

"Dear Sir: In connection with the note that you are due the Union Central, past due and unpaid, (sic) beg to call upon you for a settlement of the note in question for the proportionate part of the note for the time the insurance was in force. I wish to treat you fairly in this matter, and would like to have you make application for reinstatement of your policy and pay the note in full; but, if you do not wish to do this, then I ask for a settlement as outlined above.

"Yours very truly,

John Alley Parker, General Agent."

On February 26, 1907, plaintiff again wrote to the defendant, and among other things said:

"I beg to state to you that, unless you pay for the time that you have been insured and make payment by Thursday of this week, I shall bring suit against you. I don't want to do this, would like to have you make application for reinstatement of your policy and continue same; but, inasmuch as you don't seem to look at it in this way, I see no other course open, other than outlined in this letter."

On April 27, 1907, defendant wrote to plaintiff:

"Dear Sir: I beg to acknowledge the receipt of your favor of February 21st, in which you call for a settlement of the proportionate part of note for insurance which lapsed on January 15th by reason of nonpayment of same. I therefore inclose my check for \$4.41, including interest.

"Yours truly,

Henry A. Murphy."

On the same day plaintiff replied:

"I regret very much that I am compelled to return you herewith the check which you sent me.

"Yours truly,

W. M. Miller, Cashier."

The plaintiff, called as a witness on behalf of defendant, testified that the policy lapsed on January 15, 1907. We are of the opinion that the company elected not to further continue the policy, and lapsed it on January 15, 1907. Having once elected to so treat it, and the defendant having acted on that election, and having sent to the company his check for the proportionate amount demanded, the company is bound by the election. The mere statement in the letter of February 26, 1907, that, if the note was not paid by Thursday following, suit would be brought, did not rescind its act of election previously exercised. The threat to sue was not made to cover the amount of the note, but for only "the proportionate part of the note for the time the insurance was in force." The request in both letters that application be made for reinstatement clearly established that the company no longer treated the policy as binding upon it. This election before suit was made with full knowledge of its rights, and it may not now recall it. The remedies of the company were wholly inconsistent. Of the two, it could treat the policy as continuing and recover on the note, or it could lapse the policy and forfeit the premium due. It preferred the latter remedy, and it must now abide by it. In *Heidelberg v. Bank*, 87 Hun, 126, 33 N. Y. Supp. 800, the court said:

"An election once made is determined forever. *Moller v. Tuska*, 87 N. Y. 166. It may be determined by any decisive act made with full knowledge of all the facts. *Fowler v. Bowery Savings Bank*, 113 N. Y. 450, 21 N. E. 172, 4 L. R. A. 145, 10 Am. St. Rep. 479. And the bringing on an action to enforce one of the remedies sufficiently evidences an election. *Conrow v. Little*, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693."

In *Mills v. Parkhurst*, 126 N. Y. 89-93, 26 N. E. 1041, 1042, 13 L. R. A. 472, it was said:

"The doctrine of election, usually predicated of inconsistent remedies, consists in holding the party, to whom several courses were open for obtaining relief, to his first election, where subsequently he attempts to avail himself of some further and other remedy not consistent with, but contradictory of, his previous attitude and action upon his claim. The basis for the application of the doctrine is in the proposition that where there is, by law or by contract, a choice between two remedies, which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other."

We therefore conclude that the election to lapse the policy bound the company, and that there is at least a partial failure of consideration of the note in suit. No claim is made that the offer of defendant to pay the \$4.41 before the action was brought was either insufficient in amount, or ineffectual, because not made in cash. "The partial failure of the consideration of a note may be given in evidence to reduce the amount of the plaintiff's recovery." *Spalding v. Vandercook*, 2 Wend. 431. The answer tenders the defense of a partial failure of consideration, and the judgment should be modified accordingly.

Judgment modified, by reducing the amount thereof to \$4.41, and, as so modified, affirmed, with costs of the appeal to the appellant.

GILDERSLEEVE and LEVENTRITT, JJ., concur in the result.

(57 Misc. Rep. 47.)

In re CLEMENT, State Excise Com'r.

(Supreme Court, Special Term, Ulster County. November 20, 1907.)

1. INTOXICATING LIQUORS—LICENSES—REVOCATION.

Liquor Tax Law, Laws 1896, p. 66, c. 112, § 24, as amended by Laws 1905, p. 1728, c. 677, § 3, forbids traffic in liquor in any building on the same street and within 200 feet of a building occupied exclusively as a church, but provides that the prohibition shall not apply to a place which on March 23, 1896, was lawfully occupied as a hotel, nor to a place in which traffic in liquors was lawfully carried on at that date. At the time a liquor tax certificate was issued there was no church building within 200 feet of the place where liquor was to be sold, but before the expiration of the same a church was completed within that distance, so that, when a second application for a certificate was filed and a certificate issued thereon, there was a church within the prohibited distance. *Held*, on application to cancel the second certificate, that the exemption relating to March 23, 1896, not applying, the licensee had no greater rights in seeking the second certificate than if it were an original application, and hence the certificate was canceled.

2. SAME—PROCEEDINGS TO REVOKE—COSTS.

Where an application for a liquor tax certificate truly stated the conditions at the proposed place of trafficking in liquors, and it does not appear that the precise point on which the certificate issued is subsequently canceled, on application of the state commissioner of excise, has been decided before, costs will not be imposed; the same being, under the liquor tax law, discretionary.

Application by Maynard N. Clement, as state commissioner of excise, for an order revoking and canceling liquor tax certificate No. 24,558, issued to Wilson Van Etten. Certificate revoked.

Russell Headley (Samuel H. Salisbury, of counsel), for petitioner.
William D. Brinnier, for defendant.

BETTS, J. This matter comes before me by the return of an order to show cause granted by Mr. Justice Fitts, returnable at the Albany Special Term. Application is made for the revocation and cancellation of Van Etten's liquor tax certificate for the reason that at the time it was granted the place where liquors were to be trafficked in was on the same street and within 200 feet of a building occupied exclusively as a church, that the application so stated, and that traffic in liquors was not carried on in this particular place now occupied by Van Etten on March 23, 1896.

No witnesses were sworn, but the parties agreed on a statement of facts, from which it appears that a certificate (No. 33,786) for the sale of liquor was first duly issued to Van Etten on October 11, 1906, and that Van Etten carried on his business under said certificate up to May 1, 1907, and until the certificate in question (No. 24,558, for the years 1907-1908) was issued. It further appears therein that at the time the first certificate (No. 33,786) was issued there was no building occupied exclusively as a church within 200 feet of said saloon building; that the church building in question was erected commencing December, 1906, and finished in January or February, 1907; that the church building, from its completion down to the time of the hearing, was occupied exclusively as a church building; that it was

within the prohibited 200 feet of Van Etten's building; and that Van Etten's building, for which the certificates were issued, has been used to traffic in liquors under the two certificates referred to from the 11th day of October, 1906, to the time of the hearing. It appears, therefore, that at the time the first certificate was issued in October, 1906, there was no church building within the 200 feet for which the statute refuses permission, but that during the time of the holding of the first certificate a church was completed, some time in February, 1907, so that, when the new application for a certificate was filed, which was on or about April 29, 1907, there was a church within 200 feet of said proposed saloon.

The question and answer in Van Etten's application for a certificate are as follows:

"(9) Does the applicant intend to traffic in liquors under the certificate applied for in any building, yard, booth, or other place which is on the same street or avenue and within two hundred feet of a building occupied exclusively as a church or schoolhouse? Yes; a church built in winter 1906-1907."

The restriction under which it is sought to cancel this certificate to traffic in liquor is section 24 of the liquor tax law (Laws 1896, p. 66, c. 112, as amended by Laws 1905, p. 1728, c. 677, § 3), which, so far as material to the inquiry here, is as follows:

"Sec. 24. Places in Which Traffic in Liquor shall Not be Permitted. Traffic in liquor shall not be permitted: * * * (2) * * * In any building * * * which shall be on the same street or avenue and within two hundred feet of a building occupied exclusively as a church: * * * provided, however, that this prohibition shall not apply to a place which on the twenty-third of March, eighteen hundred and ninety-six, was lawfully occupied for a hotel, nor to a place in which such traffic in liquors was actually lawfully carried on at that date * * * nor to any place within the above described limit of a building occupied exclusively as a church, if, simultaneously with the filing of an application statement descriptive of such traffic, there shall be filed a consent in writing that such traffic in liquors be so carried on during a term therein stated, executed by the corporation, association or society using such building as a church, or the duly authorized agent thereof, and acknowledged as are deeds entitled to be recorded. * * *"

No consent in writing has been given by the church authorities. Liquor tax certificates as now issued are all in one form, and are all made to expire on the last day of the month of April following the date of their execution. They have been held to be personal property and a chose in action. *Niles v. Mathusa*, 162 N. Y. 546-551, 57 N. E. 184. All rights under certificate No. 33,786, held by Van Etten, issued October 11, 1906, expired on April 30, 1907, so that upon the taking effect of the liquor tax certificate No. 24,458, now sought to be canceled, Van Etten had no greater rights in seeking a certificate than if it was an original application, since neither he nor the premises were protected by the exception in the statute relating to March 23, 1896. His application upon which the certificate in question was issued was dated April 29, 1907, and at that time a church was within the prohibited limits, as we have seen from his application; and unless he can show some right, either by reason of his prior occupancy of the premises before the erection of the church or otherwise, his certificate must be canceled.

In seeking for authority upon the question, we find a decision under a prior statute, known as the "Excise Law," being chapter 401, p. 837, of the Laws of 1892. Section 43 thereof, as amended by chapter 480, p. 1056, of the Laws of 1893, provided, so far as essential to our inquiry, as follows:

"Sec. 43. Restrictions as to Licenses Near Churches and Schools. No person or persons who shall not have been licensed prior to the passage of this act, shall hereafter be licensed to sell strong or spirituous liquors * * * in any building not used for hotel purposes, and for which a license does not exist at the time of the passage of this act, which shall be on the same street or avenue and within two hundred feet of a building occupied exclusively as a church or schoolhouse."

Under that statute the commissioners of the board of excise of the city of New York refused a saloon license to one Thomas Cairns for premises No. 700 Third avenue, in that city. It appeared that a license had been issued to different persons to conduct the saloon business on these premises for upwards of 40 years, down to the 6th day of April, 1895, on which day Cairns purchased the good will of the business and the license from the then licensee. The Church of St. Agnes erected in the year 1895, within 80 feet of the main entrance of this saloon, a school building occupied by St. Agnes Parochial School. Whereupon the board of excise refused a license to Cairns, for the reason that the nearest entrance to the said premises was within 200 feet of the nearest entrance of a building occupied exclusively as a school. On certiorari the General Term of the New York Superior Court overruled the board of excise and held that Cairns was entitled to his license applied for, holding that the Legislature by the section quoted intended to protect property where licenses had existed prior to the time of the enactment, even though within the prohibited distance, and, further, that the managers of the church or school erected a building and occupied it for school purposes so near to this saloon at their peril. The Court of Appeals, however, in *People ex rel. Cairns v. Murray*, 148 N. Y. 171, 42 N. E. 584, reversed the General Term and affirmed the determination of the board of excise, holding:

"It is manifest that the general purpose of the Legislature was to prohibit the licensing of saloons within 200 feet of a school; but for obvious reasons it made an exception in favor of parties who were engaged in the business at such prohibited places at the time of the passage of the act under an existing license."

Section 28 of the present liquor tax law was construed in an action entitled *In re Korndorfer* (Sup.) 49 N. Y. Supp. 559, and it was there held that where premises were occupied as a saloon up to April 2, 1896, when the license was surrendered, and the premises were vacant down to June 9, or 12, 1897, no liquor traffic being carried on at the place and the premises being vacant, and an adjoining premises being hired on the 15th of June, 1896, and on the 5th of July, 1896, opened for religious services, whatever rights, if any, had been obtained by the liquor traffic having been carried on there on March 23, 1896, had been lost by this disuse, and the liquor tax certificate, which was issued about June 4, 1897, was canceled. See, also, *People ex rel. Bagley v. Hamilton*, 25 App. Div. 428, 49 N. Y. Supp. 605, where premises upon which traffic in liquors had been carried on on March 23, 1896,

but such traffic was abandoned July 1, 1897, and upon owner attempting to renew such traffic September 1, 1897, at same place and within 200 feet of a church, permission was refused.

I cannot find from the statute, nor from the decisions on somewhat similar (though not precisely the same) facts, any authority for the county treasurer to issue this certificate. The Legislature evidently intended to protect the church and school building from being within 200 feet of a saloon or hotel, save where a hotel or liquor traffic had been carried on March 23, 1896. If the contention of Van Etten were correct that the church must keep away because he had taken his position first, it would create a new exception not in the statute. It may be that the statute will oppress those persons who have created valuable properties since March 23, 1896, for saloon or hotel purposes, and find them worthless by the approach of a church or school; but, if so, relief must be sought from the Legislature, not from the courts.

Costs under this statute are discretionary. Van Etten's application truly stated the conditions at his proposed place of trafficking in liquors. The county treasurer issued the certificate to him. I do not find that the precise point here involved has been decided before, and I do not impose any costs in this case.

An order in the usual form may enter, canceling and revoking said liquor tax certificate.

(57 Misc. Rep. 81.)

HOY et al. v. VILLAGE OF SALAMANCA et al.

(Supreme Court, Special Term, Cattaraugus County. October 18, 1907.)

1. MUNICIPAL CORPORATIONS—CHANGE OF STREET GRADE—DAMAGES—REMEDIES.

LAWS 1883, p. 100, c. 113, providing that where the grade of a street is changed, so as to interfere with any building or the use thereof or to damage the real property, the owner may apply for the appointment of commissioners to ascertain the damage, creates a right to compensation, which does not exist independent of it, and is exclusive of any other remedy, either on the theory of trespass or otherwise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 989, 990.]

2. SAME—RENTAL DAMAGES.

Rental damages to an owner abutting on a street, the grade of which was changed, for the time required for doing the work and to the report of the commissioners to assess damages, based on a diversion of travel and traffic, but which change was accomplished without a closing of the street or interference with the right of access to abutting property, are not within LAWS 1883, p. 100, c. 113, providing that where the grade of a street is changed, so as to interfere with any building or the use thereof or to injure or damage the real property, the owner may apply for the appointment of commissioners to ascertain the damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 942, 943.]

Proceedings in the matter of the claim of Dora Hoy and others against the village of Salamanca and the Erie Railroad Company for damages from the change of grade of Main street. Report of commissioners as to damages confirmed in part, and disapproved in part.

Frank H. Callan, for claimants.

Thomas L. Newton, for village of Salamanca.

Thomas H. Dowd, for Erie R. Co.

MARCUS, J. The commissioners report:

"That said permanent change of grade in front of said premises is, and since September 1, 1901, has been, a continuous trespass upon the easement of access to claimants of said premises, and solely in consequence of said trespass, and aside from any other causes, the rental or useful value of said premises was depreciated from said date to the date hereof (July 1, 1907) in the sum of [stating] below what said rental value would have been during said period if there had been no change in the grade of said street," etc.

Charles Johns testified:

That the work was begun in the undergrade, but not in front of his property, on Labor Day in September, 1901, and was completed in September, 1902. "Q. So that there was no time when trade was suspended, or cut off, between the north and south side of the tracks, on account of the work in the undergrade crossing? A. No; not until after the work was done. Q. And then, when travel was turned under the subway, then it was— A. I want to modify my answer. There was a short time when it was suspended, when the detour was made in the sewer. The piles were driven through the sewer, and the contractors had to make a detour, and run the sewer easterly. Q. How long was that? A. Perhaps a week or ten days. Q. With that exception it was kept open all the time? A. Yes."

It appears that only the westerly half of Main street was changed as to grade, so there was left a pavement of about 22 feet in front of the claimants' premises. It is too clear for discussion or argument that damages cannot be assessed on the theory of a trespass, or a continuing trespass, since the work or improvement was lawful, and no action at law or in equity for damages or compensation could have been maintained by the abutting owners independent of the statute. The right to compensation is created by statute, and the statutory remedy is exclusive. *Melenbacker v. Salamanca*, 188 N. Y. 377, 80 N. E. 1090. The *Elevated Railroad Cases* are entirely different, and have no application, for the reason that the abutting owners had a common-law right to damages resulting from the trespass or wrongful act of the railroads. Here the right to compensation is entirely dependent upon the provisions of the statute, and the measure or extent of the right is to be determined by the particular terms in which it is expressed. *Heiser v. Mayor, etc.*, of N. Y., 104 N. Y. 68, 9 N. E. 866. And the statute will not be enlarged or extended beyond the scope of the words or language employed; for instance, where the statute specifies "the owners of buildings," the owner is not entitled to compensation in respect to injury to his lands. *People ex rel. Heiser v. Gilon*, 76 Hun, 346, 27 N. Y. Supp. 704, affirmed on opinion below 148 N. Y. 763, 43 N. E. 989; *Matter of Ersham*, 37 App. Div. 272, 55 N. Y. Supp. 942.

In the *Matter of Squire*, 125 N. Y. 131, 26 N. E. 142, the court said:

"The remedy sought in this proceeding is purely statutory, and the only question is whether the injury which the claimant suffered is within the statute, and one for which the commissioners were authorized to award compensation. We are of opinion that the language of the eleventh section, authorizing damages to the owner of lands which may be affected by the

construction and maintenance of the aqueduct and its appurtenances, applies only to permanent injuries to the land from the completed works and their use thereafter. It may be supposed that the Legislature understood that the construction of the aqueduct would injuriously affect the rights appurtenant to contiguous lands, and that the structures which were to form a part of the aqueduct system might interfere with the enjoyment or impair the value of such contiguous lands, and that for consequential injuries merely, sustained in consequence of the construction and maintenance of public works under legislative authority, the parties would not, under the general rules of law, have any redress. It was, we think, to meet this class of cases that the provision in question was made. It would require very clear language to impose a liability upon the city for damages for the temporary inconvenience which would be occasioned to adjacent lot owners from the prosecution of the work and during the course of construction."

It was held, therefore, that the owner of a house on an adjoining lot, although seriously incommoded by the noise, soot, smoke, and dust, was not entitled to damages. The court refers to a case arising under the English statute authorizing compensation in respect of any lands "which shall have been injuriously affected by the execution of the works," and in which it was held that plaintiff was not entitled to compensation for temporary obstruction of the highway during the construction of defendant's railway, which prevented free passage of persons and resort to the plaintiff's inn. Lord Chelmsford said that the words applied, not to temporary, but to permanent, works of companies; that "the injury must be an actual injury to the land itself, as by lowering the foundation of the building on it, or obstructing its light or its drains, making it inaccessible by lowering or raising the ground, or by some such physical obstruction."

In *Bishop v. North Adams*, 167 Mass. 370, 45 N. E. 928, the court said:

"The statement in the bill of exceptions that the excavations made in laying pipe rendered it impossible to drive on her land relates, we presume, to a temporary interruption of travel which would not entitle her to relief"—citing *Matter of Squire*, supra.

The decision in the *Squire Case* is, however, distinguished in *Matter of Grade Crossing*, 52 App. Div. 32, 64 N. Y. Supp. 769.

The proceedings in question were instituted under and by virtue of chapter 113, p. 100, Laws of 1883, which provides that, whenever the grade is changed or altered so as to interfere in any manner with any building or the use thereof, or shall injure or damage the real property, the owner may apply for the appointment of commissioners to ascertain the damage sustained thereby. The village law (Laws 1897, p. 421, c. 414, § 159) provides that, if the change of grade shall injuriously affect any building or land or the use thereof, the change of grade to the extent of the damage resulting therefrom shall be deemed the taking of such property for a public use. Though this provision is not applicable to this proceeding instituted by abutting owners (*Torge v. Salamanca*, 176 N. Y. 324, 68 N. E. 626; *Melenbacher v. Salamanca*, 188 N. Y. 370, 80 N. E. 1090), it may properly be referred to. Now, it appears from the record in these proceedings that there has been no interference in any manner with the buildings or the use of them during the progress of the work or improvement. Nor was the right of access to the premises interfered with,

or the street closed or obstructed so as to hinder or prevent travel or traffic. The award of rental damages appears to be based solely upon an alleged diversion of travel and traffic. But the statute does not warrant the allowance of compensation upon that ground, either upon the "erroneous principle" of trespass or otherwise. "Whenever the grade is changed or altered, so as to injure or damage the real property," the statute allows compensation as for a permanent injury or damage in respect of depreciation in value of the property. But here there was no injury or damage to the realty during the progress of the work, upon which an award as for past damages could properly be based.

It will be observed that the commissioners have awarded past damages, not only during the period of time required for doing the work, but also from the time the improvement had been completed down to the date of their report; and all this upon the principle that the village was chargeable as for a continuing trespass. Clearly, after the work has been completed, past damages cannot be allowed upon any principle; and, in the present case, the award of past damages was wholly unwarranted by the statute. The cases decided under the Buffalo grade crossing act are not applicable. Certainly they are not decisive. That act is not the same in terms as the act of 1883. In 52 App. Div. 28, 64 N. Y. Supp. 769, the court emphasizes the language of the act, "and the amount to be paid in carrying out the proposed plan," and lessees, as well as owners, were entitled to compensation. In that case the commissioners awarded past damages accruing between the commencement of the construction of the approaches to the viaduct in Seneca and other streets and the reopening of said streets for traffic. The commissioners were appointed August 1, 1898, and filed their report in July, 1899. It appears that the work upon the improvement in question was commenced and the street closed on the 9th day of August, 1897. In *Re Grade Crossing Com'rs*, 17 App. Div. 54, 44 N. Y. Supp. 844, the property affected was the Continental Hotel, situated upon the corner of Exchange and Michigan streets. Improvement was begun in May, 1895, when Michigan street was closed, and completed in March, 1896. The commissioners were appointed in June and made their report in September, 1896. In the present case, as we have said, there was no closing of the street, nor any interference with the right of access.

It necessarily follows that the report of the commissioners should be confirmed in so far as the award of fee damages is concerned, and be disapproved in respect to the award of past or rental damages.

DEWLING v. C. W. KLAPPERT'S SONS.

(Supreme Court, Appellate Term. November 29, 1907.)

MASTER AND SERVANT—MASTER'S LIABILITY—LOSS OF SERVANT'S TOOLS.

Where defendant subcontractor, who was bound by agreement to provide a locker wherein its employes might place their tools over night, provided a properly constructed locker and required the principal contractors to engage a night watchman, and no omission of duty by the

watchman appeared, and he was not shown to be incompetent, defendant was not liable for a theft of the tools.

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by James W. Dewling against C. W. Klappert's Sons. Judgment for plaintiff, and defendant appeals. Reversed, and a new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Wesselman & Kraus, for appellant.

Charles Maitland Beattie, for respondent.

LEVENTRITT, J. The defendant is engaged in business as a general carpenter. In April, 1907, it had in its employ the plaintiff, a journeyman carpenter, on the building No. 235 West Twenty-Third street, on which it had the contract for the carpenter work. As part of its contractual duty toward the plaintiff and its other employes, the defendant had provided on the second floor of the building a tool box or locker, in which, at the close of each day's work, the tools of the workmen were placed and there remained until the following morning. During the night of April 2d the locker was forced open and the plaintiff's tools were stolen. The plaintiff sued to recover for the loss, basing his right upon allegations of the defendant's negligence in failing to care for and guard the locker and its contents. From a judgment in the plaintiff's favor, the defendant appeals.

The obligation of the defendant to furnish a locker for its employes attached by virtue of an agreement, to which the defendant was a party, entered into between the Master Carpenters' Association of the City of New York and the Joint District Council of Greater New York. Section 3 of article 10 of this agreement reads as follows:

"In buildings ten stories high or over, a lock-up to be provided by the employer on every fifth floor."

It is conceded that the locker provided by the defendant was properly constructed in every essential particular. In fact it appears that it was more than usually secure, and that more than ordinary care had been exercised in its construction. While the plaintiff does not pretend that there was any defect in the locker, he argues that the defendant owes him the duty, not only of furnishing the locker, but of guarding his property from possible loss or injury, and that he omitted to perform the latter duty. The defendant was a subcontractor. Under its agreement with the principal contractors, the latter undertook to employ a night watchman. This watchman testified that on the night of the burglary he went to the second floor of the building at 2 o'clock; that at that time the locker was securely fastened and undisturbed; that he then returned to the first floor, where he watched the remainder of the night.

Under the circumstances it cannot be said that any negligence on the part of the defendant was established. Its duty to the plaintiff to provide a locker was a contractual one, and there flowed therefrom the obligation to adopt every reasonable precaution to safeguard the

plaintiff's property against loss or injury—to exercise such care as an ordinarily prudent man would exercise in the protection of his own property. Such measures were adopted by the defendant. It not only supplied a properly constructed locker, but in its contract with the principal contractors it required them to engage a night watchman, whose duty it was to care for and guard the building and its contents. There is no proof of any omission on the part of the watchman to perform his duty, or any evidence of incompetency. The looker was on the second floor, and the evidence shows that, when the watchman was not occupied in going about the building, he remained on watch on the ground floor. The plaintiff rested upon the mere proof of his ownership and the loss of the tools. To sustain the judgment, therefore, would in effect be to hold the defendant liable as an insurer, which he was not under any aspect of the case. The liability for the loss of the plaintiff's property would attach only upon affirmative proof that the defendant had failed in the performance of some duty which it owed the plaintiff. There is no such proof. The judgment must be reversed.

Judgment reversed, and new trial ordered, with costs to appellant to abide event. All concur.

(56 Misc. Rep. 504.)

NYMAN et al. v. DIAMOND et al.

(Supreme Court, Appellate Term. November 29, 1907.)

COURTS—MUNICIPAL COURTS.

Under the express provisions of Municipal Court Act, Laws 1902, p. 1562, c. 580, § 251, body execution cannot issue unless it is so ordered in the judgment.

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by Alexander Nyman and another against William Diamond and another. Judgment for plaintiffs, and defendants appeal. Dismissed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

David W. Rockmore, for appellants.

Hugart F. Norman, for respondents.

PER CURIAM. The cause of action is conversion. The defendants concede liability for the amount of the plaintiffs' claim, but contend that they are not liable for conversion. On this appeal the only ground upon which a reversal is asked is that under the judgment as rendered the defendants are subject to arrest under an execution against the person. Both counsel have treated the judgment as one in *ex delicto*. It appears, however, that only a money judgment was rendered, and under its terms no body execution could issue, for the reason that it does not contain the statement required by section 251 of the Municipal Court act (Laws 1902; p. 1562, c. 580).

It follows that the appeal must be dismissed, with costs.

(56 Misc. Rep. 454.)

MORONEY v. COLE et al.

(Supreme Court, Appellate Term. November 29, 1907.)

APPEAL—RECORD—COLLOQUY BETWEEN COURT AND COUNSEL.

The ownership of plaintiff, suing on a claim alleged to have been assigned to him by a corporation, was denied. Defendants objected to the assignment offered as not properly proved and insufficient, and the court excluded it. Plaintiff's counsel then called the court's attention to the fact that according to a case cited defendant could not question the validity of the assignment and that the assignment was executed by a corporate officer in its name, to which the court replied that there must be authority for it and that there was no evidence of any corporate act. Thereupon plaintiff offered a resolution authorizing the assignment, to which defendants' counsel objected, and on its admission defendants' counsel stated that, the assignment having been excluded as a separate exhibit, it had been by plaintiff's counsel annexed to the resolution, that the annexation was without authority, and that they were separate instruments. *Held*, that though, ordinarily, a colloquy between court and counsel had no place in the record on appeal, yet that defendants were entitled to have all of such colloquy appear, in order that there might be such a statement of the proceedings as would enable them to secure a proper review of what actually took place.

Appeal from City Court of New York, Special Term.

Action by Edward Moroney against George W. Cole and another. Judgment for plaintiff. From an order denying defendants' motion to resettle the case and restore certain portions stricken out (103 N. Y. Supp. 560), defendants appeal. Order reversed, and motion granted.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Malcolm Sundheimer, for appellants.

Epstein Brothers (William C. Rosenberg, of counsel), for respondent.

LEVENTRITT, J. The plaintiff sued on a claim alleged to have been assigned to him by the Astor Company. His ownership of the claim was put in issue. Upon the trial the plaintiff offered in evidence the assignment, after its identification by the secretary of the Astor Company. The record discloses the following colloquy between court and counsel:

"Plaintiff's Counsel: We offer the paper in evidence.

"Defendants' Counsel: Objected to as incompetent, irrelevant, and immaterial; that the paper is not properly proved, and is not a sufficient assignment. There is no evidence whatsoever that it is a proper assignment.

"The Court: Paper excluded.

"Plaintiff's Counsel: I desire to call your honor's attention to that fact that the defendants' counsel in this case cannot question that assignment. It is not within his province to do so. According to the case of *Sheridan* against the Mayor, the defendant cannot question the validity of the assignment if the assignment is sufficient. Here is an assignment executed by an officer of the corporation in the name of the corporation assigning the account. An assignment of account does not need to be in writing.

"The Court: There must be authority for it. There is no evidence of any corporate act, or anything of that kind, before me."

Thereupon the plaintiff offered in evidence a resolution purporting to authorize the execution of the assignment. The defendant objected, on the ground that the resolution was incompetent, irrelevant, and immaterial, and the record continues as follows:

"Defendants' Counsel: * * * Here is a paper which is separate, and comes into court separate and distinct, which your honor has admitted over my objection. That is Exhibit B, and when you say you would not take the assignment as a separate exhibit they immediately annex it to the other paper. Mr. Epstein is a lawyer, and I do not see what authority he has to do this, and I object to the admission of the paper on the ground that they are separate and distinct instruments.

"The Court: Not necessarily.

"Defendants' Counsel: And I further object to the alleged assignment on the ground that it is insufficient and improper in form."

To the proposed case on appeal from a judgment in favor of the plaintiff respondent, the defendant appellants proposed amendments which called for the striking out from the case of the portions of the record which we have quoted. These amendments were allowed by the trial judge, the portions referred to were stricken out, and the defendants' motion to resettle the case and restore them was denied. The order entered on that denial gave rise to this appeal.

We think the portions of the record omitted should be included in the case on appeal. The assignment to the plaintiff bears no date, and the resolution, dated December 28, 1906, purports to ratify an assignment of November 1, 1906. If, as we infer from the record, these instruments were not attached until after the offer of the assignment had been rejected, and they were then attached in the manner suggested, the appellant is entitled to have these circumstances appear in the record. We are not concerned with the effect these circumstances have on the questions which may be presented on the appeal. But we are concerned with the right of the appellant to have such a statement of the proceedings on the trial, such a reproduction of the occurrences incidental thereto, as will enable him to secure a proper reconsideration of what actually took place. An appellate court must necessarily be governed by the record on appeal, irrespective of the incidents of the trial. It is, therefore, the duty of the trial court to see to it that the case presented for review contains substantially all that transpired, to the end that the ultimate rights of both parties may be intelligently considered and effectually conserved. While ordinarily colloquy between court and counsel has no place in the record on appeal, we do not think that the order in this case was proper, since its effect would be to deprive the defendants of their right to have what may prove to be a most material circumstance reviewed.

The order must be reversed, with \$10 costs, and the motion granted. All concur.

(122 App. Div. 487.)

MUNK v. MARYLAND CASUALTY CO.

(Supreme Court, Appellate Division, Second Department. November 29, 1907.)

1. INSURANCE—PAYMENT—ELECTION TO REPAIR.

The lessor of a drug store insured the plate glass window front, and on its being broken the insurer elected to replace it, which was not done for several days. *Held*, that the lessee, not being privy to the agreement,

could not recover from the insurer for damages sustained during the delay in repairing the window.

2. SAME.

The failure of an insurer to promptly repair a glass window of a drug store is not a tort as to the lessee of the store.

Appeal from Municipal Court, Borough of Queens, First District. Action by Joseph T. Munk against the Maryland Casualty Company. From a judgment in favor of the plaintiff, defendant appeals. Reversed.

See 102 N. Y. Supp. 164.

Argued before WOODWARD, JENKS, HOOKER, GAYNOR, and RICH, JJ.

Frederick E. Fishel, for appellant.

Morris Kamber, for respondent.

GAYNOR, J. The complaint should have been dismissed. The plaintiff kept a drug store. His landlord had the glass window front of the store insured by the defendant. It was broken by a bat or ball on the outside. Instead of paying the landlord the amount of the damage done to it, the defendant agreed with him to replace the pane, but, it is claimed, neglected to keep such agreement by doing the repairs promptly, and meanwhile the weakened pane fell in upon the plaintiff's goods and damaged the same, and the plaintiff also had to hire a watchman to keep people from coming in through the broken front.

The plaintiff had no privity with the said agreement, and therefore cannot maintain an action upon it or for damages to him by its breach. The contention that the failure to make the repairs promptly was a tort, i. e., negligence toward the plaintiff, is without support either in reason or authority. Moreover, the action is not for a tort. The landlord assigned to the plaintiff any right of action the former had against the defendant for damages for the said breach, and the action is brought upon that cause, and also for the damages to the plaintiff himself by the breach. There was no evidence that the landlord suffered any damage.

This case was here before (116 App. Div. 756, 102 N. Y. Supp. 164) when the former judgment for the plaintiff was reversed, but our decision was altogether disregarded on the present trial. The plaintiff should not have been permitted to give evidence of the injury to his property.

The judgment should be reversed.

Judgment and order of the Municipal Court reversed, and new trial ordered; costs to abide the event. All concur.

BLEIBERG v. OTTENBERG.

(Supreme Court, Appellate Term. November 29, 1907.)

DISMISSAL AND NONSUIT—INVOLUNTARY DISMISSAL—WANT OF PROSECUTION.

Under Code Civ. Proc. § 822, and rule 36 of the General Rules of Practice, providing for dismissal of complaints for failure to proceed, where plaintiff served a summons and complaint, which was promptly answered,

and then waited four years and three months before bringing it up for trial, and until younger issues had been tried, giving as an excuse that he had been informed and believed that a note of issue was filed, and that he had made inquiries of a clerk of his attorney, who said that the calendar was moving slowly and it would take some time before the case was reached for trial, it is not sufficient to excuse the delay, and the action was properly dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dismissal and Nonsuit, §§ 140–152.]

Gildersleeve, P. J., dissenting.

Appeal from City Court of New York, Special Term.

Action by Max Bleiberg against Adolphus Ottenberg. From an order denying a motion to dismiss for want of prosecution, defendant appeals. Reversed, and action dismissed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Nadal & Carrere (Edward P. Mowton, of counsel), for appellant.
Don R. Almy, for respondent.

LEVENTRITT, J. The facts disclosed on the motion called for an unconditional dismissal of the complaint. On April 8, 1903, the plaintiff suffered injuries in an accident which he charges to the defendant's negligence, and for the resulting damages he brought this action. The summons and complaint were served on May 7, 1903, and the defendant promptly interposed an answer on May 13th. After waiting four years and three months, the defendant moved to dismiss the action for failure to prosecute it, alleging the undisputed facts that the plaintiff had taken no steps to bring the cause to trial, had neither noticed it nor placed it on the calendar, and that unpreferred issues of November, 1904, had been regularly reached and tried. The plaintiff succeeded in defeating defendant's right to a dismissal by averring that after May 13, 1903, he "was informed and believed that a note of issue was filed," and that he "had made numerous inquiries" of a clerk in the office of his attorney, who informed him "that the calendar was moving along very slowly, and it would take some time before it was reached for trial." In opposing the application the plaintiff relied solely upon his own affidavit. The motion resulted in an order requiring the plaintiff, within 10 days, to pay \$30 costs and to place the cause on the calendar, and directing, in default thereof, a dismissal of the complaint. That order is before us for review.

The explanation tendered by the plaintiff was accepted by the court below as sufficient to overcome the prima facie case of neglect established by the defendant. We are, however, of the opinion that the excuse presented was so unsubstantial that it did not furnish the basis for the exercise of judicial discretion vested by section 822 of the Code and rule 36 of the general rules of practice, which relate to the dismissal of complaints for failure to proceed. It has been uniformly held that, where no excuse is offered for unreasonable neglect to proceed with litigation, dismissal must ensue. *Zafarano v. Baird*, 80 App. Div. 144, 80 N. Y. Supp. 510; *McMann v. Brown*, 92 App. Div. 351, 87 N. Y. Supp. 38; *Anderson v. Hedden & Sons*, 116 App. Div.

231, 101 N. Y. Supp. 585. Certainly the mere semblance of an excuse can have no greater virtue and will not justify a contrary result. Excuses based upon lack of funds with which to file the note of issue (*Mladinich v. Livingston*, 112 App. Div. 181, 98 N. Y. Supp. 46), or the ignorance of the attorney that it had not been filed (*Brown v. Gauss* [Sup.] 95 Supp. 538), or vague statements of the ill health of the plaintiff's attorney (*Seymour v. Lake Shore & Michigan Southern Railway Co.*, 12 App. Div. 300, 42 N. Y. Supp. 92), having been pronounced ineffective to defeat dismissal. Here the explanation rests upon statements made on information and belief, without an attempt to account for the omission to furnish the affidavit of the informant, whose name is not even given; nor does the plaintiff apprise the court, even approximately, when the inquiries were made which resulted in the information which created the belief that the cause had been placed on the calendar. If such a vague and shadowy explanation is to be accepted as an adequate excuse for long-continued inaction, then the rule becomes a dead letter. The plea that the plaintiff was misled through misinformation received at some indefinite time from an unnamed clerk in the office of his attorney is but a mere pretext, not a genuine excuse. If such explanations are to be accepted, plaintiffs can try their causes at their pleasure and through prolonged inaction prejudice defendants by increasing the many risks to which they are exposed by delay.

The order should be reversed, the motion granted, and the complaint dismissed.

Order reversed, with \$10 costs, and motion granted, with \$10 costs.

ERLANGER, J., concurs.

GILDERSLEEVE, P. J. I dissent. This is an appeal from an order denying defendant's motion to dismiss the complaint for neglect to prosecute. While the court might, perhaps, have properly granted the motion, still, under the facts disclosed, it cannot be said to have been an abuse of the court's discretionary power to deny it. The plaintiff presented a fair excuse for his delay; i. e., the misconduct of his former attorney. The defendant himself does not seem to have shown any marked disposition to press the case for trial. To dismiss the complaint now would greatly prejudice the plaintiff. The court imposed terms as a condition for denying the motion, and upon the facts presented the order should be affirmed.

KROOSS v. LEHMAIER et al.

(Supreme Court, Appellate Term. November 29, 1907.)

MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE MACHINE—NOTICE.

A master is not liable for injuries to a servant by an alleged defect in a machine, in the absence of proof that the master had notice that the machine was defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 243.]

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Mattie Krooss, an infant, by Margretta Krooss, her guardian ad litem, against James M. Lehmaier and others, doing business as Lehmaier, Schwartz & Co. From a Municipal Court judgment for plaintiff, defendants appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Winter & Winter, for appellants.

August L. Martin, for respondent.

PER CURIAM. This action was brought by an employé to recover for injuries alleged to have been sustained through the negligence of her employers, the defendants. From a judgment in favor of the plaintiff, based upon the verdict of a jury, the defendants appeal.

The plaintiff was injured on a machine used for pressing metal caps for bottles. Without considering the question raised involving the plaintiff's contributory negligence and her assumption of risk, we think that a new trial should be had for the reason that there was insufficient proof of notice to the defendants of the alleged defective condition of the machine. The plaintiff's statements on cross-examination not only contradicted her direct testimony, but they defined and limited its apparent meaning to such an extent that its effect was destroyed, and there remained no affirmative proof which would justify a finding that the defendants had notice of any defect.

Judgment reversed, and new trial ordered, with costs to appellant to abide event.

CENTRAL BUREAU OF ENGRAVING v. SCHMIDT-WILCKES ELECTRIC CO.

(Supreme Court, Appellate Term. November 29, 1907.)

EVIDENCE—DECLARATIONS OF THIRD PERSONS—LETTERS.

Letters written to plaintiff by a stranger to the action, and containing statements tending to negative plaintiff's claim, cannot be introduced in evidence by defendant to establish his defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1194.]

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by the Central Bureau of Engraving against the Schmidt-Wilckes Electric Company. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Arthur Furber, for appellant.

Walter H. Dodd, for respondent.

PER CURIAM. The issue presented by the pleadings and outlined by the evidence was whether the defendant had authorized the

plaintiff to charge to its account certain purchases made by the Beck Pacific Lamp Company. In order to establish its defense the defendant introduced in evidence over the plaintiff's objection two letters, written by the Beck Company to the plaintiff, containing statements which tended to negative the plaintiff's claim. These declarations, made by a total stranger to the action, were in no way binding upon the plaintiff, and the letters should have been excluded. While the effect of these letters upon the result is problematical, it was sufficiently prejudicial to the plaintiff's case to call for a new trial.

Judgment reversed, and new trial ordered, with costs to appellant to abide event. All concur.

MINSKY v. STRANSKY.

(Supreme Court, Appellate Term. May 17, 1907.)

EXECUTION—SUPPLEMENTARY PROCEEDINGS.

Supplementary proceedings may be maintained against a judgment debtor in a judgment against him, though his true Christian name is unknown; but, where the parties agree on the true name, the proceedings will be deemed amended, and the subsequent proceedings will be taken under the true name.

Appeal from City Court of New York, Special Term.

Action by one Minsky against one Stransky. From an order denying a motion to vacate an order requiring defendant as judgment debtor to submit to examination in supplementary proceedings, he appeals. Affirmed.

The following is the opinion of the court below:

The affidavit recites the recovery of a judgment against the defendant; that the judgment was duly docketed in the office of the clerk of the Municipal Court; that thereafter a transcript of said judgment was duly filed, and said judgment was duly docketed in the New York county clerk's office, and that thereafter an execution was duly issued out of the Supreme Court to the sheriff of New York county against the property of the judgment debtor, and the same has been returned wholly unsatisfied and the judgment remains wholly unpaid; that at all times the debtor resided and still resides in said county. There is no direct proof submitted hereon as to the true name of the judgment debtor. The statement as to what he said upon the trial and what the creditors' attorney has sworn to with respect thereto does appear, but there is lacking a direct statement as to the true name. If, however, it is agreed between the parties that the true name of the debtor is "Maurice I. Stransky," then an order may be presented providing that the proceedings be deemed amended and that all subsequent proceedings be taken under the true name.

Motion denied, with \$10 costs, and debtor directed to appear and submit to examination on a day to be fixed in the order hereon. Settle order on one day's notice.

Argued before GILDERSLEEVE, P. J., and SEABURY and BRADY, JJ.

PER CURIAM. Order affirmed, with costs and disbursements.

(City Court of New York, Special Term. October, 1907.)

EXECUTION—SUPPLEMENTARY PROCEEDINGS.

Supplementary proceedings may be maintained against a judgment debtor on a judgment against him under a fictitious Christian name, where his real name is unknown.

Action by J. R. Smith & Co., against "Joseph" Josephson; first name being unknown. Motion to vacate order requiring judgment debtor to submit to examination in supplementary proceedings.

Richard J. Donovan, for plaintiff.

Henry L. Rupert, for defendant.

O'DWYER, C. J. The affidavit recites the recovery of judgment against "the above-named Josephson" after personal service of the summons upon said judgment debtor; that a transcript thereof was duly filed and the said judgment duly docketed in the office of the clerk of the county of New York; and that thereafter an execution upon said judgment was duly issued out of the Supreme Court by the clerk of New York county to the sheriff of the county of New York, where said judgment debtor resided and still resides, and the same has been returned wholly unsatisfied and the said judgment remains wholly unpaid. The affidavit of service recites that the affidavit and order has been served upon J. Josephson, the defendant and judgment debtor, and that the affiant knew the said J. Josephson to be the individual mentioned and described in said affidavit and order. Upon the return day a special appearance is entered for "Joseph" Josephson, first name fictitious, real name unknown to plaintiff, and motion made to vacate the order upon the ground that the execution described in the affidavit is void and that the judgment entered herein cannot be enforced. *Goldberg v. Markowitz*, 94 App. Div. 243, 87 N. Y. Supp. 1045, is cited as a controlling authority in support of the application.

It has been frequently decided in proceedings supplemental to execution that the regularity of the judgment or the validity of the execution cannot be questioned. Section 27, Municipal Court Act (Laws 1902, p. 1498, c. 580), provides that the summons must be addressed to the defendant by name, or, if his name be unknown, by a fictitious name, and under section 451, Code Civ. Proc., the plaintiff, being ignorant of the real name of the defendant, had a right to pursue him by a fictitious name. The case relied upon is clearly distinguishable, for in that case a marshal attempted to justify under an execution issued upon a void judgment. The case of *People ex rel. Maibach v. Dunn*, 38 App. Div. 112, 56 N. Y. Supp. 627, appears to be an authority for the maintenance of a proceeding supplementary to execution against a debtor whose real name is unknown, and the later case of *Minsky v. Stransky* (Feb. 27, 1907, affirmed May 17, 1907) 107 N. Y. Supp. 220, is a direct and controlling authority; the identical question having been presented and determined in that case.

Motion denied, without costs, and debtor directed to appear and submit to examination upon a day to be fixed in the order hereon.

(56 Misc. Rep. 218.)

In re ENGLER'S WILL.

(Surrogate's Court, Onelda County. October, 1907.)

1. **WILLS—EXECUTION—SIGNATURE.**

Though testatrix does not sign her will in the presence of witnesses, an acknowledgment by her of her signature is sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 302–304.]

2. **SAME—WITNESSES.**

It is not necessary that each witness to a will sign in the presence of the other, if the witnesses sign in the presence of testator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49; Wills, §§ 321–331.]

3. **SAME—EXECUTION BY MARK.**

A will signed by testatrix with her mark was attested by two subscribing witnesses, the attestation clause fully reciting compliance with all requisites to its valid execution, and was read aloud in the hearing of testatrix to one of the witnesses. There was no evidence that any one person dissented from any statement made in such clause. The witness, after having testified that she saw testatrix make her mark, failed to remember that testatrix made her mark in her presence, but remembered she heard testatrix say it was her mark. *Held*, that probate should not be denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 299–313.]

In the matter of the probate of the will of Amelia C. Engler. Probate decreed.

W. L. Goodier, for proponent.

Chester W. Davis (W. F. Dowling, of counsel), for certain contestants.

W. J. B. Williams, for other contestants.

SEXTON, S. The questions to be decided arise on a regularly instituted proceeding for the probate of a will in this estate. On the return of the citation a written answer was filed, which alleged failure to comply with any of the statutory requirements, and also alleged undue influence. The will was drawn on the usual printed blank and dated June 26, 1905, with full attestation clause, and signed by mark and attested at the end by two witnesses. Testatrix died July 16, 1907, a little over two years after she made her will.

The only evidence before me is that of the two subscribing witnesses. The evidence given by them on direct examination was sufficient to establish the will. On cross-examination, when closely pressed, they failed to remember all the details of the execution of the will. Henrietta Krubeck, one of said witnesses, testified that she did not remember that the testatrix made her mark to the will in her presence, but she heard testatrix say that it was her will, and that she wanted it put in her trunk, and that witness left before the other witness signed the will. This same witness testified that she saw testatrix make her mark upon the will and heard her announce that it was her will. It is urged by contestants, who are half-brothers of the testatrix, that the evidence is so contradictory, and the memory of the witnesses so clouded as to what actually transpired at the time the

will was executed, that probate should be denied. A substantial compliance with the statute is sufficient. *Matter of Voorhis*, 125 N. Y. 765, 26 N. E. 935.

It was not necessary for the testatrix to have signed the will in the presence of both witnesses, as an acknowledgment of her signature is equivalent to signing in the presence of the witnesses. *Hoysradt v. Kingman*, 22 N. Y. 372. Upon the evidence it appears that the testatrix knew that she was engaged in the business of making her will, and, in answer to questions put to her, acknowledged the paper presented to her, in the presence of both witnesses, to be her will. The exact words used by her the witnesses were unable to give. Any form of language for that purpose would suffice. *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235.

It is not essential to the validity of a will that each witness sign in the presence of the other, provided it is signed in the presence of the testator. *Willis v. Mott*, 36 N. Y. 486. The testatrix and both witnesses were in the same room, a small one, and testatrix was sitting near the middle thereof in an arm chair, in a conscious, but sick, condition, and on at least two occasions made remarks regarding the will. Testatrix made no request that either witness sign; but Mr. Van Baasten, who prepared the will at the testatrix's request and in her presence and superintended its execution, requested the other witness, Mrs. Krubeck, to sign it. This sufficiently evinces the testatrix's request that the witness sign the will, and is a compliance with the requirements of the statute. *Coffin v. Coffin*, supra; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220. Where a person superintending the execution of a will requests the witnesses to sign it as such, and the testator silently acquiesces, such request is sufficient. *Matter of Nelson*, 141 N. Y. 152, 36 N. E. 3. The witness Van Baasten testified that he read the attestation clause aloud, in the hearing and presence of the testatrix, to the witness Krubeck. There is no evidence of any protest or objection to any fact recited in the attestation clause, at the time it was read, by the testatrix or any person present. Such a clause is sufficient to establish the facts therein recited. *Matter of Nelson*, supra. Bare lapse of memory, or contradictions on the part of the attesting witnesses, when it is reasonably probable, from the evidence and surrounding facts and circumstances, that the statute was complied with, furnish no legal ground for refusing probate, particularly where there is a full attestation clause, which recites compliance with all of the statutory requirements.

The will by its terms gave all of testatrix's property to her brother-in-law, Charles L. F. Frederick. It was conceded in court that testatrix had lived in the Frederick family for 25 years, and that testatrix had an undivided half interest in the house in which they lived. The petition shows that the testatrix's sister, wife of said Frederick, died before testatrix, and that the real estate was worth \$700 and the personal property \$610. It can be assumed, from the testatrix's long residence in the Frederick family, that their relations were friendly; hence the disposition of her property to her brother-in-law, upon the facts of this case, seems perfectly natural. No evidence of undue influence was adduced upon the trial. The reasoning in *Peck*

v. Cary, *supra*, fully answers all objections urged, and furnishes abundant authority for admitting the will to probate. A rule of law requiring attesting witnesses to remember what took place at the time of the execution of the will, keeping in mind the many years that often intervene between the execution and probate thereof, would result in defeating the probate of a majority of the wills. The will is therefore admitted to probate.

Findings and decree may be prepared accordingly. Probate decreed.

(56 Misc. Rep. 217.)

In re FAIL'S WILL.

(Surrogate's Court, Kings County. October, 1907.)

EVIDENCE—PEDIGREE—HEARSAY.

On a proceeding to probate a will, on the question of contestant's relationship to deceased and his right to contest, proof of declarations of deceased, his wife, and a deceased brother of the contestant that the latter was a son of a brother of decedent's wife is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1152.]

In the matter of the probate of the last will of Edward Fail. Decree rendered.

Edward A. Richards, for petitioner.

Lehman & Telsey, for contestant.

CHURCH, S. On the probate herein the proponent objects to the right of a party claiming to be a son of the deceased to contest the will; it being asserted that he is not a son of the deceased, but a nephew of the deceased's wife, who had predeceased him. This was shown by the testimony of the various members of the family now living, who state that declarations to this effect were made by the deceased, his wife, and a deceased brother of the contestant. The evidence also shows that these declarants alleged that the contestant was the son of one William Parker, a brother of the deceased's wife, and that deceased and his wife had upon William Parker's death taken contestant to live with them, or, as some witnesses say, adopted him. This evidence is competent as declarations as to pedigree. Chase's Steph. Dig. Ev. (2d Ed.) 103; McKelvey Ev. 220; Eisenlord v. Clum, 126 N. Y. 564, 27 N. E. 1024, 12 L. R. A. 836.

The contestant simply states that he is the son of the deceased and was born in Brooklyn. No attempt is made to show that he was the lawfully born child of the deceased, nor is any explanation given of why such testimony is not produced. In fact, the contestant admits that it was claimed he had a brother, Henry Parker. This is insufficient; and, believing the evidence as to pedigree, it is satisfactorily established that contestant is not a lawful child of deceased, and hence is not a proper party to contest his will.

Decreed accordingly.

HYLAND et al. v. PRESIDENT AND TRUSTEES OF VILLAGE OF OSSINING.

(Supreme Court, Trial Term, Westchester County. November 30, 1907.)

1. MUNICIPAL CORPORATIONS—CLOSING STREET—NOTICE OF PROCEEDINGS.

The closing of a street at its intersection with another road and the change of grade of a portion of the road, without service of notice required by Laws 1906, p. 474, c. 242, on the owners of the land, all of whom were of full age and had resided on the premises for many years, were void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 780.]

2. SAME—DUTY OF OFFICERS.

Where proceedings were instituted by village officers to close a street and change the grade of a road, the village trustees were bound to know who were the owners of the premises affected by the change and to exercise more care than a mere examination of the assessment roll to ascertain them and give the required notice.

3. STATUTES—CONSTRUCTION.

Laws 1906, p. 474, c. 242, authorizing village trustees to change the grade of a highway and to close streets on notice to property owners affected, must be strictly construed.

4. MUNICIPAL CORPORATIONS—CHANGING GRADE OF STREET—PUBLIC HEARING.

Where a change of plan for the improvement of a street is contemplated by a board of village trustees, it should be made at a public hearing before the board, where a full hearing of persons whose property was affected could be had, after notice.

5. SAME—INDIVIDUAL ACTION—RATIFICATION.

A meeting by the road committee of a board of village trustees and the engineer in charge of an improvement, at which a change in the plan was agreed on, though subsequently ratified by the board, was without legal authority, and gave the village officers no right to improve the street on the amended plan.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 803.]

6. SAME—STREETS—CHANGE OF GRADE—AUTHORITY OF VILLAGE.

Since the ordinary meaning of the term "grade" is the amount of difference between grade line and a level or horizontal line, and to grade a street is to bring the surface to the grade line, a village charter authorizing it to grade its streets did not include permission to erect a wall in the street to alter its grade, without ordinance or resolution, nor authorize the closing or withdrawal of any part of the street from public use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 718.]

7. SAME—ABUTTING OWNERS—OWNERSHIP OF STREET.

Adjoining landowners own the land to the center of a street, subject only to the easement of the public to the right of way, and therefore are entitled to exercise all ordinary remedies for injuries to the freehold.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1441, 1447, 1448, 1450.]

8. SAME—OBSTRUCTIONS IN STREET—NUISANCE.

The unauthorized erection of a wall in a street in front of plaintiff's premises, on the sidewalk and street, by village officers, to consummate a plan for improvement of the street, constituted a nuisance.

Action by William Hyland and others against the president and trustees of the village of Ossining for an injunction to restrain the

closing of a highway and the change of grade of a street and for damages. Judgment for plaintiff.

Smith Lent and Edgar L. Ryder, for plaintiffs.
Frank L. Young, for defendants.

MORSCHAUSER, J. The revised act under which these defendants continue to conduct their municipal affairs is chapter 242, p. 474, of the Laws of 1906. There have been amendments, but such did not affect that part of the act relating to this action. A petition was presented to the defendants, asking for the altering, widening, and change of alignment of a portion of the Secor Road, in said village, and the closing of Main street at its intersection with the west side of Secor Road. The petition was filed on the 16th day of July, 1907, with a map thereto. After some adjournments an order was made by the defendants' trustees, wherein it was ordered that the petition be granted and that Secor Road be altered or widened and the alignment changed, and Main street be closed at its intersection with the west side of Secor Road therein, in accordance with the description and specifications contained in said petition, and that the parcels of land described in the petition be acquired therefor in the manner provided by the charter of the village. The plaintiff William Hyland appeared with others upon a hearing and filed objections before the order was made. The defendants, after the order was made, passed various resolutions for the purpose of erecting the abutment and closing Main street at its intersection with Secor Road. A contract was entered into and the work was begun, proceeding until this action was commenced by the plaintiffs against the defendants on October 21, 1907, when an injunction was obtained *pendente lite*.

The plaintiffs, by their complaint, after alleging that they are the owners in fee and in possession and occupying certain premises situated on Main street, and continuing along Main street for a distance of more than 150 feet, allege that they (the plaintiffs) are the owners to the center of the street, that such highway has been such for more than 150 years, that the premises are of the value of \$15,000, and that the defendant village is a municipal corporation organized under the law mentioned. The complaint further alleges that the defendants, without any right or authority, entered upon the highway and dug a trench or ditch across the highway, describing the ditch to be several feet in depth and width, and setting therein certain up-rights and cross-pieces of timbers and closing up the highway for travel, and that the defendant intended to build a solid wall of masonry and carry such wall of masonry to the height of 8 feet above the surface, and threatened to continue such excavation along the lands of the plaintiffs on Main street for a distance of more than 100 feet, and intended to fill in such excavation with a wall of solid masonry and to permanently maintain such a wall; that the defendants rendered it impossible to use it for public travel, and have deprived the plaintiffs of access to a barn on the westerly side of the premises, and that, if the defendants are permitted to carry out the work, the plaintiffs' dwelling house, as well as the barn and premises, will be

shut off from the free use of said street and rendered valueless, and that no proceeding of any kind had been legally instituted to close the highway, and no compensation made to owners of property abutting on the highway, and that no public purpose requires the closing of the highway; that the acts of the defendants were malicious and in wanton disregard of the plaintiffs' rights, and that if such acts are permitted the plaintiffs will suffer irreparable injury. The plaintiffs ask that the defendants be restrained from continuing these acts, and be enjoined from closing said approach, and be compelled to restore said Main street to its former condition. They ask for damages in the sum of \$1,000.

The defendants, denying the several allegations of the plaintiffs' complaint, except that no compensation was made to the plaintiffs or other persons abutting on the highway, allege that proceedings have been taken by the defendants as provided by law to close the highway described in the complaint, and that public purpose and necessity require the closing of the highway. As a defense, the defendants allege that it is planned to change the grade of Secor Road, which plan for a change has been duly adopted by the defendant village, providing for the construction of a new approach from Secor Road to Main street, and taking no property of the plaintiffs in changing the grade of the aforesaid streets in the manner provided by law. The plan adopted by the defendant was to erect a wall commencing some distance below Main street, in Secor Road, and continuing in a northerly direction for more than 150 feet; the height of the wall varying at the end, but in the center, or at the part where it crosses Main street, or where Main street is intersected by Secor Road, to be from 4 to 5 feet in thickness at the base, becoming narrower at the top, and to be from 5 to 6 feet in height. It would be built of concrete and would close the road at this point. The proposed wall would continue in its course in a northerly direction after reaching the sidewalk in front of plaintiffs' premises, and, when finished, would be of such height that the top thereof would be on a line with the top of plaintiffs' front door, and continuing then in the same direction until it reached the barn on plaintiffs' premises, where the wall would be 4 feet high, and the plaintiffs' premises would then be inclosed along the line in front of plaintiffs' premises at the point indicated. An iron rail was to be placed on the top of the masonry wall. The defendants, by their engineer and road committee, changed the plan and made a new plan, laying out a street to begin in Secor Road below the abutment on the south and then proceed in a northerly direction and make an abrupt turn into Main street; the road to be 18 feet in Main street and 20 feet wide at the beginning of Secor Road. This was designed to be used for vehicles, and steps were to be made over and on the abutment on Main street for the use of pedestrians, and the wall, instead of being erected on plaintiffs' premises, was to be placed by the new plan on the sidewalk in front of the premises. This plan, the defendants claim, although changed by the engineer and road committee on the ground, was adopted by the defendants after this action was commenced, and the defendants claim that they were acting within their legal rights when they did this. The work was

begun, and it has so far progressed that the wall is partially completed on Main street, with an opening reaching to the sidewalk in front of plaintiffs' premises for the purpose of erecting the wall.

By stipulation of the parties, it was requested that I should view and examine the premises. The erection of this proposed wall in the manner contemplated will eventually destroy the use and enjoyment of plaintiffs' premises, unless some radical changes are made. The defendants claim that these changes were necessary at this place because of accidents happening and likely to happen at this intersection. I cannot find this from the evidence. The defendants undoubtedly acted and carried out this plan with an honest intention to serve the village and change the condition of the streets at this intersection, with a purpose of bettering the highway, and without any malice or wanton disregard of the plaintiffs' rights, and believing that they had a legal right so to do, and that it was for the best interest of the village. I think, upon proper application, the change contemplated by the defendants could be eventually brought about; but the proceedings taken by the defendants were not taken pursuant to law.

The application and order was for the purpose of altering, widening, and changing the alignment of a portion of Secor Road and closing the highway at the intersection of Secor Road with Main street. The defendants failed to comply with the statute, which requires service of notice upon the owners of the land, all of whom were of full age and resided on the premises for many years. The owners were not served with notice. The only person served, if he was served at all, was William Hyland, the father, and I am not assuming too much when I infer from the facts adduced upon the trial that at the time of the issuing of the notice the trustees knew the plaintiffs to be the owners of the land and premises which had been assessed to William Hyland. Ossining being a village, I must infer from the evidence that the trustees knew who were the owners of these premises. They could not guess. They were bound to exercise diligence; but it seems all that was done was the examination of the assessment roll. When a proceeding of such importance is to be instituted, care should certainly be exercised, so that no person be injured or deprived of property without due notice. There is no proof of service of notice on the owners of the property affected by these proceedings; and the plaintiffs, with the exception of the plaintiff William Hyland, are in the same position as if nothing had been done after the filing of the petition. The statute in this respect must be strictly construed. *Archer v. City of Mt. Vernon*, 63 App. Div. 286, 71 N. Y. Supp. 571.

The new plan, or its approval thereof, was not adopted by the defendants until October 30, 1907, and after this action was begun. For members of a board to ratify in meeting acts previously committed by members of that board as individuals is hardly to be regarded as a legal proceeding, especially when notice has not been given to the persons whose property rights were to be affected. The petition and plans, as originally proposed and adopted, were therefore never changed. The order making it still remains, and has never been revoked. Such a change of plan as was attempted to be made by defendants' trustees should be made at a public hearing before the

board, where a free and full discussion and consideration of such a public matter could be had, giving plaintiffs an opportunity to be heard after receiving proper notice. A meeting by the road committee and the engineer in charge, and their action, although ratified by the board, was without legal authority and gave defendants no right to do the acts complained of. As was said by Mr. Justice Bartlett in *People ex rel. Mershon v. Shaw*, 34 App. Div. 64, 54 N. Y. Supp. 220:

"The law takes no account of what the trustees may individually agree upon outside. As was said in an Ohio case, where a prior agreement of the members of a school board to award a certain contract was pronounced void: 'The board is constituted, by statute, a body politic and corporate in law, and as such is invested with certain corporate powers, and charged with the performance of certain public duties. These powers are to be exercised, and these duties discharged, in the mode prescribed by law. The members composing the board have no power to act as a board, except when together in session. They then act as a body or unit. The statute requires the clerk to record, in a book to be provided for the purpose, all their official proceedings. * * * The public, for whom they act, have the right to their best judgment, after free and full discussion and consultation among themselves, of and upon the public matters intrusted to them, in the session provided for by the statute.' *McCortie v. Bates*, 29 Ohio St. 419, 23 Am. Rep. 758."

In *People ex rel. Johnson v. Whitney's Point*, 32 Hun, 514, Mr. Justice Learned said:

"The law gives them no right to change the route specified in the petition. They may 'deny the petition,' or approve it, etc., and declare their intentions to 'make said improvements.' It is no answer to say the change made was small and did no harm to any one. This would be to say they need not follow the direction of the statute; that they may disregard its requirements. Here was a statute with special provisions directing what steps should be taken and how they should be taken. If not followed, the trustees were without jurisdiction. * * * The said law in which the trustees were authorized to proceed must be looked to, and its requirements followed."

This case was affirmed in 102 N. Y. 85, 6 N. E. 897. Mr. Justice Earl, writing the opinion, said:

"If upon the hearing, or at any time after presentation of the petition before final action thereon and before the road was actually laid out, the trustees found it was necessary to change the line or route or to take other land not specified in the petition, then the proceedings should have been abandoned, and a new petition filed, and proceedings commenced de novo. It is true that the variation here is not great; but if a change in the center line of the road for one rod can be justified, if the trustees had jurisdiction to make such change, then it is difficult to perceive how their power could be limited."

The application was made and the order granted upon a petition that Secor Road be altered or widened and the alignment thereof be changed, and that Main street be closed at the intersection with the west side of Secor Road therein, in accordance with the description and specifications mentioned in the petition. The defendants claim that, if this procedure had not been in proper form, the village could change the grade without formal resolution or ordinance fixing the grade, and that the change of plan by the engineer and road committee and its subsequent adoption by the village board were within the powers vested in them, and no notice was required to be given. As was said in *Whitmore v. Village of Tarrytown*, 137 N. Y. 413, 33 N. E. 490:

"Before it can be said that the grade has been changed or altered, there must generally have been some formal action by resolution or ordinance of the village fixing the new grade. There may, however, be exceptional cases where, under peculiar circumstances, a new grade may be established by directions given or by acquiescence. According to the ordinary understanding of the language used in the act, there is implied some definite action, or at least some definite acquiescence, fixing a new grade to which a street is either to be raised or lowered. If the street commissioner in a village should go upon a street and from time to time take a few loads of earth from one place and deposit it in another, or for the purpose of repairing and improving a street should cut it down in one place and raise it in another, or dig out earth in the sides of the street for the purpose of widening the traveled bed thereof, by all these acts, although in the process of years they may work an actual change in the grade of the street, the grade is not changed or altered within the meaning of the act. Could an adjoining owner, every time the street commissioner takes a yard of earth out of the street at one place and deposits it at another, thus causing an appreciable damage to his abutting property, institute proceedings under this act for the appraisalment of his damages? Such a construction of this act might involve a village in constant litigation with numerous owners of real estate along streets which are from time to time improved."

The same conditions do not hold in this case. Nowhere in the minutes of the board or in the proceedings has the question of the change of grade been mentioned, and it seems, and I infer, that it was an afterthought. The grades of Secor Road and Main street had been fixed for many years, except with slight changes that would ordinarily take place in the filling in of a roadway or the removal of material therefrom for improving its condition. The grading provision, as set forth in the charter of the defendant village, gave it authority for grading, but gave it no authority to withdraw any part of the highway from public use, or to erect any nuisance thereon, or to close a highway or take any part of it.

"Grade" is defined by Mr. Justice Woodward, in the Matter of Bissell, 57 App. Div. 62, 67 N. Y. Supp. 963, citing 14 Am. & Eng. Enc. of Law (2d Ed.) 1108, where he says:

"The ordinary meaning of the term 'grade' is the amount of difference between grade line and a level or horizontal line, and to grade a street is to bring the surface of the street to the grade line."

This, like other provisions of law, must be construed in a reasonable manner. To construe the grading provision in defendant's charter as permitting the village to carry out the design contemplated by the erection of this wall without ordinance or resolution, and simply upon the ratification of an act of the highway committee and engineer, would, in my opinion, be far beyond the power contemplated by the Legislature.

The plaintiffs own the highway to the center of the street, subject to the easement of the public to the right of way. *Van Winkle v. Van Winkle*, 184 N. Y. 193, 77 N. E. 33; *Holloway v. Southmayd et al.*, 139 N. Y. 405, 34 N. E. 1047, 1052; *Platt v. Village of Oneonta*, 88 App. Div. 192, 84 N. Y. Supp. 699, citing a number of cases. Kent, in his Commentaries (volume 3 [14th Ed.] *432), says:

"The presumption is that the owners of the land on each side go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public. Being owners of the soil, they have a right to all ordinary remedies for the freehold."

The unauthorized erection of the wall in front of plaintiffs' premises on the sidewalk and street is a nuisance. *Ackerman v. True*, 175 N. Y. 353, 67 N. E. 629; *City of New York v. Knickerbocker Trust Co.*, 104 App. Div. 228, 93 N. Y. Supp. 937; *Holloway v. Southmayd*, 139 N. Y. 390, 34 N. E. 1047, 1052. I think \$100 will be a fair and equitable amount to allow to plaintiffs for damages suffered. The plaintiffs are entitled to judgment asked for in the complaint, with \$100 damages, besides costs. I will not make an additional allowance. Settle findings on notice.

(56 Misc. Rep. 196.)

SMITH et al. v. FLOYD et al.

(Supreme Court, Special Term, New York County. October, 1907.)

TRUSTS—TESTAMENTARY TRUSTEE—PERSONAL CONFIDENCE—POWERS OF SUCCESSION.

Testatrix devised the residue of her estate to executors in trust, to collect the income and pay the same to the support of the daughter and husband of testatrix for and during the life of the survivor of them. The daughter was given the right to dispose of the trust fund by will, subject to the trust for testatrix's husband. Failing such disposition, the estate, on the death of both beneficiaries, was given to the daughter's child or children surviving her, and, failing the same, was to be divided among the children of the two brothers of testatrix. The executors were given authority to apply such portion of the capital as they might deem advisable, to the use of the daughter and husband. The husband died before his wife. The executors qualified; and on the death of one of them the survivor resigned his trust, and plaintiff was appointed as successor, with all the powers of the original trustee. The income proving insufficient for the daughter's education and maintenance, she applied for an allowance out of the principal. *Held*, in an action for instructions as to the trustee's authority, that it could not apply any part of the corpus to the daughter's use; the power given being a personal trust and confidence, to be exercised only by the original trustees.

Action by Alice L. F. Smith and the Van Norden Trust Company against Richard F. Floyd and others to construe will. Decree rendered.

John Nicolson, Jr., for plaintiffs.

David Asch, for defendants Eunice Floyd and David Asch, administrator, etc., of Richard S. Floyd, deceased.

BISCHOFF, J. Action by the substituted trustee of an express trust and the cestuis que trustent for the construction of the will by which the trust was created and for instructions respecting the substituted trustee's authority as such. By her last will and testament and a codicil thereto, dated, respectively, December 12, 1895, and November 6, 1896, and admitted to probate by the Surrogate's Court of Suffolk county December 21, 1898, Sarah W. F. Smith devised and bequeathed all her residuary estate, consisting of real and personal property, to her executors or such of them as should qualify, in trust, to collect and receive the income thereof and to "pay and apply the same to the use, maintenance and support" of her daughter Alice and her husband, Nathaniel, "for and during the life of the

survivor of them." Alice was given the power to dispose of the corpus of the trust estate by will, subject to the trust for the testatrix's husband. Failing of such testamentary disposition by the daughter, the estate, upon the death of both cestui que trustents, was given to the daughter's child or children surviving her, and, failing of any such child or children, then, upon the death of the cestui que trustent, the estate was directed to be divided among the children of the testatrix's brothers, John Floyd and Richard Floyd. The will further provided as follows:

"Fourth. I hereby authorize and empower my said executors or such of them as shall qualify, in their discretion and with the approval of my daughter Alice, expressed in writing, either to sell or to mortgage, or both, the whole or any part of my said estate as they may deem necessary from time to time, and to invest the proceeds arising therefrom, and to pay and apply the income thereof towards the use, maintenance and support of my said daughter Alice and my said husband, Nathaniel, as aforesaid, with full power to my said executors to apply such portion of the capital of the trust funds as they may deem advisable to the use of my said daughter and husband."

The executors named were Thomas S. Mount and Morgan Blydenburgh and both qualified as such. Mount died in August, 1900. Subsequently Blydenburgh instituted proceedings in the Surrogate's Court of Suffolk county for the judicial settlement of his account as sole surviving executor and trustee, and by decree dated May 27, 1901, he was directed to transfer and deliver to himself as such trustee the net residue of the testatrix's estate. In October, 1902, Blydenburgh applied to the same Surrogate's Court for leave to resign his trust, and the proceedings terminated in a decree allowing such resignation and appointing the plaintiff the Van Norden Trust Company in place of and as successor to Blydenburgh as trustee under the will, "with all the powers of an original trustee as fully as if it [the Van Norden Trust Company] had been mentioned in said will in place and stead of Morgan Blydenburgh." The Van Norden Trust Company accepted the trust and qualified as such trustee. Pursuant to the terms of the decree, Blydenburgh transferred the estate to his successor, and he was thereupon finally relieved and discharged as such trustee. Nathaniel Smith had predeceased the testatrix. The trust estate comprises about \$21,000 of personalty and a tract of land at St. James, Long Island, valued at present at \$30,000, but regarded as having a near prospective value far in excess of that amount. Little or no income has thus far been had from the land, and there is no immediate prospect of any. The average monthly income to the surviving cestui que trust, the testatrix's daughter, from the personalty, has been about \$77. Conditions have now arisen which render the income insufficient for the cestui que trust's education and her maintenance in a manner becoming her station. She has applied to the present trustee for an allowance out of the principal of the trust estate in accordance with the provisions of the will, but the trustee, while regarding the request as in every way reasonable under the circumstances, has refused solely because it doubts the devolution upon it of the authority given by the will to the executors. The trustee and the cestui que trust are agreed that a sale of the land

at the present time for the purposes of increasing the income by the investment of the proceeds of sale would be detrimental to the cestui que trust and opposed to the interests of the remaindermen; and an allowance out of the principal of the trust estate for the temporary needs of the cestui que trust is urged as the only means of obviating the sale of the land. This action is brought to have the court's instructions respecting the present trustee's authority to make the allowances. The meritorious attitude of the cestui que trust toward those who may succeed her in the enjoyment of the trust estate only adds to my embarrassment in deciding adversely to her very reasonable request, and I reluctantly reach the conclusion that the present trustee is without authority to apply any part of the corpus of the trust estate to her use. The power to resort to the corpus of the trust estate for the cestui que trust's benefit was given by the terms of the will to the executors therein named or such of them as should qualify, and, since both qualified, the power must be deemed to have been conferred upon the executors jointly; that is to say, it required the joint assent of the executors named to apply any portion of the corpus of the estate to the cestui que trust's use. The repose of this power was expressive of the testatrix's confidence in the personal judgment and discretion of the persons named as executors. She referred to them as her "friends," and it was to them that she confided the welfare of her daughter and husband, so far as additions to their income out of the principal would promote it, and it was upon them that she depended to preserve her residuary estate intact, excepting so far as the reasonable needs of the beneficiaries demanded an encroachment. The scheme of the will forbids any extension by implication to others of the power given to the executors named to apply the corpus of the trust estate to the use of the cestui que trust. It was the testatrix's intention, expressed in plain and unequivocal language, that the corpus of the estate should be preserved for the remaindermen, whether these be her daughter's appointees or her children, or those named to succeed to the estate if the daughter should die childless and without having exercised her power of testamentary disposition of it. Foreseeing conditions which might require material assistance toward the welfare of the cestui que trust beyond the income given them, she provided for resort to the principal of the estate, but only with the approbation of her "friends," the executors named, chosen by her personally because of their peculiar fitness arising from an acquaintance more or less intimate with her intentions and the reasonable requirements of the social station and condition of her family, and therefore better qualified than others to determine the propriety of any call for more than the income to the use of the cestui que trust, and of the amount required for their relief. That such a power does not, excepting where the donor has otherwise provided, devolve upon the survivor of the donees or upon their successors in office, is well settled in principle and by authority. 1 Sugden Powers (3d Am. Ed.) c. 5, § 1, subd. 3; Perry, Trusts, §§ 273, 496; 22 Am. & Eng. Encyc. of Law (2d Ed.) 1103. "Whenever a power is of a kind that indicates a personal confidence, it must prima facie be un-

derstood to be confined to the individual to whom it is given, and it will not, except by express words, pass to others, to whom by legal transmission the same character may happen to belong." *Gambell v. Tipple*, 75 Md. 252, 23 Atl. 461, 15 L. R. A. 235, 32 Am. St. Rep. 388, 390. "Where a power is to be exercised entirely at the discretion of the donee, courts of equity have no jurisdiction to force him to act, and, if he has died without exercising the power, they cannot confer it on a trustee appointed by the court." *Young v. Young*, 97 N. C. 132, 2 S. E. 78. "I conceive," says Sir William Grant, Master of the Rolls, "that wherever a power is of a kind that indicates a personal confidence it must *prima facie* be understood to be confined to the individual to whom it is given, and will not, except by express words, pass to others, to whom by legal transmission the same character may happen to belong." *Cole v. Wade*, 16 Vesey, Jr. 27, 44. "The power given to" the executors "was a personal trust and confidence to be exercised by them jointly according to their best judgment under the circumstances contemplated by the will. One executor in this case cannot commit his judgment and discretion to the other, any more than to a stranger for *delegatus non potest delegare*." *Berger v. Duff*, 4 Johns. Ch. 369. "It is settled beyond controversy that when the donee of a power has any discretion to exercise for the benefit of others, in the execution of the power, he must exercise such discretion, and the execution of the power cannot be delegated." *Crooke v. County of Kings*, 97 N. Y. 421, 453. "The rule of law no doubt is that a power of this kind is a personal trust and confidence, which cannot be committed to another than the grantee or donee of the power." *Newton v. Bronson*, 13 N. Y. 587, 593, 67 Am. Dec. 89. "The inflexible rule is that a confidence reposed cannot be delegated." *Mayor v. Stuyvesant*, 17 N. Y. 34, 42.

I note the request of the plaintiff's counsel for opportunity to submit a memorandum upon the question as to whether the trustee's expenditures for repairs and improvements to the St. James premises are chargeable against the principal or income of the trust estate, and await counsel's indication of the time when the memorandum will be submitted.

(56 Misc. Rep. 192.)

FOGARTY v. O'REILLY et al.

(Supreme Court, Special Term, New York County. October, 1907.)

1. TRUSTS—ACCOUNTING—JURISDICTION.

The Supreme Court has jurisdiction of an action against the executrix of a deceased trustee and other parties for accounting of the rents of certain realty in possession of the trustee, payable in part to plaintiff as a beneficiary of the trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 417.]

2. SAME—DEATH OF TRUSTEE.

On the death of a testamentary trustee, where no successor has been appointed, a beneficiary can sue the executrix of the decedent for an accounting under the trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 411.]

3. SAME—PLEADING—CONVERSION.

A complaint in an action against the executrix of a deceased testametary trustee for accounting alleged that of the three trustees named in the will two were dead and the other had never acted; that on an accounting in the Surrogate's Court the defendant executrix interposed a defense that the deceased trustee was in possession of the premises from which certain rents were claimed under a title in hostility to the trust; that on appeal the Appellate Court dismissed the proceedings as not within the jurisdiction of the surrogate, and alleged that the decedent received the rents and converted the same to his own use. *Held* to state a cause of action for an accounting, the allegation that the decedent converted the rents not making the action one for conversion.

4. JUDGMENT—RES JUDICATA.

Where a proceeding for an accounting by an executrix of a testamentary trustee was dismissed on appeal for want of jurisdiction in the Surrogate's Court, the proceeding was not *res judicata* in the subsequent action by the beneficiary under the trust for accounting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1037.]

Action by William P. Fogarty against Sarah A. O'Reilly and others. Demurrer to complaint overruled.

Franklin H. Mills, for plaintiff.

Edward W. S. Johnston, for defendant demurrant.

BISCHOFF, J. The action is brought against the personal representative of a deceased trustee, with a joinder as defendants of other parties in interest, for an accounting of rents of certain real property in the possession of the trustee, as such, during his lifetime, which rents were payable in part to the plaintiff as a beneficiary of the trust.

The complaint sets forth the will of Patrick A. Fogarty, under which the trust was created; and it is alleged that of the three trustees named in the will one never acted as such and the others are dead; that, in a proceeding instituted in the Surrogate's Court for an accounting of these moneys, the defendant-executrix interposed the defense that the deceased trustee was in possession of the premises from which the rents were derived under a claim of title in hostility to the trust, a defense which served to take the case without the jurisdiction of the surrogate, and that an appeal to the Appellate Division resulted in the dismissal of the proceedings; that this deceased trustee received the rents but, except as to a certain portion, has failed to pay them over to the persons entitled, "and converted the same to his own use."

The defendant-executrix demurs to the complaint upon the ground (1) that the court has not jurisdiction of the subject of the action; (2) that the plaintiff has not legal capacity to sue in that any cause of action growing out of the alleged facts existed in the trustee of the trusts contained in the last will and testament and codicil of the said Patrick A. Fogarty, deceased, or in the substituted trustee to be appointed by the Surrogate's Court of the county of New York and does not exist in the plaintiff; (3) that there is a defect of parties plaintiff, and that William P. Fogarty, as administrator with the will annexed of Patrick A. Fogarty, deceased, is a necessary party plaintiff; (4) that there is a defect of parties-plaintiff, in that the trustee under the trust or trusts created by the will of Patrick A. Fogarty, deceased,

is a necessary party-plaintiff; and (5) that the complaint does not state facts sufficient to constitute a cause of action.

Upon demurrer to the complaint in an earlier action between these parties for the same relief I had occasion to consider certain questions now raised; and I reached the conclusion, to which I adhere, that the failure to cause the joinder of a substituted trustee of this trust was not a defect, also that the questions at issue related wholly to property set apart to the trustee and did not call for the joinder of the personal representative of the testator under whose will the trust was created. *Fogarty v. O'Reilly*, N. Y. Law J. Nov. 29, 1905. I sustained the demurrer in that action upon the ground that, in the absence of circumstances showing the necessity of resorting to a court of equity, jurisdiction of the action would not be entertained, since the Surrogate's Court could, apparently, afford all necessary relief; but the averments of the complaint before me supply what was then absent. The facts alleged foreshadow the main issue of the case—the defense of title—and disclose a situation which, in all probability, must render a resort to the Surrogate's Court abortive, since with this defense the surrogate's jurisdiction would fall. *Matter of Fogarty*, 117 App. Div. 586, 102 N. Y. Supp. 776. Needless to say, this court must determine the issue of law as to the question of jurisdiction without waiting for the interposition of an answer, otherwise the plaintiff in such a case as this must be continuously remitted to successive proceedings in the Surrogate's Court, foredoomed to dismissal at the defendant's election, and there is no rule of policy which requires such a result. The special circumstances alleged, therefore, suffice for the exercise of jurisdiction by this court. *Matter of Fogarty*, *supra*.

As to the plaintiff's capacity to sue, it is quite true that the primary right of collection of these rents would reside in a trustee appointed in the place of the deceased trustees; but where there is no trustee, a party, substantially and beneficially interested, may come into equity and procure an adjustment of the rights arising out of the trust, the performance of which is thus dictated and controlled by the court. In such a case the appointment of a new trustee is not important, since it is a matter of no moment whether one or another of two possible plaintiffs—the cestui que trust or the new trustee—sets the court in motion, as was held in *Ettlinger v. P. R. & C. Co.*, 142 N. Y. 189, 36 N. E. 1055, 40 Am. St. Rep. 587; and within the principle of this authority the plaintiff's right to maintain the action is not well open to question.

The argument against the sufficiency of the complaint proceeds upon some assumed technicalities which call for but little discussion. The statement that the deceased trustee converted these rents to his own use does not impress the action with the character of a suit for conversion in any aspect, even assuming that if it did the pleading would be insufficient in substance. The fact that this trustee did "convert" the funds is material so far as it negatives the presumption, which the demurring party seeks to draw, that the deceased co-trustee had equal possession; but the complaint is framed for an accounting, as demanded, the right to which form of relief is determined by the facts surrounding the possession of the moneys and by the strict fiduciary

relation which existed. Equally futile is the contention that the pleading discloses a defense of estoppel by former adjudication in the averment that the proceeding for an accounting in the Surrogate's Court was dismissed. There is no presumption that the dismissal was upon the merits, a fact which, for the purposes of a bar, must affirmatively appear from the record (*Patchen v. D. & H. C. Co.*, 62 App. Div. 542, 71 N. Y. Supp. 1144); and this complaint certainly contains no suggestion that the merits of an asserted right to an accounting were determined.

The demurrer is therefore overruled upon every ground stated, with costs, with leave to defendant to plead over on payment of costs within 20 days.

Demurrer overruled, with costs, with leave to defendant to plead over on payment of costs within 20 days.

(122 App. Div. 193.)

ROCHESTER TRUST & SAFE DEPOSIT CO. v. ONEONTA & M. V. R. CO. et al.

(Supreme Court, Appellate Division, Third Department. November 13, 1907.)

1. RECEIVERS—RECEIVER'S CERTIFICATES—FORECLOSURE—PARTIES.

Where, pending an action to foreclose receiver's certificates issued by a receiver appointed in sequestration proceedings against a corporation, an action was commenced to foreclose a mortgage on the corporate property, and the same was sold thereunder subject to the claims, if any, on the certificates, and the proceeds of the sale went to the holders of the bonds secured by the mortgage, it was a matter of interest only to the one claiming under the purchaser at the mortgage foreclosure sale whether the certificates were adjudged valid and a lien on the property.

2. SAME—DEFENSES AGAINST RECEIVER'S CERTIFICATES.

The purchaser of corporate property at a mortgage foreclosure sale, subject to the claims, if any, on receiver's certificates issued by a receiver appointed in sequestration proceedings against the corporation, may avail itself of any defense to the certificates which the holders of the bonds secured by the mortgage could have asserted, and of those defenses only.

3. SAME—PLEADING—SUFFICIENCY.

Where, in an action to foreclose receiver's certificates issued by a receiver appointed in sequestration proceedings against a corporation, there was no allegation that holders of bonds of the corporation secured by a mortgage on the property were estopped from questioning the validity of the certificates, in that they had consented to their issuance, such defense was not available.

4. CORPORATIONS—RECEIVER IN SEQUESTRATION PROCEEDINGS—POWERS AND DUTIES.

The power and duty of a receiver of a corporation, appointed under Code Civ. Proc. § 1788, to "preserve the property," is no less in sequestration proceedings than in foreclosure.

5. RECEIVERS—ORDER DIRECTING ISSUANCE OF RECEIVER'S CERTIFICATES—CONCLUSIVENESS.

Where holders of corporate bonds secured by a mortgage were parties to a proceeding wherein a receiver, appointed in sequestration proceedings against the corporation, was directed to issue receiver's certificates and the same were declared to be a lien prior to all other liens, and the bondholders in effect joined in the application for their issuance, such determination was *res judicata*, in all collateral proceedings, as to the neces-

sity of their issuance and their propriety, notwithstanding the bondholders were not parties to the sequestration proceedings.

6. SAME—PURPOSES OF ISSUE OF CERTIFICATES—COMPLETION OF RAILROAD.

A receiver of a trolley railroad may be authorized to issue receiver's certificates, which shall be a lien prior to all other liens, for the final completion of an extension of the railroad.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, §§ 204, 206.]

7. SAME—CONSENT OF PARTIES INTERESTED—CONSENT OF TRUSTEE TO MORTGAGE.

Notice to the trustee under a corporate mortgage securing bonds of an application for the issuance of receiver's certificates by a receiver appointed in sequestration proceedings against the corporation, and consent thereto by the trustee, are binding on the bondholders.

8. RAILROADS—MORTGAGES—POWER OF TRUSTEE TO BIND BONDHOLDERS.

In cases of railroad mortgages, where the court has a double duty in respect of property taken into its possession, the duty to creditors and the duty to the public, the trustee under the mortgage represents the bondholders secured thereby for the purpose of any application by a receiver of the corporation for direction in the execution of his trust, in whatever proceedings the receiver was appointed, and whether the trustee was or was not originally a party to such proceeding.

9. RECEIVERS—ACTION TO FORECLOSE RECEIVER'S CERTIFICATES—APPLICATION TO PROCEEDS OF CERTIFICATES.

In an action to foreclose receiver's certificates issued by a receiver appointed in sequestration proceedings against a corporation, the holder of the certificates need not show the application of the proceeds thereof.

10. SAME—DEFENSES.

Where claims to which the proceeds of receiver's certificates issued by a receiver appointed in sequestration proceedings against a corporation were directed to be applied were prior to the claims of holders of bonds of the corporation secured by a mortgage, it would be inequitable to permit the bondholders to object to their allowance after receiving the proceeds of a sale under the mortgage, without diminution by reason thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, §§ 216, 218.]

Appeal from Special Term, Otsego County.

Action by the Rochester Trust & Safe Deposit Company against the Oneonta & Mohawk Valley Railroad Company and others to foreclose receiver's certificates as a first lien upon the railroad property. From a judgment declaring the certificates legally issued and directing a sale for the payment thereof, defendants appeal. Affirmed.

In 1898 there existed a trolley railroad running from Oneonta to West Oneonta, in the county of Otsego. This railroad was owned by a corporation known as the Oneonta & Otsego Valley Railroad Company. The line was thereafter extended to Cooperstown, and thence to Richfield Springs. The former company was in some way merged into a company known as the Oneonta, Cooperstown & Richfield Springs Railway Company, organized in 1902. A further extension from Richfield Springs northward to the village of Mohawk was in process of construction at the time of the issuance of the receiver's certificates hereinafter referred to. At the time of the construction of the extension of the road to Cooperstown and Richfield Springs, bonds were issued by the Oneonta, Cooperstown & Richfield Springs Company, secured by a mortgage. These numbered 1,500, and were for \$1,000 each. The Knickerbocker Trust Company of New York was the trustee of the mortgage. Of these bonds 1,364 only were issued. In 1903 one Lucius H. Townsend purchased a judgment against the defendant for \$470.84. Execution was returned unsatisfied, and an action was brought by him for a sequestration of the property of the corporation. Herbert T. Jennings was appointed temporary receiver in

the sequestration action. Thereafter, and on the 19th of March, 1904, Myron A. McKee was appointed co-receiver with Jennings.

Upon the 10th day of February, 1904, at a Special Term held in Canastota before Mr. Justice Forbes, an order was entered which provided for the issuance, by said Jennings as receiver, of receiver's certificates to the amount of \$250,000. It was provided that the proceeds of said certificates should be applied "to the completion of the extension of said railway from Richfield Springs to Mohawk, the improvement, betterment, and equipment of the railway property, and the payment of the receiver's fees and expenses, including fees and expenses of his attorneys and counsel, and the payment of the fees and allowance of the Knickerbocker Trust Company, as trustee under the railway company's mortgage in the litigations mentioned in said settlement agreement. * * * " It was further ordered that the said certificates be made a lien upon the said property prior to all liens and claims thereon whatsoever, and that for failure to pay interest the holders of the certificates might declare the full amount due and bring action to foreclose the same.

These certificates were afterwards purchased by this plaintiff, who purchased about \$50,000 from other holders, and the balance from the receiver himself. and the face value thereof was duly paid by the plaintiff. The Special Term has found that the moneys so received were applied according to the terms of said order, with the exception of between \$4,000 and \$5,000, which are now in the bank to the credit of said receiver.

In August, 1904, after a default had been made for 90 days in payment of interest upon said certificates, and after the plaintiff had elected to declare the whole amount due, an action was brought to foreclose the said certificates as a first lien upon said property and for the payment thereof. In that action no personal judgment was demanded against any one. Pending that action the Knickerbocker Trust Company commenced an action to foreclose its mortgage. In that action Henry B. Coman was appointed temporary receiver. That action was prosecuted to judgment, and the property sold thereunder and purchased by one Henry W. Bean for the sum of \$960,000. Under the terms of the sale and by the terms of the deed to said Bean, the property was sold "subject to the claim, if any, upon the receiver's certificates theretofore issued by said Herbert T. Jennings and Myron A. McKee, or either or both of them, pursuant to the order set forth in paragraph 7 of the complaint." Thereafter the defendant, the Oneonta & Mohawk Valley Railroad Company, purchased the said property from the said Bean.

Upon the application of the Oneonta & Mohawk Valley Railroad Company it was made a party to this action before judgment, and the complaint was deemed amended to state the facts leading up to the purchase and ownership of said property by said defendant. The said defendant answered, raising the principal issue in the case. The trial judge determined that these certificates were legally issued and directed a sale of the property for the payment thereof with costs. From the judgment so entered this appeal is taken. Further facts appear in the opinion.

Argued before SMITH, P. J., and CHESTER, KELLOGG, and COCHRANE, JJ.

McFarlane, Whitney & Monroe, for appellant Oneonta & M. V. R. Co.

Joseph G. Deane, for appellants Johnson Co. and others.

William N. Cogswell (James Breck Perkins, of counsel), for respondent.

SMITH, P. J. My conclusions in this case, briefly stated, are as follows:

First. The defendant the Oneonta & Mohawk Valley Railroad Company is the only party interested in this appeal. These certificates were not paid by the receiver. They were not directed to be paid from the proceeds of the sale. The full amount of such proceeds went

to the bondholders. The sale was made subject to the claims, if any, upon these certificates. It is a matter of interest, therefore, to the defendant railway company only whether these certificates be adjudged valid and a lien upon said property.

Second. When this action was brought the plaintiff had some right of action for reimbursement for the moneys paid. Before its conclusion the property had been sold to the defendant, subject to the claims under these certificates, if any. This sale and purchase itself constituted these certificates a lien, if the certificates were valid and enforceable obligations against the company. This is irrespective of any prior lien created by the order of February 10th. By the purchase, subject to the claims, if any, of the certificate holders, the defendant railroad company in no way admitted their validity, and is not estopped from questioning the same. It acquired by the sale the rights of the mortgagor and mortgagee. It may avail itself of any defense to the certificates which the bondholders could have asserted, and of those defenses only.

Third. This judgment cannot stand upon an estoppel against individual bondholders. There was considerable evidence introduced as to the consent to the issuance of the certificates and of the priority of their lien by a large majority of the bondholders, under a so-called voting trust agreement. There was evidence as to the written consents of still other bondholders who had not signed the so-called voting trust agreement. There was still further evidence as to the oral consent of other bondholders. From all of this the plaintiff claims that the bondholders have individually estopped themselves from questioning the validity of these certificates. However effective might be such proof, if the plaintiff had been in a position to present the same, no notice was given to the defendants by the plaintiff's pleading of an intention to stand upon any individual consents. This objection was explicitly and fully stated at the time the plaintiff offered the same in evidence. The defendants' objection was, however, overruled, and the evidence is in the case, without an amendment of pleading, over the defendants' objection and exception. I am of the opinion that the evidence was improperly admitted, and can form no basis upon which this judgment can stand.

Fourth. Plaintiff's judgment must stand, if at all, upon the validity and effect of the order of February 10th, authorizing the issuance of certificates and their priority of lien. In *Anderson on Receivers*, § 341, it is said:

"It is not true that the power of a court to authorize the issuance of receivers' certificates depends upon the consent of the parties to the litigation, or either of them. The public character of the property, the necessity to preserve and operate it properly and safely, give and demand the exercise of the power. It has been expressly declared that the exercise of this power does not depend on consent or on prior notice."

Upon this issue it is first objected by defendant that this receiver was appointed in sequestration proceedings with power limited by the statute. By the statute (section 1788 of Code of Civil Procedure) his power and duty is to "preserve the property." A receiver under foreclosure is given no greater power. In *Anderson on Receivers*, § 2. a

receiver is defined as an officer appointed by the court "to take possession of and preserve, pendente lite, and for the benefit of the party ultimately entitled to it, the fund or property in litigation. * * * " The extent of the receiver's power rests upon the construction of the word "preserve." The power and duty to "preserve the property" cannot differ, in whatsoever action or proceeding the receiver be appointed. Again it is objected that the order was improvidently made; that the completion of this road was not germane to the preservation of the property. If this were an open question, I should incline strongly to approve of the defendants' contention. The power to authorize construction should be most cautiously exercised, and should only be exercised when the cost is limited and the promise of return abundant. If objection had been made at Special Term, the order for the issuance of the certificates for this purpose would probably never have been made. It was granted, however, without objection on the part of the bondholders, in a proceeding to which they were parties, and in which they in effect joined in the application for their issuance. This determination was *res adjudicata* in all collateral proceedings upon the necessity of their issuance and their propriety. It cannot matter that the bondholders were not parties to the sequestration action. They were made parties to the proceeding in which the certificates were ordered. They have had their day in court. After being heard upon the application, and in effect joining therein, and not appealing from the order, they are in equity and law foreclosed from questioning the validity of the certificates in the hands of one who has advanced the moneys on the faith thereof which has gone to the betterment of their security. *High on Receivers* (3d Ed.) § 398f.

But appellants challenge my assertion that the bondholders have had notice of the application for the issuance of the certificates and consented thereto. That notice was given to the mortgage trustee, and it was he who consented. The challenge is well taken, unless the trustee represented the bondholders in that application.

It may be conceded at the start that, if there was no power under any circumstances to order certificates for the completion of the road, then the trustee had no authority to consent or to bind the bondholders on that application. But such a power had been recognized in several cases. In *High on Receivers* (3d Ed.) § 398d, it is said:

"No limit has been fixed to the purposes for which receivers' certificates may be issued, other than that they shall be germane to the objects of the receivership and necessary to the proper administration of the trust. Thus they have been authorized for the preservation, management, and repair of the road, and for the purchase of rolling stock; for the making of repairs only; for the further construction, equipment, and final completion of the road; to complete an unfinished portion of the road within the time fixed by law, and thus to prevent the lapsing of valuable land grants and franchises of the company. * * * "

In *Bank of Montreal v. C., C. & W. R. R. Co.*, 48 Iowa, 518, the court had authorized the issuance of certificates for the "further construction, equipment, and final completion of the road." It was held in that case, under the wording of the order, that certificates could only be issued for materials after delivery, and not for materials only contracted for. In the opinion it is said:

"In construing the order it must be borne in mind it confers upon the receiver extraordinary and unusual powers, which, however, it will be assumed were necessary and proper for the preservation and protection of the property committed to his charge."

The court, therefore, was not without power to issue the certificates under some contingencies.

With the power to issue the certificates conceded under any circumstances, and the propriety of their issuance alone at issue, both upon principle and authority, notice to the mortgage trustee bound the bondholders. In some cases where the receiver was appointed in an action to foreclose the mortgage, it has been stated that the bondholders submitting their claims to equity impliedly consented to the issuance of certificates upon notice to their trustee. But in this only half the truth is told. Bondholders have been held bound by notice to their trustee, where the trustee has been brought into court as defendant in an action, where no consent can be implied from his presence in court. *Kerrison v. Stewart*, 93 U. S. 160, 23 L. Ed. 843. In that case, in writing of this rule, Chief Justice Waite says:

"The principle which underlies this rule has always been applied in proceedings relating to railway mortgages, where a trustee holds the security for the benefit of bondholders. It is not, as seems to be supposed by the counsel for the appellants, a new principle developed by the necessities of that class of cases, but an old one, long in use under analogous circumstances, and found to be well adapted to the protection of the rights of those interested in such securities, without subjecting litigants to unnecessary inconvenience."

But, were the rule not otherwise established, the necessities of this class of cases would give full warrant for its existence. When property of a railroad is taken by the court into its possession, the court has a double duty. It must conserve that property to the best interests of the creditors. It must also protect the public, which has the legal right to demand that the road be operated. To whatever is necessary to protect that public right the bondholders have impliedly consented. Their trustee has implied authority to represent them in any proceeding instituted for such purpose. Holders of a large issue of railroad bonds are numerous, and their names and residences wholly unascertainable. It is impossible to give to each one notice of each application by the receiver for direction in the execution of his trust. In the case at bar, suppose it had been necessary to issue certificates for the running of the road. The individual bondholders could not be ascertained, that notice might be given to them. Defendant contends that notice to the trustee is not binding, because it is not a party to the sequestration proceedings. The logical conclusion of defendants' contention is that in this case no certificates could have been directed for necessary running expenses which would not be subject to question by each bondholder, when the certificate holder sought to enforce his prior lien. Certificates thus burdened would have little value, if a sale were at all possible, and the court would find itself unable to fully execute its trust. The better and necessary rule is that in cases of railway mortgages, where the court has a double duty in respect of property taken into its possession, a duty to all the creditors and a duty to the public, the trustee represents the bondholders for the purpose of

any application by the receiver for direction in the execution of his trust in whatsoever proceeding the receiver has been appointed, and whether or not the trustee was originally a party to such proceeding. In this case the receiver made application for authority to issue these certificates, both for the purpose of maintenance of the property and to complete the extension from Richfield Springs to Mohawk, a distance of about 12 miles. Upon this extension the heavy work had been done, the bridges built, and the rails and ties partly placed. Of this application the Knickerbocker Trust Company was given notice. The trust company appeared and filed an affidavit of its vice president, in which it is stated:

"That there had been exhibited to said trust company an instrument in writing, purporting to be signed by the owners and holders of 1,110 bonds secured by said mortgage out of a total outstanding issue of 1,364, and that the said trust company believes that the persons signing said instrument as aforesaid are the owners and holders of the number of bonds set after their names respectively; that aforesaid instrument contains a consent on the part of each of the holders of said bonds to the making of an order authorizing the receiver heretofore appointed in this case to issue his certificates, to amount not exceeding \$250,000, for the purposes expressed in the petition, such certificates to be a lien upon all the property and franchises of said railway company prior to the aforesaid mortgage; that the said assenting bonds constitute a very large majority of the bonds outstanding, and the said trustee knows of no person owning any other of the said bonds who has objected to the authorization of said certificates with a prior lien as aforesaid. None of the bonds secured by the said mortgage are registered, and the holders thereof have not left their addresses with the said trustee. In view of these facts, the said trustee submits to the jurisdiction of the court for such action in the premises as it may deem just and proper."

Thereupon the order was made for the issuance of said certificates and for their priority as a lien upon the property. This order has never been directly questioned, either by an appeal or by motion. The case of *Hollister v. Stewart*, 111 N. Y. 644, 19 N. E. 782, is cited as denying the power of the trustee to consent to the creation of a prior lien. In the opinion of Judge Finch in that case, it is stated:

"That thereafter the trustees, under the authority of the mortgage, solely and without judicial intervention took possession of the railroad and began to operate it, and eventually joined with the bondholders, outside of the plaintiff and the few others, in a plan of reorganization. * * *

It would seem to be clear that, without express authority in the mortgage, trustees would not have the right to consent to the placing of a prior lien. The validity of this order of February 10th does not stand upon their consent alone. It stands upon the authority of the court to administer the property in its possession upon notice to them. If this order would be binding upon notice of the trustee, if the application were made by a receiver appointed in the foreclosure of the mortgage, I can see no reason for refusing to give it effect upon application by the receiver in sequestration proceedings. Under either receivership, the court takes the property in its possession, to administer for the interests of exactly the same parties. Its duty is the same in either case. Plaintiff by his purchase from the receiver stands in privity with him and can invoke the protection of this adjudication.

That plaintiff need not show the application of the proceeds of the

certificates is held in *Union Trust Co. v. Ill. M. Co.*, 117 U. S. 435, 6 Sup. Ct. 809, 29 L. Ed. 963; *Wesson v. Chapman*, 77 Hun, 145, 28 N. Y. Supp. 431. The other claims to which the proceeds of the certificates were directed to be applied come prior to the claims of the bondholders. It would not be equitable to permit them to object to their allowance now, after receiving the proceeds of the sale, without diminution by reason thereof. Other objections have been made to the validity of this judgment, which have been examined and found untenable. The judgment should therefore be affirmed, with costs.

Judgment affirmed, with costs. All concur; KELLOGG, J., in result.

(57 Misc. Rep. 42.)

In re SHERIDAN.

(Supreme Court, Special Term, New York County. September 17, 1907.)

ELECTIONS—PRIMARY ELECTIONS.

Under Primary Election Law, Laws 1898, pp. 332, 341, c. 179, § 4, subd. 4, requiring the chairman of the general committee of each political party to deliver a statement of the conventions, committees, and offices for which delegates, candidates, etc., are to be elected at a primary, and the number of delegates and members of committees to be elected in each "unit of representation," and section 2, providing that "unit of representation" shall apply to an assembly district, etc., a rule of the general committee of a political party, which provides that the unit of representation shall be the assembly district, is valid, and a statement specifying the number of delegates, etc., to be elected in each "unit of representation" is sufficient, though it permits the participation in the nomination of candidates for offices on a smaller unit by those who cannot vote for the candidates at the general election, notwithstanding Election Law, Laws 1896, pp. 913, 922, c. 909, §§ 34, 53, defining a qualified elector; the election law not affecting the primary election law subsequently enacted.

Application by John V. Sheridan to review the decision of the board of elections of the city of New York in the matter of the application of Michael J. Redmond to correct the statement filed by the chairman of the general committee of the Democratic-Republican party of New York county, in so far as the same affects the Forty-First aldermanic district of the city of New York. Determination of the board of elections reversed, with directions.

Daniel F. Cohalan, for applicant.

Francis K. Pendleton, for board of elections.

SEABURY, J. This is an application to review the determination of the board of elections of the city of New York sustaining certain objections urged to the call or notice filed by the chairman of the general committee of the Democratic party of the county of New York for the Democratic primary election to be held September 24, 1907, and for an order directing the board of election to publish the call or notice as required by statute. Although there are seven applications now made, but a single question of law is presented for determination. On September 3, 1907, the chairman of the general committee of the Democratic party of the county of New York certified and delivered to the custodian of primary records a statement of the conventions, commit-

tees, members, or candidates to be elected, specifying the number of delegates to conventions and members of the committee to be elected "in each unit of representation." This statement was filed pursuant to subdivision 4 of section 4 of the primary election law (Laws 1898, p. 341, c. 179). Objections were filed to this statement upon the ground that under it enrolled members of the Democratic party would be permitted to vote for delegates to aldermanic and Municipal Court conventions in districts other than those in which said enrolled members resided, and thereby participate in the nominations of candidates for office for whom they could not vote at the general election. After a hearing had, upon notice to the parties interested, the board of elections, on September 12, 1907, adopted resolutions sustaining the objections and notified the chairman of the general committee of the Democratic party that the statement filed by him was rejected, and requested him to certify and file with said board a correct statement. The board of elections sustained the objections to the call or statement on the ground that in certain districts, where the assembly district is not coterminous with the aldermanic district and Municipal Court district, the unit of representation should not be the assembly district, but some smaller unit which is within the boundaries of the aldermanic or Municipal Court districts.

The question presented for determination is whether the specification in the call or statement of the assembly district as the unit of representation is valid, when the assembly district is not coterminous with the aldermanic or Municipal Court districts. This question must be determined by reference to the provisions of the statute in relation to this subject. Subdivision 4 of section 4 of the primary election law provides as follows:

"At least twenty days before each official primary day the chairman of the general committee of each party subject to the provisions of this act shall certify and deliver to the custodian of primary records a statement of the conventions, committees and offices for which delegates, members or candidates, as the case may be, are to be elected thereat, and the number of delegates to conventions and members of committees to be elected in each unit of representation."

The statement or call filed by the chairman of the general committee of the Democratic party fully complied with this section, provided that it specified a lawful "unit of representation." The question, therefore, is not whether the statement or call specified the fairest possible "unit of representation," but whether it specified a lawful "unit of representation."

Section 2 of the primary election law provides that:

"The term 'unit of representation' shall apply to an election district, a ward of a city, an assembly district, a congressional district, a senatorial district or any other political subdivision of the state which by the rules and regulations of a party may be the unit from which members of any political convention or committee to which this act is applicable shall be chosen."

Thus it is clear that the term "unit of representation" as used in the primary election law may by the rules and regulations of a party be made to apply to an assembly district. To determine, therefore, whether the designation of the assembly district as the "unit of rep-

resentation" is lawful, we must inquire, as to the rules and regulations of the Democratic party on this subject.

Article 2 of the rules and regulations of the "Democratic-Republican General Committees of the County of New York" provides that:

"The unit of representation to be observed in the election of delegates to the county general committee and to the several nominating conventions shall be the assembly district and the annexed district. Where a portion of an assembly district is within the political division for which the committee or convention is elected, such portion shall be deemed to be an assembly district for the purpose of representation, and the rules and regulations applying to an assembly district shall in all things apply to such portion of an assembly district."

This rule unquestionably fixes the assembly district as the "unit of representation," except in one contingency, which is different from that existing in any of the applications now before the court. In the Matter of Nagle, Mr. Justice O'Gorman determined that the "unit of representation" within the Democratic party in the county of New York was the assembly district. N. Y. Law Journal, September 4, 1902. The party rules then under consideration were similar to those now before the court. This determination was affirmed in the Appellate Division. 76 App. Div. 619, 79 N. Y. Supp. 1139. It is evident, therefore, that in so far as the provisions of the primary election law are concerned the designation of the assembly district as the "unit of representation" is a valid designation, unless it is in violation "of any other law" (subdivisions 1, 2, of section 9 of the primary election law).

The board of election contends that such a designation is in violation of section 53 of the election law (Laws 1896, p. 922, c. 909). This section provides that:

"No person shall be entitled to vote at any primary unless he may be qualified to vote for the officers to be nominated thereat on the day of election. They shall possess such other qualifications as shall be authorized by the regulations and usages of the political party or independent body holding the same."

The election law from which this section is quoted was passed in 1896, and cannot be held to refer to the primary election law, which was not adopted until 1898. The qualifications contemplated by section 53 of the election law are evidently those which are specified in section 34 of the election law. Section 34 of the election law contains general provisions as to the qualifications of an elector and provides that:

"A qualified elector is a male citizen who is or will be on the day of election twenty-one years of age, who has been an inhabitant of the state for one year next preceding the election and for the last four months a resident of the county and for the last thirty days a resident of the election district in which he may offer his vote."

Thus construed, there is no conflict between the provisions of section 53 of the election law and those provisions of the primary election law, quoted above, which permit a party organization by its rules to designate an assembly district as a "unit of representation." To adopt the construction of the board of election is to hold that the provisions of the election law and the primary election law are in direct conflict.

The proper construction to be placed upon these statutes is that which I have indicated, and conforms to the well-established canon of statutory construction which harmonizes the provisions of both statutes and gives effect to all of the provisions of each.

These applications now before the court must be determined by the plain provisions of the statute, and not by the adoption of a forced construction for the purpose of avoiding certain hardships which it is assumed would result in certain districts if the statutory provisions are followed. If the existing statutes do not compel political organizations to adopt the fairest possible "unit of representation," it is entirely within the province of the Legislature to remedy the situation by appropriate amendment. But the functions of the board of elections are not legislative, and it is not within its province nor within that of the courts to attempt by constructions which do violence to the plain provisions of the statute to remedy what may be conceived to be defective in the existing law.

It follows that the determination of the board of elections upon the objections to the call or statement should be reversed, and the board of elections should be directed to publish the call as provided by law and to print the ballots in substantial conformity to the usual forms.

Settle order on notice.

PEOPLE v. NEW YORK CITY RY. CO.

(Supreme Court, Special Term, New York County. November 30, 1907.)

1. CORPORATIONS—RECEIVERS—MANAGEMENT OF PROPERTY—AUTHORITY OF RECEIVER.

The appointment of a receiver of a corporation by a court of equity at the instance of a creditor gives to the receiver only its temporary management under the direction of the court, and is merely incidental to the principal relief sought; but the corporate existence continues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2243.]

2. SAME—DISSOLUTION—CAUSES—ACTION TO REVOKE CHARTER—JURISDICTION.

A corporation can only cease to exist by a surrender, forfeiture, or repeal of its charter; and a surrender can only be made to the state which grants it, whose courts also have exclusive jurisdiction of actions to revoke or forfeit its charter and franchises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2422.]

3. COURTS—CONFLICTING JURISDICTION—STATE AND FEDERAL COURTS—CORPORATIONS—APPOINTMENT OF RECEIVERS.

A state court has jurisdiction of an action brought under the express provisions of Code Civ. Proc. § 1785, to forfeit the charter and franchises of a domestic corporation insolvent for at least a year, and for the appointment of a temporary receiver, notwithstanding receivers of the same corporation have already been appointed in a suit by general creditors brought in a federal court to protect the corporation's franchises and property and preserve its corporate existence, since the objects of the two suits are different, although ordinarily, where two courts have concurrent jurisdiction, the one which first assumes jurisdiction has it exclusive of the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1347.]

4. SAME—COMITY—EXTENT OF DOCTRINE.

Courts will not indulge considerations of comity when to do so would disown their own exclusive jurisdiction of a matter over which they have the exclusive control, or work to the injury of residents of their own state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1343.]

5. SAME—GROUNDS OF JURISDICTION—RECEIVERS.

The power of a federal court to appoint receivers of a corporation is an incident of its equitable jurisdiction, while the jurisdiction of the state courts to forfeit corporate franchises is statutory.

6. FRANCHISES—TRANSFER.

A corporation owning public franchises owes primarily a duty to the state, and is subject to governmental regulation; and the transfer of its public franchises, either by the corporation or by other means, without the consent of the state, is against public policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Franchises, § 5.]

7. STREET RAILROADS—APPOINTMENT OF RECEIVER PENDENTE LITE—EFFECT.

The appointment pendente lite of receivers of a street railway corporation exercising public franchises practically devolves upon the receivers the performance of corporate functions of a public character and governmental nature, amounting to a transfer of its franchises.

8. COURTS—CONFLICTING JURISDICTION—FORFEITURE OF CORPORATE FRANCHISE—PROCEEDINGS BY STATE—RECEIVERS—ACTION PENDING IN FEDERAL COURT.

In an action in a state court to forfeit the charter of a domestic street railway corporation exercising public franchises delegated by the state, for which receivers have been appointed by a federal court, it is proper to appoint a receiver, with instructions to request the federal court to relinquish control.

Action by the people of the state of New York against the New York City Railway Company for a dissolution of the defendant corporation. On motion to appoint a receiver. Granted.

William Schuyler Jackson, Atty. Gen. (Frank H. Mott, William F. Mackey, and Herbert R. Limburg, of counsel), for the motion.

Samuel Untermyer, opposed.

SEABURY, J. This action is brought by the Attorney General of the state of New York to dissolve the defendant corporation, pursuant to the provisions of sections 1785 and 1786 of the Code of Civil Procedure.

Section 1785 of the Code of Civil Procedure provides that:

"An action to procure a judgment dissolving a corporation, created by and under the laws of the state, and forfeiting its corporate rights, privileges and franchises, may be maintained as prescribed in the next section: (1) When the corporation has remained insolvent for at least one year. * * *"

Section 1786 of the Code of Civil Procedure provides that:

"An action specified in the last section may be maintained by the Attorney General in the name and in behalf of the people."

The Attorney General seeks to maintain this action under subdivision 1 of section 1785 of the Code of Civil Procedure, upon the ground that the defendant "corporation has remained insolvent for at least one year." In the action now pending the Attorney General moves for the appointment of a temporary receiver. This motion is made

pursuant to section 1788 of the Code of Civil Procedure, which provides for the appointment of a temporary receiver and defines the powers of such receiver. The motion for the appointment of a receiver is made upon the summons, verified complaint, and affidavit of the Attorney General. The answer of the defendant and the affidavits submitted on its behalf deny that it has been insolvent for "at least one year," but admit its present insolvency. The proof now before the court establishes beyond all question, not only that this defendant has been insolvent for at least one year past, but that for several years last past it has been in this condition, and that its insolvency during that time has been continuous and progressive. Under the provisions of the Code of Civil Procedure referred to above the right and duty of the court to grant this motion would be perfectly clear, except for certain proceedings which have been taken in the federal court. It is necessary, therefore, at the outset to consider the proceedings in the federal court and to ascertain their legal effect upon the motion now made in this action.

On September 24, 1907, the Pennsylvania Steel Company and the Degnon Contracting Company, both being foreign corporations organized under the laws of the state of New Jersey, filed a bill in equity in the United States Circuit Court against the New York City Railway Company. It does not appear that the usual notice of motion was given or that any order to show cause why receivers should not be appointed was made or served. It does, however, appear that upon the same day the New York City Railway Company filed its answer in said suit, which confessed the allegations of the bill, an order was then immediately made, by Mr. Justice Lacombe of the United States Circuit Court, appointing Douglas Robinson, Esq., and Adrian Joline, Esq., receivers of all the property and franchises of the defendant. The bill filed in the United States Circuit Court prayed that receivers be appointed "for the purpose of preserving the unity of the system of the defendant as it has been maintained and operated, and to enable the receiver to do any and all acts which may be necessary to preserve valuable rights and franchises of the defendant," and "to protect and preserve the corporate franchises, privileges, and property and to preserve the corporate existence of the defendant." It also appears that the Pennsylvania Steel Company and the Degnon Contracting Company, who filed the bill, were merely general creditors, never having reduced their claims to judgment, nor having secured any other lien of any nature upon the property of the defendant corporation. Notwithstanding this fact, the defendant corporation, upon the same day that the bill was filed, confessed the claims and made no opposition to the appointment of receivers, and the court immediately granted the application, and the order appointing receivers directed "that the operation of the railroad system of the defendant shall be continued in the same manner as at present." On October 8, 1907, Mr. Justice Lacombe, in the United States Circuit Court, made an order making permanent the receivership. The Attorney General, in the papers submitted upon this application, charges that the above-described proceeding in the federal court was fraudulent and collusive, in that the defendant induced the Pennsylvania Steel Company and the Degnon

Contracting Company to file the bill, and immediately confessed all of its allegations and aided in securing the appointment of receivers of its own property, to the end that the property of this corporation should be left under a control that was friendly to the interests of those who had previously managed its affairs, and that it might by means of such receivership be relieved of obligations which it owed to the state which had created it. While the unity of action and purpose which seems to have actuated the plaintiff and defendant in that suit, together with the extraordinary—if not unseemly—haste which characterized the action taken, cause such suspicion to arise in every unprejudiced mind, it must be remembered that suspicion, no matter how well founded it may be, does not rise to the dignity of legal proof, upon which alone courts may base the judgments or decrees which they render in judicial proceedings.

Before we attempt to determine the legal effect of the proceedings in the Circuit Court and the appointment of the receivers therein, we should understand clearly the distinction which exists between the suit in the federal court and the action now pending in this court. The purpose or object of the suit in the federal court and that of the action now pending in the state court are radically different. The suit in the federal court is based upon the assumption of the continued existence of the corporation, and seeks to liquidate its affairs only in so far as may be necessary to protect the interests of those who have invoked the jurisdiction of that court. The action in the state court is primarily for the purpose of terminating the existence of the corporation by forfeiting its charter. The purpose of such an action is to enable the state, which gave corporate life, to take it away and to administer the assets and property of such corporation as a trust fund, so that the rights of all those having an interest in it may be fully protected. The existence of this distinction is nowhere so clearly marked as in those cases where receivers of corporations have been appointed. The appointment of a receiver of a corporation by a court of equity at the instance of a creditor gives to the receiver only the temporary management of its affairs under the direction of the court, and is merely incidental to the principal relief sought, "and the corporation still exists, and may, nevertheless, exercise any of its franchises so long as it does not interfere with the rightful management of its affairs by the receiver, as his duties are defined by the order of the court appointing him." *Alderson on Receivers*, p. 506, § 353; *Decker v. Gardner*, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480, and cases cited. In such cases the property may be sequestered, but the corporate existence continues, and its corporate identity is preserved. *Del Valle v. Navarro*, 21 Abb. N. C. 136; 24 Am. & Eng. Ency. of Law, p. 10. Thus a corporation still continues to exercise its corporate powers after the appointment of a receiver when its dissolution is not decreed. Even in an action to forfeit the charter of a corporation, such corporate powers would continue to be exercised until the corporate existence was terminated, and, in that event, its property would be distributed as provided by law.

An action to revoke a charter and franchises of a corporation granted by a state is one of which the courts of that state have sole

and exclusive jurisdiction. Having in mind the radically different objects sought to be accomplished in the suit in the federal court and the action in the state court, we are in a position to arrive at a correct conclusion as to the effect of the proceedings in the federal court upon the motion now pending in this court. The rule applicable to this case is stated with great clearness by Mr. Justice Bradley in the case of *Wilmer v. Atlantic & Richmond Air Line Co.*, 2 Woods, 426, Fed. Cas. No. 17,776. In that case Mr. Justice Bradley said:

"It is too well settled to admit of controversy that, where two courts have concurrent jurisdiction of a subject of controversy, the court which first assumes jurisdiction has it exclusive of the other; but, where the objects of the suits are different, this rule does not apply, although the thing about or in reference to which the litigation is had is the same in both cases."

This statement of the rule, and the "significant and important" exception to it, have been generally accepted by courts and text-book writers as being a correct declaration of the law upon this subject. *Ill. Steel Co. v. Putnam*, 68 Fed. 515, 15 C. C. A. 556; *East Tenn. & Ga. R. R. Co. v. Atlanta & Fla. R. R. Co.* (C. C.) 49 Fed. 608, 15 L. R. A. 109; *Liggett v. Glenn*, 51 Fed. 381, 2 C. C. A. 286; *Shields v. Coleman*, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660; *Merchants' & Planters' Nat. Bank v. Trustees of Masonic Hall*, 63 Ga. 549; *Anderson on Receivers*, p. 26, § 20. After stating the rule declared by Mr. Justice Bradley, Mr. Alderson, in his work on Receivers, reviews the authorities and then says:

"It is apparent from the foregoing cases, as well as the reason attending the rule announced in the preceding section, that Mr. Justice Bradley correctly asserted in the *Wilmer Case* that, 'where the objects of the suits are different, this rule does not apply, although the thing about or in reference to which the litigation is had is the same in both cases.'"

The same author, after intimating that some difficulty may attend the application of this rule, makes the following statement, which is clearly applicable to this case, and which he fortifies by the citation of authorities:

"Nor can the seizure and possession of property of a corporation through a receiver appointed in a proceeding by a stockholder or creditor preclude the court having cognizance of a proceeding by the state to dissolve and wind up the affairs of the corporation from appointing a receiver and taking possession of the property of the defendant, and this both because of higher right and the fact that the objects of the suits are not the same." *State v. Port Royal & Augusta Ry. Co.*, 45 S. C. 470, 23 S. E. 383, 386; *Herring v. N. Y., L. E. & W. R. R. Co.*, 105 N. Y. 340, 12 N. E. 763; *In re Kittaning Ins. Co.*, 146 Pa. 102, 23 Atl. 336; *St. Louis Car Co. v. Stillwater Ry. Co.*, 53 Minn. 129, 54 N. W. 1064; *City Water Co. v. State of Texas*, 88 Tex. 600, 82 S. W. 1033; *Texas Trunk Ry. Co. v. State of Texas*, 83 Tex. 1, 18 S. W. 199; *In re Pound*, 42 Ch. Div. 402; *De La Vergne Ref. Mach. Co. v. Palmetto Brewing Co.* (C. C.) 72 Fed. 579; *Met. Trust Co. v. Lake Cities Elec. Ry. Co.* (C. C.) 100 Fed. 897; *Merchants' & Planters' Nat. Bk. v. Trustees of Masonic Hall*, 63 Ga. 549.

In *State v. Port Royal & Augusta Ry. Co.*, supra, it was held, in the language of the syllabus to that case, that:

"In an action in a state court to forfeit the charter of a corporation for which a receiver has been appointed by a federal court, it is proper to appoint a receiver, with directions to him to apply to the federal court for the possession of the property."

In *Louisville, New Albany & Chic. R. R. Co. v. Cauble*, 46 Ind. 277, 280, an action was brought in the state court of Indiana, under an act of the Legislature of that state, against a corporation of that state of which the federal court had already appointed a receiver. The court upheld the right of a party to proceed under the statute in the state court, and said:

"The question discussed by counsel for appellant, therefore, resolves itself into the question of whether the Legislature of this state possessed the constitutional power to pass the above recited act. The corporate existence, powers, and franchises of the appellant were conferred by the Legislature of this state. We have carefully examined the decree of the United States Circuit Court for the District of Indiana appointing Mr. Chapman receiver, and find nothing therein which attempts to take away the corporate existence, powers, or franchises of the appellant; and it is therefore unnecessary for us to express any opinion as to the power of the federal judiciary to decree a forfeiture of the corporate existence and franchises of a corporation created by a sovereign state. The whole decree proceeds upon the theory that the appellant is a corporation created and existing under the laws of this state. The whole effect of the decree is to take the custody, control, and management of such corporation out of the hands of the persons who were controlling and managing the same, and to place the same into the custody and under the control and management of the receiver for a specified time and for a special purpose. The corporate existence of the appellant was left intact. The corporate powers and franchises which have been exercised by the officers of the company were conferred for the time being upon the receiver. The power and authority of the receiver to manage and control the company and its operations depended upon its corporate existence. If that had been taken away, the power and authority of the receiver would have ceased and terminated; for no court, federal or state, can confer corporate powers and franchises upon an individual. Such powers can be created and conferred by the legislative department alone."

In *City Water Company v. State of Texas*, 88 Tex. 600, 604, 32 S. W. 1033, a receiver of the property of a corporation was appointed in the federal court, and an action was brought in the state court to forfeit the charter of such corporation. The court held that the action in the state court might proceed notwithstanding the action in the federal court, and in answer to the question propounded to it the court said:

"That the receivers appointed by the United States Circuit Court for the corporation defendant in this suit was neither a proper nor necessary party to an action by the state to forfeit its charter."

In *People v. Seneca Lake Grape & Wine Co.*, 52 Hun, 174, 178, 5 N. Y. Supp. 136, 138, it has been held that the pendency of voluntary proceedings for the dissolution of a corporation is no bar to a proceeding by the Attorney General in the name of the people, under chapter 15, tit. 2, art. 3, of the Code of Civil Procedure, to dissolve the corporation. The court said:

"We think it obvious that it was not intended by the Legislature that the voluntary proceedings for the dissolution of the corporation should preclude the people, by the Attorney General, from commencing an action to procure a dissolution of a corporation for any of the grounds stated in section 1785. As a general rule a cause of forfeiture cannot be taken advantage of and enforced against a corporation, except by the government creating the corporation, which alone can institute such a proceeding, as it may waive a broken condition, express or implied, in the act of incorporation."

In *St. Louis Car Co. v. Stillwater Street Ry. Co.*, 53 Minn. 129, 54 N. W. 1064, an action was instituted under a state statute to sequester the property of a corporation of which a receiver had already been appointed in a foreclosure suit. In asserting the right of the court to appoint a receiver in the action brought under the state statute, the court said:

"The fact that a receiver had already been appointed in the foreclosure suit constituted no reason why a receiver should not be appointed under Gen. St. 1878, c. 76. A receivership in a suit to foreclose a mortgage is only for the purposes of the foreclosure, and, however general the language of the appointment, affects only the property covered by the mortgage. Its purpose is to preserve the mortgaged property for the benefit of the mortgagee. On the other hand, the object of a receivership of an insolvent corporation under Gen. St. 1878, c. 76, is to sequester all its property for the benefit of all its creditors. The powers of the receivers in the two cases are entirely different. There are various classes of property that can be reached by a receiver under chapter 76 which could not be reached by a receiver appointed in a foreclosure suit."

The object of the suit in the federal court being different from the action now pending in the state court, the present application for the appointment of a receiver is clearly within the well-recognized and established exception to the general rule stated by Mr. Justice Bradley. There is no doubt, therefore, of the legal right of this court to grant the motion of the Attorney General and appoint receivers.

The only other question to be determined upon this motion is whether, on account of considerations of comity, this court in the present action should decline to exercise its undoubted right to appoint receivers, in view of the fact that receivers have already been appointed in the federal court in a suit of a different character and designed to accomplish a different object. Courts will not indulge considerations of comity, when to do so would disown their own jurisdiction in reference to a matter of which they have the exclusive right to act, or when to do so would work to the prejudice or injury of residents of their own state. *Mercantile Trust Co. v. Lamoille Valley R. R. Co.*, 16 Blatchf. 324, Fed. Cas. No. 9,432. A corporation can only cease to exist by virtue of a surrender, forfeiture, or repeal of its charter, and such surrender can only be made to, and such forfeiture or repeal effected by, the state. *Denike v. N. Y. & R. Line*, 80 N. Y. 599. Neither the federal court nor any other power than that of the sovereign to which the corporation owes its life and franchises can cause a forfeiture of these privileges. There is no principle more firmly fixed in English and American jurisprudence than that the state which gave can alone take away the life and privileges of a corporation.

The power of the federal court to appoint receivers exists by virtue of their equitable jurisdiction. *Payne v. Hook*, 7 Wall. (U. S.) 425, 19 L. Ed. 260. Jurisdiction to forfeit corporate franchises in England was vested in the courts of law, and "the courts of chancery never assumed jurisdiction in such cases until it was conferred by act of Parliament." *Decker v. Gardner*, 124 N. Y. 334, 337, 26 N. E. 814, 11 L. R. A. 480. At the present time such power is wholly statutory, and is vested in the state courts. *Matter of B. G. E. Co.*, 143 N. Y. 261, 38 N. E. 297; *Matter of Coleman*, 174 N. Y. 373, 382, 66 N. E. 983. The reason why courts of equity cannot dissolve corporate franchises

depends upon the essential nature of the powers which corporate bodies possess. While the authorities do not deny the right of a court of equity to appoint receivers of corporate property, as an incident to its jurisdiction, they show very plainly that, in case of a corporation exercising public franchises, such an appointment pendente lite practically devolves upon the receivers appointed by the court the performance of corporate functions which are public in character and governmental in their nature. A corporation owning and operating public franchises owes primarily a duty to the state which created it. As was said by the United States Supreme Court in *Wisconsin, etc., R. Co. v. Jacobson*, 179 U. S. 287, 296, 21 Sup. Ct. 115, 118, 45 L. Ed. 194, in speaking of such corporations:

"Railroads have from the very outset been regarded as public highways, and the right and the duty of the government to regulate in a reasonable and proper manner the conduct and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the functions of proper regulation by the government spring from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions. *Olcott v. Supervisors*, 16 Wall. 678, 694, 21 L. Ed. 382; *Cherokee Nation v. So. Kan. Ry. Co.*, 135 U. S. 641, 10 Sup. Ct. 985, 34 L. Ed. 295; *U. S. v. Joint Traf. Ass'n*, 171 U. S. 505, 569, 570, 19 Sup. Ct. 25, 43 L. Ed. 259; *Lake Shore Ry. Co. v. Ohio*, 173 U. S. 285, 301, 19 Sup. Ct. 465, 43 L. Ed. 702. It is because they are such highways that the land upon which the rails are laid, and also that which may be necessary for the other purposes of the corporation, is said to be used for a public purpose, and on that ground the power of eminent domain which is given to them is held to be a constitutional exercise of legislative authority. The right of the Legislature to tax in furtherance of such use is founded upon the same consideration that the use is a public one, and therefore taxation in support of such use is valid. *Olcott v. Supervisors*, supra. The companies hold a public franchise, and governmental supervision is therefore valid. They are organized for the public interest and to subserve primarily the public good and convenience."

Such being the case, they are subject, as has been repeatedly held, to governmental regulation and supervision. But the effective exercise of the power of regulation and supervision depends upon the continuance of state control over the franchises which the corporation enjoys. In the case of *Atlantic Coast Line v. No. Ca. Corp. Com'n*, 206 U. S. 1, 19, 27 Sup. Ct. 585, 591, 51 L. Ed. 933, the court said:

"The elementary proposition that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine."

Thus it is settled that the public franchises of a corporation cannot be alienated without the consent of the state. This rule and the reasons upon which it rests are well stated by Judge Noyes in his valuable treatise on *Inter-corporate Relations* (section 135), where he says:

"It is a rule applicable to all corporations exercising public franchises that such franchises can be transferred only by and with the consent of the state which granted them—that corporate franchises are incommunicable without legislative authority. The courts have assigned various reasons for the existence of the rule, of which the following are based upon principles fundamental-

ly sound: (1) The charter of a corporation is the measure of its powers. Unless authority to transfer its franchises is expressly granted, such an act is *ultra vires*. (2) The transfer by a corporation of its franchises—disabling it from the performance of its public duties—is against public policy. (3) A corporation exercising public franchises is an agent of the state, and without the consent of the state cannot delegate its powers.”

The rule thus declared is obviously for the benefit of the state, and not of the corporation. The same reasons which demonstrate that the transfer by a corporation of its public franchises, without the consent of the state, is against public policy, apply with equal force when such transfer is effected by other means without the consent of the state which created them. The public character and governmental nature of the functions performed by a street railway corporation are evident from the following considerations:

1. Such functions cannot be exercised without the consent of a sovereign power. The construction and maintenance of a street railway by an individual, or association of individuals, without legislative authority, would constitute a public nuisance, and subject the persons maintaining it, not only to indictment, but also to a private action in favor of any person sustaining special injury. *Fanning v. Osborne*, 102 N. Y. 441, 447, 7 N. E. 307.

2. Those functions involve the use of state public property. Such franchises are exercised in public highways or streets. Our modern streets, roads, and highways constitute “the people’s highways,” as at common law they were regarded as belonging to the king, and such “public highways” belong, from side to side and end to end, to the public. *State v. Berdetta*, 73 Ind. 185, 193, 38 Am. Rep. 117. See, also, *Wis. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194.

3. Such corporations are agents of the state, permitted by the sovereign power to exercise the right of eminent domain and to collect tolls or fares for the service which they render. The exercise of these rights involves the exercise of the state’s sovereign power, and cannot be delegated without the consent of the state, and the enjoyment of these great privileges imposes upon such corporation a corresponding duty.

In *Matter of Loader*, 14 Misc. Rep. 208, 35 N. Y. Supp. 997, Mr. Justice Gaynor said:

“It [the railroad corporation] has a dual relation; a public relation to the people of the state, and a private one to its stockholders. It must not be forgotten here, though it may seem to be growing dim, if not wholly forgotten elsewhere, that in its chief aspect it is a public corporation, having duties to perform to the public which transcend any obligation which in its private aspect it owes to its stockholders. It has received franchises of great value from the state, and had conferred upon it the state’s transcendent power of eminent domain. In return it took upon itself the performance of public duties and functions, in the performance of which it is in law and in fact not an independent individual or entity, but the accountable agent of the state. Though these principles are old, and inherent in the idea of the sovereignty of the people, it would seem that in the recent rapid growth of corporate power, and of the tendency to use public franchises for the aggrandizement of individuals first and for the service and benefit of the public second, they have come to be somewhat overlooked, and need to be restated. They have often been declared by the highest courts of the state and the Supreme Court of the United States.”

The fact that a railroad corporation is chargeable with the performance of public governmental functions is, therefore, clear beyond all reasonable dispute. This governmental power which it exercises is the power of the state government. When such corporations offend against the law of the state, or have remained insolvent for at least a year, the state has the right, in the manner prescribed by law, to forfeit its charter and distribute its property to those entitled to it. Pending the rendering of such final judgment, the state court may appoint a temporary receiver, and thus retain within its control and in the hands of another of its own agents the powers and franchises which it originally gave to the corporation, the proper administration of which constituted the primary purpose for conferring them. The fact that the federal court, upon the application of a general creditor and without notice to the Attorney General or any other public official of the state, appointed receivers of a railroad corporation, will not preclude the state from revoking the charter of such corporation in a proper case, and thus protecting its own rights and the interests of those resident within its territory. To deny its right to take this action is to question its power over its own creature. To assert that a federal court, which has appointed receivers of these franchises, will refuse to grant the request of the state court that it should surrender its possession to the state court, to the end that the state may bring about their forfeiture, and in the meantime keep within the hands of its own agents the governmental powers which it has granted, is to contend that when the state seeks to take away the corporate existence the federal court may keep it alive and continue its existence. If this be so, then the right of the state to forfeit the charter of a corporation may be suspended at the pleasure of the federal court, and the sovereign power which the state alone is authorized to grant is exercised by the receivers of a federal court against the will of the state. If such a proposition be sound, then the state governments no longer enjoy any real or effective power of control over the corporations which they create, and upon the application of any creditor of a foreign state and by the consent of the officers of the corporation the state may be ousted of its rights to forfeit corporate privileges, no matter how grossly those privileges may have been abused, and the public duties, for the proper performance of which the corporation was created may be surrendered to the federal courts, which are in no way responsible to the state. Certainly no principle of comity requires a state court to assent to such a proposition, or aid in establishing a precedent so disastrous in its consequences to the constitutional rights of the state.

Such a doctrine I believe to be fundamentally wrong, without the sanction of any constitutional provision or statute, and one that can exist by virtue of no power other than that of usurpation. In view of the considerations urged above, and because the state court has exclusive jurisdiction of an action to revoke a corporate charter, and full authority and ability in such action to completely protect the rights and interests of those who invoke the jurisdiction of the Circuit Court, I believe that the motion for the appointment of receivers, in the present action, should be granted. Although this court feels bound to take this action in order that the rights of the state of New York may be

vindicated and protected, it instructs its receivers not to molest or interfere with the possession which the receivers of the federal court have assumed, inasmuch as such receivers are now actually in the possession of such property. To the end that the questions involved may be settled in a proper and orderly manner, and in deference to that spirit of comity the observance of which has done so much to make productive of goods results that dual system of jurisdiction which characterizes our government, this court instructs the receivers which it appoints to apply to the federal court and on behalf of the state court to request the federal court to relinquish its control over the corporate rights, privileges, franchises, and property involved, to the end that the purposes of this action may be carried out, and to assert whatever rights they may have by reason of their appointment as receivers of the property in question. This was the course approved in the cases of *Adams v. Mercantile Trust Co.*, 66 Fed. 617, 15 C. C. A. 1, and *Central R. R. Co. v. Farmers' Loan & Trust Co.* (C. C.) 56 Fed. 357, and in both of those cases the federal court complied with the request that was made to it.

As the Attorney General specifically charges that the receivership in the federal court was brought about by the fraudulent collusion of the parties to that suit, the receivers appointed by this court are authorized to take such action as may be proper, in an orderly manner, to establish by competent evidence, if that be possible, the charge which the Attorney General has made upon this motion, but which the proofs now before me are insufficient to sustain.

PEOPLE v. HASBROUCK et al.

(Supreme Court, Special Term, New York County. November 30, 1907.)

1. CORPORATIONS—ACTIONS—RECEIVERS.

In an action under Code Civ. Proc. § 1782, by the Attorney General on behalf of the people, brought against a corporation and its directors to compel the directors to account for their official conduct and for their failure to perform their duties, etc., the court has authority under section 1810 to appoint a temporary receiver of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2015.]

2. COURTS—FEDERAL COURTS—JURISDICTION.

The federal court has no jurisdiction to appoint a receiver of a domestic corporation on its petition of intervention in a suit in which the federal court appoints a receiver of a lessee of the property of the corporation on the petition of creditors of the lessee; nor has the federal court jurisdiction to appoint such a receiver on the petition of another domestic corporation which is a creditor of the corporation.

Action by the people of the state of New York against Daniel B. Hasbrouck and others. On motion for the appointment of a temporary receiver of the property of defendant the Metropolitan Street Railway Company. Granted.

William Schuyler Jackson, Atty. Gen. (Frank H. Mott, William F. Mackay, and Herbert R. Limburg, of counsel), for the motion.

Samuel Untermyer, opposed.

SEABURY, J. This action is brought pursuant to section 1781 of the Code of Civil Procedure. The purpose of the action is clearly set forth in the complaint, wherein the—

"Plaintiff demands judgment that the individual defendants account for their official conduct, as directors of the defendant company, from the year 1898 up to and including the present time, including their neglect or failure to perform their duties in the management and disposition of the funds and property of the defendant company committed to their charge; that they be directed to pay to the defendant company all money and the value of all property which was lost or wasted by or through them, or through their neglect or failure to perform their duties, and by the violation of their duties aforesaid; that they and each of them be suspended from exercising the office of directors of the defendant company, and directing that, upon their removal as directors, a new election be held to substitute other directors; appointing a receiver of the property of the defendant company, both during the pendency of this action and upon final judgment, with power to take such action as may be necessary to recover the value of the assets and property wasted; restraining all creditors from taking any action against the defendant company until the determination of this suit."

On September 30, 1907, there was presented to Mr. Justice Ford, and he signed, an order to show cause why a temporary receiver should not be appointed of the property of the Metropolitan Street Railway Company in this action, which order was served on October 1, 1907. On October 1, 1907, Mr. Justice Lacombe, of the United States Circuit Court, made an order extending the receivership of the property of the New York City Railway Company, which receivership had been appointed on September 24, 1907, to the property of the Metropolitan Street Railway Company. On October 8, 1907, the United States Circuit Court made an order making the receivership permanent; and, a bill have been filed in that court on October 7, 1907, by the Morton Trust Company, as trustee under a mortgage executed by the Metropolitan Street Railway Company to secure certain bonds, praying for the appointment of receivers of the property of the Metropolitan Street Railway Company, Mr. Justice Lacombe, on October 8, 1907, made an order appointing the same receivers who had been previously appointed as receivers of the property of the Metropolitan Street Railway Company.

The power of the Attorney General to bring this action is conferred by section 1782 of the Code of Civil Procedure. In this action the Attorney General moves for the appointment of a temporary receiver of the property of the defendant corporation. The appointment of such receiver is authorized by section 1810 of the Code of Civil Procedure. It is unnecessary to set out in detail the evidence of the acts of neglect and waste of the funds of this corporation, of which its directors are charged to have been guilty. In my judgment, upon the facts shown, there can be no doubt of the duty of this court to appoint receivers, unless the action of the federal court, in extending the receivership of the New York City Railway Company to the property of the Metropolitan Street Railway Company on October 1st, or the appointment of the same receivers on October 8th, upon the application of the Morton Trust Company, makes such action improper. Many of the considerations set forth in the opinion in *People of the State of New York v. New York City Railway Company*, 107 N. Y. Supp.

247, are applicable to this case, and would operate as reasons why, if receivers are to be appointed in this action, the federal court should comply with the request of the state court that the federal receivers be directed to surrender the property now in their possession to the receivers of this court. As the jurisdiction of the federal court to appoint receivers of the Metropolitan Street Railway Company is only claimed to exist as an incident to the jurisdiction alleged to have been acquired by the appointment of receivers of the New York City Railway Company, it necessarily follows that, if the federal court grants, as this court must assume that it will, the request which the state court instructs its receivers to make, the same disposition will be made of the case of the Metropolitan Street Railway Company.

There is, however, even a clearer right and a more obvious propriety that the state court should appoint receivers in this action than that which existed in the case of the New York City Railway Company. When the action of the federal court in appointing receivers of the Metropolitan Street Railway Company is examined in the light of judicial authority, it becomes evident that the federal court was absolutely without jurisdiction in the premises, and that the action there taken in reference to this corporation was void. The Metropolitan Street Railway Company stood in the position of a creditor of the New York City Railway Company, having leased all of its property, right of way, railroad, railroad routes, and franchises in 1902 to the New York City Railway Company for a term of years. It is not contended that any foreign creditor of the Metropolitan Street Railway Company made any claim against it, or that the Metropolitan Street Railway Company was named as a party defendant in the original suit. Upon its own petition this defendant company went into the federal court and requested to be allowed to intervene, as a party defendant, in the suit of the Pennsylvania Steel Company and the Degnon Contracting Company against the New York City Railway Company, and upon its own motion requested that an order be made extending the receivership of the property of the New York City Railway Company to its property. This motion was granted upon the ground that, the federal court then having possession of the *res*, it acquired jurisdiction of its owner. See opinion of Mr. Justice Lacombe on October 1 and on October 8, 1907 (157 Fed. 440). It is, of course, conceded that if the federal court had not assumed jurisdiction of the property of the New York City Railway Company on September 24th, and that if the application of the Metropolitan Street Railway Company had been an original or independent proceeding, the federal court would have been utterly without jurisdiction to entertain the application of this defendant company. Nor would the application of the Morton Trust Company, a corporation organized under the laws of the state of New York, alone confer jurisdiction upon that court. The question to be determined, therefore, is whether the United States Circuit Court had jurisdiction to extend the original receivership to the property of the Metropolitan Street Railway Company, or to appoint receivers upon the bill filed by the Morton Trust Company. Neither in the application of the Metropolitan Street Railway Company for an extension of the receivership to its property nor in the application of the Morton

Trust Company for the appointment of receivers of the Metropolitan Street Railway Company has there been present the element of diversity of citizenship, or any cause of action which arose under the Constitution or laws or treaties of the United States, and the Circuit Court was entirely without jurisdiction to take the action which it assumed to take. The action taken in those proceedings was not ancillary, in any proper sense, to the original action commenced September 24, 1907, but was independent and original, and in both cases the relief sought could be granted in the state court. *Minnesota Company v. St. Paul Co.*, 2 Wall. (U. S.) 609, 633, 18 L. Ed. 856.

The only authority which has been called to the attention of this court which seems to sustain the action taken, and to hold that such action is sufficient to confer jurisdiction, is the case of *Central Trust Company v. Wabash, St. L. & P. R. R. Co.* (C. C.) 29 Fed. 623. In view of the criticism which judicial authority has made of this case and the decisions which have declared a contrary rule, the *Wabash Case* cannot be regarded as controlling. High judicial authority has characterized the decision in the *Wabash Case* as "sui generis," and declared it to be "without precedent" and "one that ought not to be followed." *State ex rel. Merriam v. Ross*, 122 Mo. 435, 460, 25 S. W. 947, 23 L. R. A. 534. The petition of the Metropolitan Street Railway Company states no cause of action against anybody, nor does it show that the petitioner's rights have been impaired. It was merely the application of a creditor of the New York City Railway Company, which feared that it would be unable to pay its obligations, requesting a court of equity to take over its property and carry on its business. As was said by the court in the case of *State ex rel. Merriam v. Ross*, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534:

"It is simply a petition by a debtor for the appointment of a receiver to manage and carry on its business, so that its creditors cannot enforce their legal rights in the courts of the country, and not a petition stating a cause of action either at law or in equity, in which, as incident thereto, a receiver might be appointed. The filing of that petition no more constituted an actual controversy between contending suitors in court than would the filing of a copy of the Lord's Prayer."

In the case of *State v. Ross*, supra, the authorities upon this subject are exhaustively reviewed, and the court concluded that such a petition was insufficient to confer jurisdiction upon a court. In *Merchants' & Manufacturers' National Bank of Detroit v. Kent Circuit Judge*, 43 Mich. 292, 5 N. W. 627, it was held that the appointment of a receiver when there is no suit pending concerning the property of which he is put in charge is void. In *Jones v. Bank of Leadville*, 10 Colo. 464, 473, 17 Pac. 276, the court said:

"Hitherto it has been the universally accepted opinion that courts have no jurisdiction to appoint a receiver, except in a suit pending in which the receiver is desired, unless in cases of idiots, lunatics, and infants, which, as Lord Hardwicke says in *Ex parte Whitfield*, 2 Atkins, 315, is 'a particular jurisdiction.' * * * To hold that courts of equity can entertain jurisdiction to appoint a receiver of property as the substantive ground and ultimate object and purpose of the suit, on the petition of the owner of the property to be controlled and protected, would be to make them the administrators of every estate when the owners thereof seem incapable or unwilling to administer them."

Further support for the doctrine referred to in these cases will be found in the case of Baker against Administrator, 32 Ill. 79; Hardy v. McClellan, 53 Miss. 507; In re Hancock, 27 Hun, 575; Harwell v. Potts, 80 Ala. 70; Pressley v. Harrison, 102 Ind. 14, 1 N. E. 188; Port Huron & Gratiot R. Co. v. Judge of Ste. Claire Circuit, 31 Mich. 456.

There being no legal authority for the extension of the receivership to the defendant company upon its own application, nor for the appointment of receivers upon the application of the Morton Trust Company, other than the Wabash Case, which has since been repudiated, and such applications being insufficient to confer jurisdiction upon the federal court, it follows that such action was without jurisdiction and void. Being without jurisdiction, it presents no obstacle in the way of this court granting the motion for the appointment of receivers. That motion is therefore granted.

The court appoints the same receivers as it has appointed in the case of the New York City Railway Company, and subjects them to the same instructions as to the manner of applying to the federal court to secure the possession of the property to which, under the law, they are clearly entitled.

PEOPLE v. HEGEMAN.

(Supreme Court, Trial Term, New York County. December 2, 1907.)

1. INDICTMENT—MOTION TO QUASH—INSUFFICIENCY OF EVIDENCE BEFORE GRAND JURY.

The court has power to entertain a motion to quash an indictment for the insufficiency of the evidence before the grand jury and to grant it in a proper case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 483.]

2. FORGERY—ELEMENTS OF OFFENSE—STATUTES.

Under Pen. Code, § 515, declaring that one who, with intent to defraud, makes a false entry in any book of accounts, is guilty of forgery, the two essentials to constitute forgery are the making of the false entries and the intent in so doing to defraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Forgery, § 50.]

3. CRIMINAL LAW—MOTIVE—INTENT.

A motive in a criminal case differs from an intent, and, no matter whether the motive be good or bad, if the presence of the intent required to constitute a particular unlawful act is proved, the offense, if committed, is complete.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 21-24.]

4. FORGERY—INTENT—"DEFAUD"—EVIDENCE.

Under Pen. Code, § 515, providing that one who, with intent to defraud, makes a false entry in a book of accounts, shall be guilty of forgery, and sections 718, 721, declaring that, where an intent to defraud is required, intent to defraud any person or association, etc., is sufficient, proof that the president of an insurance company made false entries in the company's books, with a view of excluding from the annual reports to the state insurance department all references to syndicate operations and collateral loans, is not alone evidence of an intent to defraud essential to constitute forgery; "defraud" implying the obtaining of an unconscionable advan-

tage to one party or the unjust deprivation of property or rights belonging to the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, § 50.

For other definitions, see Words and Phrases, vol. 2, pp. 1947-1949; vol. 8, pp. 7631, 7632.]

5. SAME—FALSE ENTRIES IN BOOKS OF ACCOUNT.

The making of false entries in corporate books, through mistake or with a purpose to accomplish by appropriate fictitious entries a proper bookkeeping result, or to deceive some one with no purpose of profit either contemplated or possible, is not forgery; but the making of false entries in corporate books with a view to conceal the evidence of a crime already committed or to render its detection impossible or more difficult, or to facilitate the commission of a future crime, or to defraud creditors, present or prospective, stockholders, or any other persons, is a forgery, under Pen. Code, § 515, defining forgery in the third degree as the making of false entries in books of account with intent to defraud, etc.

6. SAME—INTENT—PROOF.

Since intent to defraud is essential to forgery in the third degree, under Pen. Code, § 515, it must affirmatively appear that sufficient evidence to establish the intent or to justify the inference of its existence has been received by the grand jury, in order to authorize it to return an indictment.

7. CRIMINAL LAW—INTENT—PROOF.

Where an act becomes criminal only through the existence of a specific intent, the intent must be proved, and proof of the doing of the act is not sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1271.]

8. SAME.

Where the facts are undisputed, the question whether the evidence shows a crime as charged is a question of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1715.]

9. INDIOTMENT—MOTION TO QUASH—INSUFFICIENCY OF EVIDENCE BEFORE GRAND JURY.

Evidence before the grand jury, on which it found indictments for perjury, held not so insufficient as to require that the indictments be quashed on motion.

John R. Hegeman was indicted for forgery and perjury. Indictments for forgery quashed for failure of the evidence to disclose an intent to defraud.

William Travers Jerome, Dist. Atty., and Isidor J. Kresel, Asst. Dist. Atty., for the People.

John G. Milburn, De Lancey Nicoll, R. V. Lindabury, and Morgan J. O'Brien, for defendant.

DOWLING, J. These are motions, ten in number, to quash, dismiss, and set aside a like number of indictments found by the grand jury of the county of New York against the defendant, John R. Hegeman, whereof seven are for the crime of forgery in the third degree and three are for the crime of perjury, upon the ground of the insufficiency of the evidence before the grand jury. The transactions upon which they are based, as shown by the minutes of the grand jury, are as follows:

It appears that for a number of years it was the practice of the Metropolitan Life Insurance Company to transfer certain of its assets, consisting of collateral loans and syndicate participations, on the 30th of December, either to John R. Hegeman, the defendant, who was the president of the insurance company, or to Vermilye & Co., a firm of bankers, and about the 2d day of January of the following year to secure the retransfer of these assets to the insurance company. The forgery indictments charge that some of the book entries made in accordance with these transactions were false entries and made by the defendant with the intent to defraud. On December 30, 1902, the insurance company was carrying on its books and actually owned: 296 shares Federal Trust Company stock; temporary loan to William A. Read, \$200,000; sundry syndicate participations, \$1,401,943.25; sundry other temporary loans to George P. Sheldon, James P. Moran, and others, aggregating \$138,055. These loans were all secured by collateral. On December 30, 1902, the defendant gave to the company his check on the National Shoe & Leather Bank for \$138,055 to take up the sundry temporary loans above referred to, which aggregated that amount. The receipt of this check was entered in the ledger, and the check was deposited and collected. On January 2, 1903, the loans were received back by the insurance company, the defendant returning the securities, and a check of the insurance company for the same amount, \$138,055, being given to the defendant. This payment of January 2d was entered by the assistant cashier in Cash Book Q; the aggregate amount being distributed in the entries to the different temporary loans which it represented. The form of the entry was as follows:

1903	29440			
Jan. 2 62	Temp. Loan	Sheldon	4,000	
62	do	Moran	15,000	
62	do	U. S. Electric.....	38,000	
62	do	Crane	51,500	
62	do	Melghan	8,280	
62	do	Hiltner	25,000	
62	do	Hancock	1,275	

The above entries of January 2d are the basis of the charge contained in indictment No. 93 (forgery). That indictment charges that these entries purported to indicate that the Metropolitan Life Insurance Company on that date had paid to the persons named the sums set opposite their names as loans to the said persons; whereas in truth and in fact the insurance company did not on that date pay to the said persons any sums whatsoever.

On December 30, 1902, the insurance company delivered to Vermilye & Co. certificates for 296 shares of Federal Trust Company stock, and the collateral securing the \$200,000 call loan of William A. Read, accompanied by the following letter signed by the defendant:

"Gentlemen: The bearer will hand you 296 shares of Federal Trust Company stock, with receipted bill for same amounting to \$60,256. This is sold to you on the understanding that you are to resell it to us on January 2, 1903, we paying you the same price. Also inclosed find collateral for account of William A. Read, for which please send us check for \$200,000. Whatever part of this or all you would like back on January 2, 1903, advise us of at your convenience. To-morrow we will send you certain papers as heretofore advised in detail and receive from you check for \$1,401,943.25. We will send you

our check at the same time on deposit account for \$600,000. On January 2, 1903, we will reverse this, sending you our check for \$1,401,943.25, and drawing on deposit account for \$600,000. Whatever interest may be involved in this please make us an account of after the transactions are over.

"Yours very truly,

John R. Hegeman, President."

On the same day Vermilye & Co. delivered to the insurance company their check for \$260,256. On the following day, December 31, 1902, the company also delivered to Vermilye & Co. the papers in connection with the company's interests or participations in four syndicates, namely, the National Shoe & Leather Bank syndicate, \$27,000; Omaha & Sioux City syndicate, \$800,000; Pittsburgh & Toledo syndicate, \$150,000; and San Francisco Street Railway syndicate, \$424,943.25—aggregating \$1,401,943.25. For these papers the company received the check of Vermilye & Co. for \$1,401,943.25. On January 2, 1903, the insurance company delivered to Vermilye & Co. two checks, signed by the company and drawn to the order of Vermilye & Co., one for \$1,401,943.25 and the other for \$60,256. On the same day, in accordance with the request of the defendant accompanying the checks, Vermilye & Co. returned to the insurance company the syndicate participation papers and the Federal Trust Company stock certificates. When the transfer of the syndicate papers to Vermilye & Co. was made, on December 31, 1902, the assistant cashier of the insurance company entered in Cash Book Q the receipt of the amount paid by Vermilye & Co. distributed to the four syndicate participations which it represented. These entries were posted by the same assistant cashier in Ledger E in the following form:

Omaha & Sioux City Extension Synd. Co.:

1902

Dec. 31, Cash 84.....\$800,000

Pittsburgh Toledo Syndicate:

1902

Dec. 31, Cash 84.....\$150,000

The National Shoe & Leather Bank Syndicate:

1902

Dec. 31, Cash 84.....\$27,000

San Francisco Street Railway Syndicate:

1902

Dec. 31, Cash 84.....\$424,943.25

The four entries given above on December 31, 1902, are the basis, respectively, of indictments Nos. 96, 97, 98, and 99 (forgery). These indictments charge that said entries purported to indicate that on the 31st day of December, 1902, the insurance company had sold the said investments for the sums stated and received the said sums of money therefor; whereas in truth and in fact the company had not sold said investments or received the said sums, or any sum, therefor.

On December 31, 1903, in a similar manner, sundry collateral loans aggregating \$359,475 were transferred by the insurance company to the defendant; the defendant giving the insurance company his check for that amount, which check was deposited and collected. On January 2, 1904, the loans were retransferred by the defendant to the insurance company; the insurance company giving its check therefor. The payment by the insurance company to the defendant on January 2d was

entered by the assistant cashier in Cash Book R, distributed to the various temporary loans which it represented. The entries were in the same form as those of the previous year. These entries in Cash Book R under date of January 2, 1904, are the basis of the forgery charge contained in indictment No. 95.

On December 30, 1904, the insurance company was carrying sundry temporary loans amounting to \$1,492,875. On that day these loans were transferred to Vermilye & Co.; the insurance company receiving their check for the aggregate amount. This check was deposited and collected by the insurance company. On January 3, 1905, the loans were retransferred to the insurance company; the insurance company giving Vermilye & Co. its check for the aggregate amount. This payment on January 3, 1905, was entered by the assistant cashier in Cash Book S, distributed to the different temporary loans which it represented. The entries were similar to the entries of the two previous years. These entries of January 3, 1905, are the basis of the forgery charge contained in indictment No. 94.

The perjury indictments (Nos. 100, 101 and 102) are based upon the inclusion in the annual reports for the years 1902, 1903, and 1904 of the Metropolitan Life Insurance Company to the State Superintendent of Insurance, verified by the defendant, of certain statements in effect asserting the validity of the end of the year transactions with Hegeman and Vermilye & Co.; on the omission of any reference to syndicate participations or loans made on collateral; and, furthermore, upon the statement in said reports that there were no sums, except a specified amount, not drawing interest, when in fact there were two additional deposits of \$100,000 each on which no interest was being paid during said years.

The prosecution concedes the power of the court to entertain these motions; nor can its power to dismiss in a proper case be questioned, in view of the decisions in *People v. Glen*, 173 N. Y. 395, 66 N. E. 112, and *People v. Sexton*, 187 N. Y. 495, 80 N. E. 396.

Approaching in the first instance the consideration of the forgery indictments, there are many contentions raised on the defendant's behalf. It is claimed that he has not been sufficiently connected with the making of the entries in question to justify his being held responsible therefor. While it is true that there is some indefiniteness in the testimony of some of the witnesses as to who directed the making of the entries in question, yet it does appear that defendant had personal charge of all the year-end transactions and alone could furnish the information upon which the entries were made, and the witness Ecker testifies positively that the defendant directed the entries to be made in the books. I am of the opinion that there was sufficient evidence before the grand jury to justify the finding that the defendant was the official who had given the directions for the making of these entries.

As to the validity of the year-end transactions (and this term may be used throughout to designate those transfers and retransfers by which it was sought to pass title to both loans and syndicate transactions and reacquire the same) a question is raised which is not free from doubt. It appears from the testimony of both parties to these transactions—i. e., the officers of the company and Vermilye & Co.—

that they regarded it as an actual transfer of the loans and syndicate participations to Vermilye & Co. when made to them and to Hegeman when made to him, although confessedly there was an actual agreement to retransfer the loans and syndicate participations to the company after January 1st. But what, to some extent at least, negatives this claim of an actual bona fide sale and resale, is the fact that in the purchase of these loans Vermilye & Co. made no examination of the collateral and relied on the responsibility of the company, that Vermilye & Co. never received the interest accumulating on these loans during the few days they were in their possession, and that Vermilye & Co. charged and received interest on the amount they paid on their alleged purchase until they retransferred the same. But it is unnecessary, in view of the conclusions later expressed, to decide whether or not, upon the testimony before the grand jury, these transactions were valid sales. Of course, if they were, the indictments would fall, as in that event the entries would not be false.

But, even conceding these entries to be false or deceptive, in my opinion the indictments for forgery cannot be sustained by any evidence submitted to the grand jury. These indictments are found under section 515 of the Penal Code, which is as follows:

"A person who, with intent to defraud or to conceal any larceny or misappropriation by any person of any money or property, either (1) alters, erases, obliterates or destroys an account, book of accounts, record or writing, belonging to or appertaining to the business of a corporation, association, public office or officer, partnership or individual; or (2) makes a false entry in any such account or book of accounts; or (3) willfully omits to make true entry of any material particular in any such account or book of accounts made, written or kept by him under his direction, is guilty of forgery in the third degree."

These indictments fall within the provisions of subdivision 2 hereof. It thus appears that the two essentials to constitute a crime under this section are (a) the making of a false entry under the direction of defendant and (b) the intent in so doing to defraud. Conceding, for the purposes of this determination, the falsity of these entries, where is there any evidence in the mass of testimony taken before the grand jury of any intent to defraud? Where is the evidence from which an intent to defraud can be inferred, even remotely? Who was to be defrauded? Who was to profit by the defrauding? Of what could any one be defrauded? The learned and exhaustive brief of the district attorney contains no answer to these questions, nor is an answer to be found anywhere in the records submitted herewith. I have read carefully every line of testimony submitted to the grand jury, and there is nowhere a suggestion of a criminal intent in anything that was done. A motive is plainly apparent, and in fact it appears by the testimony of several witnesses, and that was to show by the annual reports that the Metropolitan Life Insurance Company was not a loaning company, or, as one of the witnesses put it, the officers did not desire to have it known that they were loaning on collateral, as otherwise they would be overwhelmed with applications for loans on collateral, and they would have to install a special service if they made such loans generally, while their policy was, as they phrased it, "to keep away from everything in connection with the stock ticker." But a motive in

a criminal case differs widely from an intent. Here the motive certainly was not criminal. However, no matter whether the motive be good or bad, if the presence of the intent required to constitute a particular unlawful act is either proved or implied, the offense, if committed, is complete. But was the intent an unlawful one? The intent, obviously, was to exclude from the annual reports all references both to syndicate operations and collateral loans, that it might not appear that the company was investing any money whatever therein, and to accomplish this by having a sale and resale of these securities; the sale taking place before December 31st, and the resale after January 1st. But wherein does this constitute an attempt to defraud?

There is, perhaps, no legal term which has given rise to more varying definitions than "defraud." Some of these definitions may show how wide a range they have taken:

"To defraud is to withhold from another that which is justly due him, or to deprive him of a right by deception or artifice." *Burdick v. Post*, 12 Barb. 168.

"The term 'defraud' means to deprive of a right, either by obtaining something by deception or artifice, or by taking something wrongfully, without the knowledge or consent of the owner." *People v. Wiman*, 85 Hun, 820, 82 N. Y. Supp. 1037.

"The task, often pronounced to be impossible, of exhaustively defining fraud, will not be here attempted. It is enough to say that fraud in a general sense is the deceitful, unlawful appropriation of the property of another, and a fraudulent intent is the intent to effect such appropriation." *Wharton on Criminal Law*, § 124.

"To deprive of something dishonestly is to defraud." *Horman v. United States*, 116 Fed. 350, 53 C. C. A. 570.

"To defraud is to cheat, to deprive another of a right, to withhold wrongfully what is due to him, or to prevent him wrongfully from obtaining what he may justly claim. To defraud implies or includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence generally reposed, and are injurious to another, or by which an undue and unconscionable advantage is taken of another." 9 *Am. & Eng. Ency. Law* (2d Ed.) p. 180.

"To defraud is to deprive of some right, interest, or property by deceitful devices; to withhold from wrongfully; to injure by embezzlement; to cheat; to overreach; to withhold from another that which is justly due to him, or to deprive him of a right by deception or artifice; to deprive of a right by withholding from another by indirection or device that which he has a right to claim or obtain; to deprive of something dishonestly." 13 *Cyc.* p. 766.

An examination of the cases upon which these definitions are based demonstrates that the term "defraud" implies in every case the obtaining of an unconscionable advantage to one party or the unjust deprivation of property or rights belonging to the other. It is, of course, not essential to the existence of an intent to defraud that the design should be to deprive some one of personal or real property. It may as well exist in the design to deprive some one of a right. Nor is it necessary to have in mind the defrauding of a particular person, if the consequences of the act would necessarily or might possibly be to defraud any person. But there must be at all events a possibility of some person being defrauded of something. The crime involves moral turpitude. Section 718 of the Penal Code renders it unnecessary to aver or prove an intent to defraud any particular person; but by section 721, Pen. Code, it suffices if the intent appears to defraud any person, association, or body politic or corporation whatsoever. This is

in accord with an early rule enunciated by Lord Chief Justice Tindale, 5 Car & P. 266, cited with approval by the United States Circuit Court of Appeals in *Horman v. United States*, 116 Fed. 352, 53 C. C. A. 572, as follows:

"Where a statute directs that in order to complete an offense it must have been with intent to injure or defraud any person, there is no occasion that any malice or ill-will should subsist against the person whose property is so destroyed. It is a malicious act in contemplation of law when a man willfully does that which is illegal and which in its necessary consequence must injure his neighbor."

No such intent appears here as brings the case within the scope of section 721. The mere making of a false entry in corporate books is not under the present state of our law a crime. Such an entry might be made in various ways and for various purposes. It might be made (a) through mistake; (b) to accomplish by appropriate fictitious entries a proper bookkeeping result; (c) to conceal the evidence of a crime already committed or to render its detection impossible or more difficult; (d) to facilitate the commission of a future crime; (e) to defraud creditors, present or prospective, stockholders or any other person; (f) to deceive some one with no purpose of gain, profit, or advantage, either contemplated or possible of accomplishment.

Under the reasoning of the decision in *Phelps v. People*, 72 N. Y. 371, and similar cases, subdivisions "a," "b," and "f," would not be criminal. Subdivision "c" would come under the phraseology "to conceal any larceny or misappropriation by any person of any money or property." Subdivisions "d" and "e" would come within the phrase "with intent to defraud." The mere intent to deceive is not criminal; otherwise, any false entry knowingly made in the books of account of a corporation, no matter how trivial, immaterial, irrelevant, and harmless, would be a crime. That the Penal Code recognizes the distinction between an "intent to defraud" and an "intent to deceive" clearly appears from an examination of sections 591 and 592 thereof. In the case at bar it does not even appear that any one has been deceived. There is some suggestion that the state department of insurance may have been deceived; but there is no such proof in the case. On the contrary, these year-end transactions had been going on in the same way for many years. The entries showing the transfers in December and the retransfers in January appeared annually, with no concealment whatever. The securities deposited as collateral for the loans and the syndicate participation certificates or bonds were in the possession of the company continuously, except during the few days Hegeman or Vermilye & Co. held them under the transfers. The checks received and delivered were entered in the check and bank books. There is no proof that the loans were not amply secured by collateral, nor that the interest was not sufficient, nor that in any way the transaction was unlawful. The loans, as a matter of fact, have been shown by the testimony to have all been paid in full, nor is there any claim that the syndicate participations were unlawful, productive of loss, or even suspicious. There is no contention that the Metropolitan Life Insurance Company had not the right to lawfully loan money on collateral or to invest in these syndicate operations. The company has, upon the

proof, lost nothing by any of these operations, nor could it have lost anything.

The element of intent to defraud being essential to the crime of forgery in the third degree, it must affirmatively appear that sufficient evidence to establish the intent or to justify the inference of its existence has been received by the grand jury. "Where an act becomes criminal only through the existence of a specific intent, such intent must be proven, or the offense is not proven." *State v. King*, 86 N. C. 603. "It is a general principle of evidence that a man shall be taken to intend that which he does, or which is the immediate and natural consequence of his act. But, where an act in itself indifferent becomes criminal if it be done with a particular intent, then the intent must be alleged and proved." *Miller v. The People*, 5 Barb. 204. "It is the criminal mind and purpose going with the act which distinguishes the criminal trespass from a mere civil injury." *People ex rel. Perkins v. Moss*, 187 N. Y. 420, 80 N. E. 386. "It is elementary, when a specific intent is required to make an act an offense, that the doing of the act does not raise a presumption that it was done with the specific intent." *Lawson on Presumptive Evidence*, 472, cited with approval by the Court of Appeals in *People v. Plauth*, 100 N. Y. 592, 3 N. E. 790, 53 Am. Rep. 236. The facts being undisputed, the question whether the evidence shows the commission of a crime as charged is a question of law, and in that is involved necessarily the question whether one of the essential elements of the crime of forgery in the third degree, the intent to defraud, has been established, necessarily or by implication.

Having reached the conclusion that, not only has no intent to defraud been proven by the testimony taken before the grand jury, but that from such testimony no intent to defraud can be inferred, the motion to quash the indictments for forgery is granted.

With respect to the indictments for perjury a different situation exists. I believe that the question of whether or not the year-end transactions constituted actual sales is a question which cannot be necessarily determined as a matter of law upon the present state of the evidence, and I have expressly withheld its determination in disposing of the other motions. In any event, I am unable to say that as a matter of law, upon the proof before the grand jury, these transactions constituted actual sales. In the present state of the proof the statements in the annual reports as to the amount of noninterest-bearing funds of the Metropolitan Life Insurance Company were not correct. Whether these statements were actually false, whether they were material, and, if so, whether they were knowingly and corruptly made, are questions which cannot be disposed of upon this motion, but must await a trial of the indictments for perjury; for there are facts both claimed and conceded which were brought to the attention of the grand jury which are relevant to the charges of perjury and not to those of forgery, and which upon the present state of the proof do not justify the dismissal of the former.

STURGIS v. FIFTH AVE. COACH CO.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. PLEADING—ADMISSIONS—PERSONAL INJURIES.

The failure to deny an allegation, in a complaint for personal injuries sustained by a passenger on a stagecoach, that defendant was operating a line of stagecoaches, admits that defendant was operating such a line, but not that it was operating the coach by which plaintiff was traveling when injured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 270-275.]

2. CARRIERS—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—EVIDENCE.

In an action for injuries to a passenger against a carrier who maintains a system of reporting by employes of accidents and of claims against it therefor, the carrier may show that its employes did not report to it the happening of any accident and that the first notice of the claim was from plaintiff.

3. WITNESSES—CONTRADICTION—CREDIBILITY.

In an action for injuries to a passenger on a stagecoach, plaintiff testified that she was injured in March, and that she put the claim in the hands of an attorney shortly afterward. The attorney did not present the claim until May. *Held*, that evidence of defendant's claim agent as to when plaintiff first made a claim arising out of her alleged accident was inadmissible to contradict plaintiff and affect her credibility.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1277.]

4. EVIDENCE—OPINION EVIDENCE—CONCLUSIONS.

Testimony of a witness, having knowledge that there is a stagecoach line on a certain street, as to whether there is any other such line on the street, is not objectionable as a conclusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2149-2185.]

Appeal from Trial Term, New York County.

Action by Marion Sturgis against the Fifth Avenue Coach Company for personal injuries while a passenger on a stagecoach. From a judgment for defendant and from an order denying plaintiff's motion for a new trial, plaintiff appeals. Reversed.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAMBERT, LAUGHLIN, and HOUGHTON, JJ.

Lewis L. Delafield, for appellant.

George S. Wing, for respondent.

HOUGHTON, J. The plaintiff claims to have been injured while riding as a passenger in one of defendant's stagecoaches, by the negligent shutting of the door by the driver. The issues litigated upon the trial not only embraced defendant's negligence and plaintiff's lack of contributory negligence, but whether or not plaintiff received any injuries at all in any stagecoach, or, if she did, whether or not it was in one belonging to this defendant. By its failure to deny the allegation, defendant admitted that it was operating a stage line for the carriage of passengers on Fifth avenue, in the city of New York; but it did not admit that it was operating the one by which plaintiff was traveling as a passenger. The jury found a verdict for the de-

fendant, and the plaintiff appeals, and urges exceptions to the admission and exclusion of evidence which we think are well taken.

Defendant maintains a system of reporting by employes of accidents and of claims made against it therefor. The defendant called as a witness the assistant manager of its claim department, and asked him when plaintiff first made a claim arising out of her alleged accident, and against plaintiff's objection the evidence was allowed, on the ground that it tended to contradict the plaintiff and affected her credibility. The accident was claimed to have occurred in March, and the claim, in the form of a letter from plaintiff's attorney to defendant's attorney, was not made until the May following. The plaintiff had not testified that she presented any claim before May. She did testify that she put the claim in the hands of her attorney shortly after the accident. There was no reason, therefore, for admitting the evidence to contradict anything that plaintiff had testified to.

It was proper to permit defendant to prove that its employes did not report to it the happening of any accident, and, if its first knowledge of the happening of an accident came through a notice of claim from plaintiff, to prove that fact. The rule permitting a transportation corporation, which has adopted a system of reporting accidents by its employes, to prove that it received no notice of the happening of the accident at the time when it is alleged to have occurred, has been adopted from the necessities of the situation. Accidents and employes of such corporations are both numerous. A report by an employe that an accident has happened upon his car or vehicle enables the defendant to investigate it at once and to ascertain who the witnesses are and to what facts they can testify. Lack of report does not prove absence of accident. The only probative force of lack of report is to excuse the defendant from calling witnesses who might explain the situation or contradict the testimony of those produced by a plaintiff. Never having had any report that an accident has happened, the defendant does not know what driver, or motorman, or conductor to call as a witness; and it can prove the lack of report for the purpose of excusing itself from the imputation of not having called witnesses who might have explained the situation.

Long and unexplained delay in making any claim on the part of a plaintiff of the happening of an accident might, under certain circumstances, be taken as indicating that the claimed accident never occurred. No such situation existed, however, on the part of this plaintiff. She placed the claim in the hands of her attorney at once, and it did not affect her credibility or tend to contradict her that the attorney delayed presenting the claim to the defendant.

In addition, the plaintiff asked a witness, an employe of defendant and familiar with the situation, whether at the time of the accident there was any stage line running on Fifth avenue other than the one operated by defendant. The answer was excluded, on the ground that it called for the conclusion of the witness. The witness knew that defendant was so operating a stage line, and whether or not any other line of stages was being regularly operated up and down the avenue was a fact which he could state, if he knew. The evidence

was material, because defendant insisted upon the trial that, if plaintiff was injured at all, she was hurt in the stage of some other line than its own. The error was not cured by the equivocal testimony which the witness was subsequently permitted to give.

The errors we have pointed out were material, and may have affected the verdict of the jury.

The judgment and order should be reversed, and a new trial granted, with costs to the appellant to abide the event.

PATTERSON, P. J., and McLAUGHLIN and LAMBERT, JJ., concur. LAUGHLIN, J., concurs in result.

GAVIN v. NEW YORK CONTRACTING CO., PENNSYLVANIA TERMINAL.
(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. DISCOVERY—CORPORATE OFFICERS—SCOPE AND EXTENT.

Where, in an action against a corporation for injuries to an employé, the negligence charged was failure to furnish plaintiff a safe place to work, in that defendant's locomotive, tracks, roadbed, and embankments were not in proper condition, failure to employ competent fellow workmen and to adopt rules for the guidance of its workmen, and that some person exercising acts of superintendence was guilty of negligence, it was proper, under an order for the examination of defendant through its secretary before trial, for plaintiff to interrogate the witness on matters within his knowledge pertaining to the charges of negligence set forth in the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Discovery, §§ 87-89.]

2. SAME.

The test of the propriety of the questions asked a witness on such examination is whether the testimony sought is material, and it was improper to ask questions calling for the witness' opinion as to what certain allegations in defendant's answer meant, or on any other subject, unless he was properly sought to be examined as an expert, or to interrogate him as to reports of, and his knowledge concerning, other accidents happening in the prosecution of defendant's work, unless they were accidents happening prior to the one from which plaintiff claimed his injury, and in the same way and in the same locality, or as to matters pertaining to other parts of defendant's work than the immediate neighborhood of the accident; nor should the witness have been asked the names of other witnesses to the accident, an order for an examination being for the eliciting of testimony, and not to gain information as to who might be called as witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Discovery, §§ 87-89.]

Appeal from Special Term, New York County.

Action by Thomas Gavin against the New York Contracting Company, Pennsylvania Terminal. From an order directing defendant's secretary to answer certain questions on an examination before trial instituted by plaintiff, defendant appeals. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, HOUGHTON, and SCOTT, JJ.

J. C. Toole, for appellant.

Charles H. Tuttle, for respondent.

HOUGHTON, J. The action is to recover damages by an employé for personal injuries claimed to have been received through defendant's negligence. The negligence charged against defendant by the plaintiff in his complaint is that it failed to furnish him a safe place in which to work, in that its locomotive engine, tracks, roadbed, and embankments were not in proper condition, and that it failed to employ competent fellow workmen, and that it failed to adopt proper rules for the guidance of its workmen, and, further, that some person exercising acts of superintendence was guilty of negligence. The plaintiff obtained an order for the examination of defendant through its secretary before trial. Upon such examination a large number of questions were objected to and not answered. Thereupon the plaintiff moved for an order directing the witness to answer all of the questions, which was granted, from which the defendant appeals.

Some of the questions were proper, and some were not; and the order directing that all of them should be answered must be reversed. It was proper for the plaintiff to interrogate the witness upon matters within his knowledge pertaining to the charges of negligence on the part of the defendant which the plaintiff had set forth, in his complaint. It was, therefore, proper to ask the witness pertinent questions relating to the construction and character of the tracks, roadbed, and embankment at the point where plaintiff's injury occurred, and as to the locomotive engine and its condition of repair, and also whether the defendant had adopted any rules, and what rules, for the guidance of its employés, and also what knowledge the witness had with respect to the incompetency of plaintiff's immediate fellow workmen or their habitual recklessness of conduct, which would also embrace the witness' knowledge in that respect concerning plaintiff's immediate superintendent. It would be proper for the plaintiff, under the broad allegations of his complaint, to give evidence of these facts upon the trial.

An examination of a party before trial will not be granted, unless the testimony sought is material and proper to be used upon the trial. *Oakes v. Star Co.*, 119 App. Div. 358, 104 N. Y. Supp. 244. Therefore the test of the propriety of the questions put to a witness upon such an examination is whether the testimony sought is material and proper to be used upon the trial of the action. Hence it was improper to ask questions calling for the witness' opinion as to what certain allegations in defendant's answer meant, or upon any other subject, unless he was properly sought to be examined as an expert. It was also improper to interrogate him as to reports of, and his knowledge concerning, other accidents happening in the prosecution of defendant's work, unless they were accidents happening prior to the one from which plaintiff claimed his injury, and in the same way, and in the same locality, which might show notice of a dangerous situation. It was likewise improper to interrogate the witness concerning matters pertaining to other parts of defendant's work than the immediate neighborhood of plaintiff's accident; for it is of no moment to the plaintiff that the defendant was negligent on another part of its work, or that another place on the work was unsafe, and evidence concerning them would be improper upon the trial. Nor should the witness

have been asked the names of other witnesses to the accident. An order for an examination is for the eliciting of testimony, and not to gain information as to who might be called as witnesses.

The court below should have selected such questions as were pertinent and proper to be answered, and confined its order to directing answers to them only.

The order appealed from should be reversed, with \$10 costs and disbursements, and the matter remitted to the Special Term for the entry of an order in accordance with this opinion. All concur.

(56 Misc. Rep. 449.)

FISH v. HAHN.

(Supreme Court, Appellate Term. November 29, 1907.)

1. **EXECUTION—ASSIGNED JUDGMENT—INDORSEMENT OF EXECUTION—STATUTORY PROVISIONS.**

Code Civ. Proc. § 1376, which provides that, after decease of a judgment creditor, execution may be issued by his personal representatives or the assignee of the judgment, etc., and that the execution must be indorsed with the name and residence of the person issuing the same, was passed to avoid the necessity of an action in the nature of *scire facias*, and to enable the personal representatives or assignee of a deceased judgment creditor summarily to issue execution; and the provision as to indorsement applies only to executions after the death of the original judgment creditor, and has no relation to prior sections dealing with other conditions.

2. **SAME.**

Code Civ. Proc. § 756, provides that in case of a transfer of interest, the action may be continued by the original party, unless the court directs the person to whom the interest is transferred to be substituted in the action or joined with the original party as the case requires. Section 1875 provides that, except as otherwise specially prescribed, the party recovering a final judgment, or his assignee, may have execution thereon of course at any time within five years after the entry of judgment. The owner of a judgment assigned it to another, and subsequently recovered a further judgment for costs on appeal. Execution was issued on both judgments in the name of the original plaintiff, and a levy made thereunder on defendant's real estate. Defendant moved to vacate the executions and set aside the levy on the ground that plaintiff had divested himself of his interest and was not entitled to issue execution. Affidavits of plaintiff and the assignee, showing that execution was issued in plaintiff's name by his authority, were filed in opposition to the motion. *Held* that, in view of the absence from the statute of any qualification of an assignee's right or of any requirement differentiating the form of the execution issued by an assignee, the motion to vacate should have been denied as to both executions, especially since defendant was apprised by the affidavits of the assignee's consent to the form of execution adopted.

3. **JUDGMENTS—PAYMENT—EFFECT OF ASSIGNMENT.**

Before notice of the rights of an assignee of a judgment, payment by the debtor would absolve him from further liability, though after notice he would not be justified in paying it to a stranger to the claim.

Appeal from City Court of New York, Special Term.

Action by John J. Fish against Henrietta Hahn. From an order vacating and setting aside an execution against defendant's property, plaintiff appeals. Reversed, and motion to vacate denied.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

August P. Wagener, for appellant.
Charles L. Burr, for respondent.

LEVENTRITT, J. The plaintiff, after recovering a judgment against the defendant, assigned it to one Louise W. Fish. An appeal from the judgment resulted in an affirmance, and a further judgment for costs. Thereafter executions on both judgments were issued to the sheriff in the name of the plaintiff. Subsequent to a levy made upon the defendant's real property, and prior to the day set for the sale thereunder, the defendant moved to vacate the executions and set aside the levies, upon the ground that the plaintiff by virtue of his assignment had divested himself of all interest in the judgments and was not entitled to issue executions thereon. In opposition to the motion the plaintiff submitted his affidavit and that of the assignee, showing, in effect, that he had authorized his assignee to enforce the collection of the judgment and to that end to issue execution in his name. The motion was granted as to the assigned judgment, and from the order entered the plaintiff appeals.

The respondent argues that, since the execution was issued by the assignee of the judgment, it should have been indorsed with the name and residence of the assignee, pursuant to the provisions of section 1376 of the Code; and he cites in support of his contention *Duryee v. Bottsford*, 24 Hun, 317, which was also referred to by the court below as authority for the conclusion reached in setting aside the execution. We think, however, that the execution was regular, and that the defendant's motion should have been denied. Section 756 of the Code, treating of the rights of an assignee, provides:

"In case of a transfer of interest, or devolution of liability, the action may be continued by or against the original party, unless the court directs the person, to whom the interest is transferred, or upon whom the liability is devolved, to be substituted in the action, or joined with the original party, as the case requires."

There is no qualification of the assignee's rights in this section, and for aught that is provided to the contrary the Code gives him the absolute right, not only of continuing the action to judgment, but of pursuing the judgment to its enforcement and collection in the name of the original plaintiff, his assignor. Chapter 13 of the Code, governing the issuance and enforcement of executions, prescribes their general requisites in section 1366 as follows:

"An execution must intelligibly describe the judgment, stating the names of the parties in whose favor, and against whom, the time when, and the court in which, the judgment was rendered; and, if it was rendered in the Supreme Court, the county in which the judgment roll is filed. It must require the sheriff to return it to the proper clerk, within sixty days after the receipt thereof. Except as otherwise prescribed in the next section, it must be made returnable to the clerk, with whom the judgment roll is filed."

And section 1368 requires that:

"An execution, issued upon a judgment for a sum of money, or directing the payment of a sum of money, must specify, in the body thereof, the sum recovered, or directed to be paid, and the sum actually due when it is issued. It may specify a day, from which interest upon the sum due is to be comput-

ed; in which case the sheriff must collect interest accordingly, until the sum is paid. If all the parties against whom the judgment is rendered, are not judgment debtors, the execution must show who is the judgment debtor."

Section 1375 provides:

"Except as otherwise specially prescribed by law, the party recovering a final judgment, or his assignee may have execution thereupon, of course, at any time within five years after the entry of the judgment."

No requirement is apparent which would differentiate the form of the execution issued by an assignee of a judgment from that issued by an original plaintiff judgment creditor. The failure of the Code to provide any such additional requirement suggests an intention to authorize the assignee to issue execution in the prescribed form, and as of course, either in his own name or in that of the plaintiff, his assignor. Coming, now, to section 1376, we find the following provisions:

"Where the party recovering a final judgment has died, execution may be issued at any time, within five years after the entry of the judgment, by his personal representatives, or by the assignee of the judgment, if it has been assigned, and the execution must be endorsed with the name and residence of the person issuing the same. And where a party or one or more of several parties against whom a judgment for the recovery of possession of real property has been obtained, has died, an order granting leave to issue and execute such execution or writ of possession may be granted upon giving twenty days' notice to the occupants of the lands so recovered and to the grantees or devisees of said deceased, or, if he died intestate, to the heirs at law of said deceased; said notices to be served in the same manner as a summons is directed to be served in an action in the Supreme Court."

Thus it is only after the death of the original judgment creditor within the period of limitation that the execution, when issued by the assignor, must contain the indorsement called for by this section. It is contended that this requirement is general, and applies to section 1375 as well as to section 1376. Such a contention is unfounded, as the sections treat of entirely different and distinct conditions; section 1375 relating to the issuance of executions during the life of the judgment creditor of record and permitting the issuance of an execution of course, with no prescription as to form, and section 1376 relating only to issuance of executions after death by personal representatives or assignee, when the execution must be indorsed with the name and residence of the person issuing the same.

Section 1376 was passed for a specific purpose. Before the Code an execution could not be issued after the death of the judgment creditor unless he had died during the last term of court (*Thurston v. King*, 1 Abb. Prac. 126); and it was necessary for a *scire facias* to issue to revive the judgment and authorize execution on it. Under the old Code (section 428) the writ of *scire facias* was abolished; but it was provided that the remedy theretofore obtainable therefrom "may be obtained by civil actions." In other words, the remedy given by *scire facias* to revive the judgment and authorize execution was superseded by the provisions of section 428, which gave an action therefor. *Cameron v. Young*, 6 How. Prac. 372; *Alden v. Clarke*, 11 How. Prac. 209; *Ireland v. Litchfield*, 22 How. Prac. 178; *Wheeler v. Dakin*, 12 How. Prac. 537. The intention of the codifiers,

when preparing the new Code, in inserting section 1376, was to avoid even the necessity of an action in the nature of *scire facias* and enable the personal representatives or assignee of a deceased judgment creditor summarily to issue execution within the period prescribed; and the indorsement called for in that event was necessarily intended as notice to the judgment debtor of the authority of the person seeking to enforce the judgment after his creditor's death. It will thus be seen that no relation exists or can be established between section 1376, or any part thereof, and the preceding sections bearing upon the subject of executions. Therefore the case of *Duryee v. Bottsford*, *supra*, cited by the court, is inapplicable, since it is based on a construction of section 1376.

While an amendment of the Code to cover the situation here disclosed might be advisable, we find no prohibition either in statute or authority which prevents an assignee from issuing an execution in the form required by sections 1366, 1368, and in the name of the judgment creditor, his assignor. Neither in text-books nor in judicial dicta do we find any attempt made to declare a definite principle; but it is significant to note that in both the practice is recognized without criticism. *Freeman on Executions*, p. 62, § 21; *Wilgus v. Bloodgood*, 33 How. Prac. 289.

The respondent argues that, if our conclusion be correct, the judgment debtor is not properly protected, and is subjected to the liability of being required to make double payment. While it is doubtless true that after notice the judgment debtor would not be justified in paying a stranger to the claim, it is equally true that before notice such payment would be effective to absolve him from further liability. However, that question is not involved on this appeal, since the respondent was apprised on his motion by opposing affidavits that the form of execution adopted was sanctioned by the assignee as well as by the assignor, so that, if he paid the execution issued, he would be protected from further liability.

It follows that the order appealed from must be reversed, with \$10 costs, and the motion to vacate denied, with \$10 costs. All concur.

IN RE POPP.

IN RE KEMPF'S WILL.

(Supreme Court, Appellate Division, Second Department. December 5, 1907.)

1. EXECUTORS—COMPENSATION—SERVICES IN TESTATOR'S BUSINESS.

Under Code Civ. Proc. § 2730, providing that on the settlement of the accounts of an executor the surrogate must allow him for his services for receiving and paying out all sums of money, not exceeding certain amounts, certain designated percentages, etc., where the will directed the continuance of the testator's business, but provided no extra compensation therefor to the executors, one of them was not entitled to extra compensation from the estate for continuing such business and working therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 2123.]

2. SAME—CONSENT OF LEGATEES.

The consent of two legatees in open court to extra compensation allowed to one of the executors operated only as a consent that their shares might be charged with their proportionate part of such extra compensation, and not that it should be paid in full therefrom.

3. SAME—CONTRACT WITH BENEFICIARY.

An agreement between an executor and certain of the beneficiaries that he should have extra compensation for services rendered in continuing the testator's business and working therein is voidable, and may be questioned for unfairness or inequity.

Appeal from Surrogate's Court, Kings County.

Judicial settlement of the accounts of Anton Popp, one of the executors of the will of Marianne Kempf, deceased. From so much of a surrogate's decree as allowed the executor compensation for continuing testator's business as directed by the will and for working therein (53 Misc. Rep. 200, 104 N. Y. Supp. 585), Jacob Kempf and another, infant legatees, by their general guardian, Franziska Heck, and such guardian individually, as legatee and as executrix, appeal. Modified.

Argued before HIRSCHBERG, P. J., and WOODWARD, GAYNOR, RICH, and MILLER, JJ.

Leopold Blumberg, for appellants.

Melville J. France, for respondent Anton Popp.

Michael F. O'Brien, for respondents Rosa Stauch and Henrietta Kempf.

GAYNOR, J. The surrogate allowed one of the executors on his accounting extra compensation for continuing the business of the testator, and working therein, the will directing that the business be continued, but providing no extra compensation therefor to the executors.

At common law executors and administrators were not allowed any compensation for their services. *Manning v. Executors*, 1 Johns. Ch. 527. This remained so in this state until 1817, when the Legislature empowered the Court of Chancery "to make a reasonable allowance to them for their services," on the settlement of their accounts, and prescribed that when "the rate of such allowance shall have been settled by the chancellor, it should be conformed to in all cases of the settlement of such accounts." Laws 1817, p. —, c. 251; *McWhorter v. Benson*, 1 Hopk. Ch. 28. The Chancellor thereupon adopted a general rule establishing a percentage on all moneys received and paid out as such compensation. 3 Johns. Ch. 630. It was incorporated into the Revised Statutes of 1830 (part 2, p. 93, § 58), and from there went into the Code of Civil Procedure (section 2730).

It follows that the statute compensation is all that an executor or administrator may be paid for his services. There can be no exception to this rule. If he be allowed compensation out of the estate of the deceased other than that fixed by statute, it cannot be for services in his office, but only for something he has done apart from and entirely outside of his office, i. e., as an individual and not as an executor or administrator. It is not enough that he does something for the estate which he has the right to employ another to do and pay him for out of the estate. That is not a test; on the contrary, it must be some-

thing which does not come within the province of his office at all, either for him to do personally or employ another to do for the estate.

In *Vanderheyden v. Vanderheyden*, 2 Paige, Ch. 287, 21 Am. Dec. 86, the charge of a guardian for the care and superintendence of the infant's real property, in addition to the statute compensation—which is the same in the case of trustees and guardians as in the case of executors—was disallowed; in the *Matter of the Bank of Niagara*, 6 Paige, Ch. 213, a receiver was disallowed for his services as attorney and counsel in the business of the trust; in *Clinch v. Eckford*, 8 Paige, Ch. 412, one of the executors was held entitled to extra compensation for any service he should render as clerk and bookkeeper of the estate, but only because the will expressly authorized it; in *Lansing v. Lansing*, 45 Barb. 182, an executor worked out the highway tax of the testator instead of paying it or hiring another to work it out, and was allowed therefor in his accounting by the General Term of the Supreme Court; in *Collier v. Munn*, 41 N. Y. 143, the charge of an executor who was an attorney and counselor at law, for extra compensation for his professional services in defending an action against the estate, at the request of his fellow executors, was disallowed; in the *Parsee Merchant's Case*, 11 Abb. Prac. (N. S.) 209, the compensation allowed by the Special Term was to a committee of his person, there being a separate committee of the property, and the case therefore has no application; in *Morgan v. Hannas*, 49 N. Y. 667, the charge of a guardian for services rendered by him as attorney and counsel in the affairs of his ward was disallowed; in *Lent v. Howard*, 89 N. Y. 169, an executor was allowed compensation for managing and improving the real estate of the deceased, but only because as executor he had nothing to do with and no duty whatever in respect of the real estate, the will imposing none; in *Matter of Reed*, 12 N. Y. St. Rep. 139, an administrator who acted as attorney and counsel on the settlement of the accounts of himself and associates was denied costs or compensation therefor by the surrogate; in *Matter of Butler* (Sur.) 9 N. Y. Supp. 641, compensation as clerk was denied to an executor by the surrogate; in *Matter of Ingersoll*, 6 Dem. Sur. 184, the surrogate disallowed a charge by an executor for the use of his own horse and wagon in collecting the assets of the estate; in *Matter of Hayden*, 54 Hun, 197, 7 N. Y. Supp. 313, an executor was disallowed a salary for superintending and carrying on the business of the deceased. He had performed the same service for the deceased in his lifetime, and his two co-executors, who were also interested under the will, employed him to continue therein at the same salary, the will authorizing the executors to continue the business for a year. There is a dictum that if the persons who agreed to the salary were the only persons in interest under the will it would have been allowed. Nothing is said as to whether those who did agree were not bound in proportion to their shares, or in full. In the *Matter of Taft*, 55 Hun, 603, 8 N. Y. Supp. 282, compensation was disallowed by the General Term of the Supreme Court to an executor, one of the surviving partners of the deceased, for carrying on the business, the will directing it to be carried on, but authorizing no extra compensation; in *Woodruff v. N. Y., L. E., &c., R. Co.*, 129 N. Y. 27, 29 N. E. 251, a trustee was disallowed compensa-

tion for his services as an attorney and counsel for the trust; in *Matter of Braunsdorf*, 13 Misc. Rep. 666, 35 N. Y. Supp. 298, an executor who was a skilled machinist was allowed compensation by the surrogate for his services in carrying on the mechanical business left by the deceased, the services having been rendered at the request of the next of kin, the parties interested, so as to complete the articles in process of manufacture at the time of the death of the testator. The will did not authorize the continuance of the business. In *Matter of McCord*, 2 App. Div. 324, 37 N. Y. Supp. 852, the will required the executors to collect the rents of the houses left by the testator and pay the same over to the widow and heirs until the executors should have sold the same under the power of sale given to them in the will. One of the executors had been employed by the testator to take charge of the said houses and clean, paint and repair them for a weekly salary. This agreement was continued by the widow and heirs, all of the parties in interest. The compensation was allowed. In *Matter of Young*, 17 Misc. Rep. 680, 41 N. Y. Supp. 539, the real estate was left to the executors in trust to manage and improve it, and collect the rents and pay them to the widow and otherwise dispose of them, and one of the executors devoted his time to managing the estate. The parties in interest agreed in advance that he should be allowed a specific monthly salary in addition to his statutory compensation "as compensation for his services as executor and trustee as aforesaid," and the surrogate allowed it. In *Matter of Hosford*, 27 App. Div. 427, 50 N. Y. Supp. 550, the executors were directed to convert the realty into personalty and distribute the proceeds. An additional compensation for their services in respect of the real estate was disallowed. In *Parker v. Day*, 155 N. Y. 383, 49 N. E. 1046, compensation was allowed to the law partner of the executor for services to the estate, but only because it appeared that the executor was excluded from all share therein; in *Matter of Moriarty's Adm'r*, 27 Misc. Rep. 163, 58 N. Y. Supp. 380, the surrogate allowed compensation to a temporary administrator, who had been the manager of the business of the deceased, for carrying on such business under the direction of the surrogate, although the will did not provide therefor; in *Russell v. Hilton*, 37 Misc. Rep. 642, 76 N. Y. Supp. 233, the Special Term allowed compensation to an executor for his services as architect in repairing the houses of the estate, the real estate being left in trust to the executors to collect and pay out the income; in the *Matter of Dummett*, 38 Misc. Rep. 477, 77 N. Y. Supp. 1118, the surrogate denied compensation to an executor (he also being surviving partner) for his services in continuing the business as authorized by the will, which did not provide for extra compensation; in *Clausen v. Puvogel*, 114 App. Div. 455, 100 N. Y. Supp. 49, the same thing was decided, but with the dictum that if he had done so at the request of all the parties in interest he would be entitled to compensation.

From this review of the cases it is plain that the rule as stated above is settled. The decisions in *Matter of Moriarty's Adm'r* and *Russell v. Hilton*, *supra*, have to be disapproved. In the case before us it would be agreeable to justice to allow the executor the extra compensation, but, as is often the case, though justice demand policy forbids.

It is of great importance that the rule be not departed from. Once relaxed, the asking and giving of extra compensation would grow apace and become an intolerable abuse.

There is some evidence that the three adult parties in interest agreed in advance to the extra compensation, but there is no finding of fact on that head. But two of them consented in open court to the extra compensation. This cannot be construed as a consent that the same be paid in full out of their shares, but only that their shares be charged with their proportionate part thereof. The judgment should be so modified in respect of them. The case should go back for a finding of fact whether the other adult made the agreement, and additional evidence may be taken. Where it is permissible at all for an executor or trustee to make such an agreement with his beneficiaries, it is subject to the general rule in respect of transactions between trustee and beneficiary, that while it is not void it is voidable, and may be called in question for unfairness or any inequitableness.

The decree is modified in accordance with the foregoing.

Decree of Surrogate's Court of Kings county modified in accordance with the opinion of GAYNOR, J., and, as modified, affirmed, with costs to the appellants payable out of the estate. All concur, except HIRSCHBERG, P. J., not voting.

(57 Misc. Rep. 17.)

PEOPLE ex rel. LAKE SHORE & M. S. RY. CO. v. CITY OF BUFFALO
(two cases).

PEOPLE ex rel. LEHIGH VALLEY RY. CO. v. SAME (two cases).

(Supreme Court, — Term, Erie County. November 18, 1907.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—TIME OF.

Buffalo City Charter, § 405, authorizes the city to widen, dredge, and deepen the Buffalo river. Section 408 prohibits the city from contracting for the making of any improvement exceeding \$500 until the assessment therefor has been confirmed and delivered to the treasurer. Laws 1902, p. 1361, c. 568, § 1, as amended by Laws 1906, p. 1725, c. 665, authorizes the city of Buffalo to issue bonds to raise money to widen and deepen the Buffalo river as therein specified, and to make provision for payment thereof out of the general fund, and that such fund shall be reimbursed by a local assessment equal to one-half of the amount of the bonds, payable in five equal annual installments. *Held*, that section 408 had no application to the power of the city to issue bonds and levy a local assessment to pay one-half the amount thereof, under Laws 1902, pp. 1361, 1362, c. 568, §§ 1-3, as amended by Laws 1906, p. 1725, c. 665, but that it applied solely to a local assessment for making an improvement under contract, and that in so far as it was claimed that it referred to the power of the city to issue bonds and levy local assessments to reimburse the general fund it must be deemed to have been repealed by Laws 1902, pp. 1361, 1362, c. 568, §§ 1-3, as amended by Laws 1906, p. 1725, c. 665.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1118-1116.]

2. SAME—BENEFIT TO PROPERTY.

An assessment levied under Laws 1902, p. 1362, c. 568, § 3, as amended by Laws 1906, p. 1725, c. 665, providing that certain river improvement bonds shall be paid by the city of Buffalo out of the general fund, and that such fund shall be reimbursed by a local assessment equal to one-half of the amount of the bonds, must take into consideration the character of the properties affected, their improvements and value, and their adapt-

ability for use in connection with the improvement, the probability of deep channel water way to each parcel benefited, etc., and an assessment on the front-foot basis will not be sustained, where the benefits and conditions are not the same.

Certiorari by the people, on the relation of the Lake Shore & Michigan Southern Railway Company against the city of Buffalo to determine the validity of two local assessment rolls of that city to raise money to pay one-half the expense of dredging Buffalo river, and like proceedings by the Lehigh Valley Railway Company. Finding against the rolls.

Hoyt & Spratt, for relator Lake Shore & M. S. Ry. Co.

Kenefick, Cooke, Mitchell & Bass, for relator Lehigh Valley Ry. Co.

L. E. Desbecker, Corp. Counsel (Samuel F. Moran, of counsel), for defendant.

BROWN, J. Section 405 of the charter of the city of Buffalo provides that the city may widen, enlarge, dredge, and deepen the Buffalo river. On September 2, 1902, the common council of the defendant voted that it intended to order the dredging of Buffalo river from Evans Slip to the south line of lot 65 of the Indian reservation, and directed the commissioner of public works of the defendant to advertise for bids for such work. Such bids were received, and on March 30, 1903, the common council directed the commissioner of public works to contract with the lowest bidder. On April 1, 1904, the contract for sections 1 to 5, inclusive, of the work, was executed by the commissioner for and on behalf of the city and the bidder; and on July 9, 1906, a contract for section 6 of the work was executed by the same parties. The work under the first contract was begun in 1904, and under the second contract in 1906, and both contracts were completed, except parts of section 5 and 6, long before the assessment complained of was made. On July 20, 1903, a resolution of the common council was duly approved by the mayor ordering the board of assessors of the city of Buffalo to spread an assessment of \$156,653.75, being one-half of the contract for sections 1 to 5, inclusive, upon the real estate benefited by such improvement in proportion to the benefits resulting therefrom, and also ordering the said assessors to spread an assessment of \$64,750, being one-half of the contract for section 6, upon the real estate benefited by such improvements in proportion to the benefits resulting thereto.

The board of assessors duly prepared an assessment roll, assessing the sum of \$156,653.75 upon all lands abutting on sections 1 to 5, inclusive, and certain lands abutting on the Buffalo river situate to the east of and up the said river from the south line of lot 65 of the Indian reservation, and not abutting on that part of the river in which such improvements had been made, among which last-mentioned lands are the properties of the relators in these proceedings. By such assessment the lands of the relator Lake Shore & Michigan Southern Railway Company were assessed at the sum of \$10,375.13, which lands are located about one mile east of, up the river, and distant from the dredging to pay which the assessment was made; and by such assessment the lands of the relator the Lehigh Valley Railway Com-

pany were assessed at the sum of \$9,482.31, which lands are located about half a mile east of, up the river, and distant from the dredging to pay which the assessment was made. This assessment roll was completed by the board of assessors in April, 1906, and a notice of such completion and that it would remain on file and on inspection for ten days was duly published as required by law, and within said ten days both the relators appeared before the assessors and objected to their respective assessments upon the ground, among others, that there was no authority of law for making these assessments after the contract to do such work was made, and that the assessment had not been made according to the benefits derived. These objections were of no avail. The board of assessors duly certified to a copy of such assessment roll, filing the same in the office of the city clerk on July 2, 1906, which officer duly gave notice according to law that the same was on file in his office and that objections thereto might be filed with him within ten days. Within said ten days each of the relators duly filed objections in writing, containing, among other things, the same objections made before the board of assessors. On July 16, 1906, the said assessment roll, together with relators' objections thereto, was duly reported to the common council, and on April 1, 1907, said assessment roll was confirmed by said common council and the resolution confirming the same was duly approved by the mayor. Such confirmed roll was duly delivered to the comptroller on April 11, 1907, and within two weeks of the first publication of a notice of its receipt by him these relators sued out the writs of certiorari to determine their validity and regularity.

The assessment roll spreading the sum of \$64,750 for one-half of the work on section 6 was likewise prepared by the board of assessors, in which assessment the lands of the relator the Lake Shore & Michigan Southern Railway Company were assessed at the sum of \$4,060.06, and the lands of the relator the Lehigh Valley Railway Company at the sum of \$3,710.68. In pursuance of notice from such assessors these relators duly appeared before them and objected to such assessment upon the ground, among others, that no assessment could be levied after a contract had been made for such work, and that such assessment was not made according to the benefits derived from such improvements. These objections were overruled, and a properly certified copy of the assessment roll was filed by them in the office of the city clerk on July 2, 1906, and the relator duly filed the same objections to said assessment roll with said clerk, by whom said objections were on July 16, 1906, duly reported to the common council, and thereafter and on February 11, 1907, such assessment roll was duly confirmed by the common council and the resolution confirming the same duly approved by the mayor. Such confirmed roll was duly delivered to the comptroller February 26, 1907, and within two weeks of the first publication of a notice of its receipt by him these relators sued out the writs of certiorari to determine their validity and regularity.

The serious objection urged by the relators to the validity of these assessment rolls is based upon section 408 of the charter of the city of Buffalo, in which it is provided:

"The city shall not enter into a contract with any person for the doing or making of any work or improvement at a price exceeding five hundred dollars until it shall have caused a notice to be published in the official paper, and two other daily papers of the city, twice a week for two weeks, inviting sealed proposals to do the work or make improvement, pursuant to the plan, specification or other proper description of the work or improvement, to be specified in the notice; and shall not enter into a contract for the doing or making of any such work or improvement for a price exceeding five hundred dollars until the assessment therefor has been confirmed, and has been delivered to the treasurer."

It is conceded that this provision applies solely to local assessments, and it is urged to be the sole and only protection that a property owner has to prevent his property being taken to pay a local assessment without due process of law; that it insures an assessment being levied before any contract liability on the part of the city has become fixed, and guarantees that such property owner shall be notified of such assessment and right to be heard by the assessors and common council on the propriety of the improvement being made and the assessment of his property therefor before the city is bound by contract to pay for the work and at a time when the common council is fit and competent to impartially pass upon the property owners' objections freed from and unbiased by the existence of any contract. It is true that by virtue of the quoted provisions of the charter and the scheme of preparing and perfecting local assessment rolls as provided by other provisions of the charter a property owner is afforded an opportunity of being heard by the assessors and common council before any contract is made for an improvement costing more than \$500 which is to be paid for by local assessment. It is also true that these relators did not have such an opportunity to be heard before the contracts were let and work completed to pay which these assessments were levied upon their property. It is a constitutional right that requires a notice to be given to persons assessed for either local or general assessments of the fact of such assessment and an opportunity to be heard relative to such assessment before it is final; but no such constitutional right exists requiring notice of a contemplated public improvement that may result in an assessment. Whatever rights these relators may have to be heard upon the necessity or propriety of improving the Buffalo river or making contracts by the city of Buffalo to dredge the same exists merely by virtue of the quoted provision of the charter, which was subject to modification or change by the Legislature. It is urged by the city that chapter 568, p. 1361, of the Laws of 1902 makes such modification and change, either expressly or by implication, as to repeal that section of the charter so far as it applies to these local assessments to pay bonds issued to raise money to discharge expense of dredging the Buffalo river.

By the terms of section 1, c. 568, p. 1361, of the Laws of 1902, it was made lawful for the city of Buffalo to issue its bonds for \$350,000 for the purpose of raising money to defray the expense of doing the work specified in the two contracts made April 1, 1904, and July 9, 1906, above referred to. By section 2 of that act the bonds were to bear interest at the rate of not to exceed $3\frac{1}{2}$ per cent. per annum; the principal to be payable in five equal annual installments from the

date of issue. They were to be issued from time to time as ordered by the common council, by the mayor and comptroller, and the common council was required to make provision for the payment of the interest and the principal of said bonds as the same would become due in the general fund estimates of said city. By section 3 of that act it is provided that one-half of the amount of such bonds shall be paid by local assessment to be levied in such proportions as the board of assessors shall deem the respective parcels of land benefited by the improvements therein specified. Such assessment to be payable in five equal annual installments in such manner and with interest at the rate prescribed in the charter of the said city, the amount collected upon such local assessment to be annually credited to the resources of the city in the annual estimates for the purpose of reimbursing the general fund to the extent of one-half of the outlay incurred in paying such bonds.

It is seen that the scheme provided by the statute was that the city should issue its bonds for the entire expense of doing the work of dredging the Buffalo river from Evans Slip to the south line of lot 65 of the Indian reservation. The common council should make provision for payment of annual installments, principal and interest, in the general fund estimates of the city; one-half of such bonds to be collected by local assessments on the property benefited, and such one-half, when collected, to be used to reimburse the general fund for the one-half of such moneys taken from such general fund to pay the same. In other words, the bonds were to be paid by the city out of the general fund, and such general fund was to be reimbursed by a local assessment equal to one-half of the amount of such bonds when collected. It is apparent that the bonds could be issued under the statute at any time when ordered by the common council, the mayor, and the comptroller, and it necessarily follows that a local assessment to pay one-half of such bonds and thus reimburse the general fund could be made at once after such bonds were issued. For the purpose of raising money by local assessment to reimburse the general fund to the extent of one-half of the moneys used to pay off such bonds, it is entirely immaterial whether the contract to dredge the river was in fact made before or after the assessment. It very clearly appears from the provisions of chapter 568 of the Laws of 1902 that the issuing of the bonds and the spreading of these local assessments were designed to be cotemporaneous, if not simultaneous, acts. The statute provides that the bonds shall mature in five equal annual installments after issue; that is, one-fifth of the amount issued shall mature in one year and one-fifth annually thereafter. The statute also provides that the amount of the local assessments shall be payable in five equal annual installments; that is, one-fifth of the amount of the assessments shall mature in one year and one-fifth annually thereafter. It is thus seen that on the maturity of one-fifth of the amount of the bonds there shall be due and available for reimbursing the general fund of the city for the payment of that matured indebtedness one-fifth of the amount of the assessments. To produce this result the assessment must of necessity be spread, made, completed, and confirmed one year before

the maturity of the first installment of the bonds. In other words, the issuing of the bonds and making of assessments are required by statute to be simultaneous acts, and any provision of the charter that would interfere with such procedure, that is antagonistic to such contemporaneous acts, must be held to be superseded, if not repealed, by this statute.

Under this statute there was abundant authority for the city to issue its bonds and proceed at once to make a local assessment to provide for the payment of one-half thereof. The fact is that the city did, under said statute and its amendment by chapter 665, p. 1725, of the Laws of 1906, issue its bonds for the sum of \$450,000, which were sold and the moneys realized therefrom were used to pay for the expense of such improvements. The fact is that the work was completed and paid for before the assessment rolls complained of were confirmed by the common council, and, while it is true that the assessment rolls purport on their face to be assessments for dredging, deepening, widening, improving, and removing obstructions from the Buffalo river, etc., the fact is that these assessment rolls and the local assessments against these relators are for no such purpose whatever. They are, in fact, for the sole and only purpose of raising money by local assessment to reimburse the general fund of the city of Buffalo to the extent of one-half of the moneys used or liable to be used from such fund to pay the bonds. The relator the Lake Shore & Michigan Southern Railway Company so alleges in its petition the actual fact to be. All the parties to this controversy allege that these local assessments are made under the authority of chapter 568 of the Laws of 1902, as amended by chapter 665 of the Laws of 1906. There could not be a local assessment in fact to pay one-half the expense of dredging Buffalo river under chapter 568 of the Laws of 1902. There could be a local assessment, in fact, to pay one-half of the bonds mentioned in that act. The charter provision (section 408) is that the city shall not enter into a contract for doing or making any such work or improvement for a price exceeding \$500 until the assessment therefor has been confirmed and has been delivered to the treasurer. This provision has no application whatever to the power of the city to issue bonds and levy a local assessment to pay one-half the amount thereof under chapter 568 of the Laws of 1902. It solely applies to a local assessment for making an improvement under contract, and in so far as it is claimed that it refers to the power of the city to issue bonds to raise money to pay the contract indebtedness of April 1, 1904, and July 9, 1906, and levy local assessments to reimburse the general fund for one-half of the amount of such bonds, it must be deemed to have been repealed by chapter 568 of the Laws of 1902. The relators had no legal right to be heard upon the question as to whether these bonds should be issued and sold and proceeds used to defray the expense of dredging Buffalo river. They did have the constitutional right to be heard upon the subject of levying a local assessment upon their property to pay one-half of these bonds. That right has been secured to them by the provisions of the charter regulating the manner of making such assess-

ment and confirmation of the assessment rolls by the common council. They in fact enjoyed their full constitutional privilege of being heard.

The naming of these assessment rolls, characterizing them as being assessment rolls for the dredging, deepening, widening, improving, and removing obstructions from the Buffalo river, etc., and mailing notices to the relators and other property owners that the assessment rolls had been completed for such a purpose, when the only authority for such local assessment was for the purpose of raising money to reimburse the general fund of the city for one-half of the moneys taken to pay the bonds issued under chapter 568 of Laws of 1902, was an irregularity that can easily be cured by a new assessment, and thus relieve the lawful assessment of relator's property from a very serious difficulty. If the only question to be decided upon this hearing was the legal right to make an assessment and the validity of these rolls upon that ground, I should be inclined to hold that they were valid under the provisions of chapter 568 of Laws of 1902; but, inasmuch as the assessments have not in fact been levied upon the several parcels in proportion to the benefits enjoyed by the properties, and for that reason a new assessment must be levied, the irregularity and defect above specified can also be remedied.

It clearly appears from the evidence that the assessment was levied on the front-foot basis, according to the frontage of the respective parcels on the Buffalo river. The original assessment roll on file in the office of the board of assessors shows on its face that all land above section 4 as far as the Lake Shore bridge was assessed for work on section 4 at the rate of 59 cents per river dock front; all land above section 5 to the same point for work on section 5 at the rate of \$2.48 per river dock front; all land above section 6 to the same point for work on section 6 at the rate of \$1.20 per river dock front. By this assessment lands of the relator more than a mile from the improvement are made to pay the same rate as the lands immediately adjoining and adjacent to the improvement. The fact that lands a mile up the river from the improvement had no present means and none in prospect of enjoying the same benefits from improvements already made as lands immediately adjoining such improvements is a demonstration that their benefits cannot be the same. While the per foot front rule is not necessarily improper, the courts have ever condemned it where the benefits and conditions are not the same. Undoubtedly the determination of the board of assessors that relators' land has been benefited is correct; but their determination that such lands, vacant and unimproved river frontage, have been benefited to the same degree, the same rate per foot front, as lands a mile or more below, some of them with present dock improvements, within the improved river and adjacent to it, cannot be upheld. If a jury had so decided, their verdict would be set aside as against the weight of the evidence. Section 2140 of the Code makes that the rule governing these proceedings.

A new local assessment must be levied for the purpose of reimbursing the general fund of the city to the extent of one-half of the moneys taken therefrom to pay the bonds issued under chapter 568, p. 1361, Laws 1902, as amended by chapter 665, p. 1725, Laws 1906, which assessment must be levied in such proportion as the board of assessors

shall deem the respective parcels of land benefited by the improvement described in chapter 568 of the Laws of 1902. In making such assessment the assessors will consider the character and condition of the properties affected, their improvements, their value, their adaptability for use in connection with the improvement, the probability, present or remote, of deep-channel water way to each parcel benefited, and such other items that must be considered to make an assessment upon all parcels according to benefits. The common council never having directed the board of assessors to levy a local assessment to reimburse the general fund of the city for one-half of the moneys necessary to pay the bonds issued and actually used in good faith for the purpose defined in chapter 568 of Laws of 1902, it is its duty so to do at once, and thus initiate a proceeding for the purpose of paying such bonds that will be free from the irregularities, etc., herein pointed out. The assessment rolls must be returned to the common council, to annul the same and direct a new local assessment as above specified.

Findings may be prepared accordingly, awarding costs to the relators in each proceeding.

(122 App. Div. 497.)

WALLACE v. JONES et al.

(Supreme Court, Appellate Division, Second Department. November 22, 1907.)

1. COUNTIES—SUPERVISORS—AUDIT OF CLAIMS—PERSONAL LIABILITY.

A board of supervisors, in auditing claims against a county, exercise a judicial function, and, if they act within their jurisdiction, they may not, in the absence of fraud and collusion, be held personally liable for their audits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 83.]

2. WORDS AND PHRASES—"COLLUSION."

"Collusion" implies a concerted or agreed purpose to commit a fraud or accomplish a wrong.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1260, 1261; vol. 8, p. 7606.]

3. COUNTIES—OFFICERS—PAYMENT OF ILLEGAL DEMANDS—STATUTE CONSTRUED.

Under Taxpayers' Act, Laws 1881, p. 709, c. 531, as amended by Laws 1887, p. 885, c. 673, and Laws 1892, p. 620, c. 301, where county officers by collusion allow or pay or connive at the audit of any fraudulent or illegal demand, the colluding official may be held personally liable. *Held*, in an action against supervisors for an illegal and collusive audit of their bills, that it is not enough that the claim is illegal, but the auditing must have been fraudulently concerted, or done by collusion, before they may be held personally liable.

4. SAME—SUPERVISORS—MILEAGE.

Under County Law, Laws 1892, p. 1750, c. 686, § 23, providing that each supervisor shall receive \$4 per day for attending sessions of the board, and mileage for once going and returning between his residence and the place of meeting for each regular and special session, and section 10 (page 1745), providing that the board shall meet annually, may hold special meetings, and may adjourn from time to time, the terms "annual meeting" and "regular session" are synonymous, and a "regular" or "special" session is measured by its actual duration; each day not being a session, within section 23, so as to entitle the supervisors to mileage for each day's actual attendance at sessions of their boards.

5. SAME—RECORDS—PURPOSE—EVIDENCE.

County Law, Laws 1892, p. 1756, c. 686, § 50, requiring clerks to record proceedings of boards of supervisors, contemplates that the boards shall keep books of record of their proceedings, for public information and as a source of authentic evidence.

6. SAME—SUPERVISORS—COMPENSATION.

Under County Law, Laws 1892, p. 1750, c. 686, § 23, authorizing compensation to supervisors while engaged in any investigation or other duty lawfully committed to them by the board when the board is not in session, members may not be allowed for services pursuant to a general understanding that each shall look after the business in his own town and report from time to time to the board.

7. SAME—RATIFICATION.

The illegal action of a board of supervisors in allowing compensation to a member for unauthorized services cannot be sustained on the theory that what the board could authorize it could ratify after the service was rendered, and that the audit of a bill for services actually rendered and expenses actually paid is equivalent to original authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 61.]

8. SAME—PERSONAL LIABILITY OF SUPERVISORS—ACTIONS—SEVERAL RECOVERY.

In an action against members of a board of supervisors for collusion in conjointly auditing their illegal claims for compensation, judgment cannot be had against them severally for moneys illegally received by each.

Appeal from Special Term, Nassau County.

Action by George Wallace against William H. Jones and others.

Complaint dismissed, and plaintiff appeals. Affirmed.

The following is the opinion of Garretson, J., in the court below:

The plaintiff, a taxpayer of the county of Nassau, has brought this action against the three defendants who composed the board of supervisors of that county to recover from them the amount of certain items in the several bills of said defendants for services and disbursements as supervisors which it is alleged were collusively audited by the said board. The action is instituted and is sought to be maintained under section 1 of the "Taxpayers Act," so called, being chapter 531, p. 709, of the Laws of 1881, as amended by chapter 673, p. 885, of the Laws of 1887 and chapter 301, p. 620, of the Laws of 1892, which provides that all officers of any county may be prosecuted and an action maintained against them by a taxpayer to prevent any illegal official act or to prevent waste and injury to, or to restore or make good, any property, funds, or estate of such county, and in case the injury complained of consists in any board, officer, or agent, by collusion or otherwise, allowing or paying or conniving at the audit of any fraudulent or illegal demand, the court shall enforce the restitution and recovery thereof, if theretofore paid, and "also may in its discretion adjudge and declare the colluding or defaulting official personally responsible therefor, and out of his property * * * provide for the collection or repayment thereof." The complaint sets forth three causes of action—one for an illegal audit of the bills of each of the defendants, and, upon the theory that the defendants as such board acted collusively in auditing each and all of the bills, judgment is asked for against all of the defendants for the aggregate amount thereof. Such is the nature of the cause of action, and the Court of Appeals, in passing upon the sufficiency of the complaint, apparently deals with it in that way, and in no other. In re Daly, 189 N. Y. 37, 81 N. E. 560. The form of the action and the judgment to be recovered therein would be the same if an audit had been alleged to have been collusively made of any illegal claim against the county other than one presented by a member of the auditing board.

It is well settled that a board of supervisors, in auditing claims against a county, exercise a judicial function, and if they act within their jurisdiction they cannot, in the absence of fraud and collusion, be held personally responsible for their audits. *People ex rel. Oneida Bank v. Supervisors*, 51 N. Y. 442; *People ex rel. Baldwin v. Supervisors*, 26 Barb. 118; *People v. Stock-*

ing, 50 Barb. 573. The "Taxpayers Act" but recognizes this principle and extends its application and operation. So that a recovery in this action must, among other things, be based upon a finding of fact that the defendants, in making the audits complained of, acted collusively. The words of the act are: "By collusion * * * allowing or paying or conniving at the audit of any fraudulent or illegal demand." The Court of Appeals has declared that the word "collusion" means "fraudulently concerted," as defined by lexicographers. Another definition is: "An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law." Bouvier, Law Dict. There is, therefore, involved in and necessarily implied by the term "collusion" a concerted or agreed purpose to commit a fraud or accomplish a wrong. It is not enough that the claim is illegal, but the auditing of it must also have been "fraudulently concerted," or done by collusion, in order that the court "may in its discretion adjudge and declare the colluding officials personally responsible therefor." Having regard to all of the evidence and the admitted facts in this case, I am unable to find that the defendants, in auditing their several claims, did so collusively, or that their audits were fraudulently concerted. That they were ignorant of the law, and acted upon the faith of misleading and erroneous precedents, and were not well advised, and were perhaps negligent, is a more accurate interpretation of their conduct.

As to the illegality of the several claims of the defendants, so much thereof as relates to mileage for attendance at regular meetings of the board in excess of once going and returning, and to per diem services and expenses for "committee work," are not sustainable in law. The county law (Laws 1892, p. 1750, c. 686) provides (section 23) that "each supervisor shall receive from the county compensation at the rate of four dollars per day for each calendar day's actual attendance at the sessions of their respective boards, and mileage, at the rate of eight cents per mile for once going and returning from his residence to the place where the sessions of the board shall be held, by the most usual route, for each regular and special session." By section 10 of the same act it is provided that the board of supervisors "shall meet annually at such time and place as they may fix and may hold special meetings," and "may adjourn from time to time." I think the words "annual meeting" and "regular session" synonymous, and that a "regular" or a "special" session is to be measured by its actual duration, and that each day of its duration is not a session, within the meaning of the law. So that the defendants were in error in assuming that they were entitled to mileage for each calendar day's actual attendance at the sessions of their board. The county law also provides that "each supervisor * * * may also receive compensation from the county at the rate of four dollars per day while actually engaged in any investigation or other duty which may be lawfully committed to him by the board, except for services rendered when the board is in session, and if such investigation or duty require his attendance at a place away from his residence, and five miles or more distant from the place where the board shall hold its sessions, his actual expenses incurred therein. No other compensation or allowance shall be made to any supervisor for his services, except such as shall be by law a town charge."

Important and valuable services seem to have been rendered by these defendants, respectively, to the people of the county during the period covered by their bills, and a large amount of money has been expended by each in actual expenses incurred therein; but the minutes of the board are barren of evidence that a single matter of investigation or other duty was committed to any of them, "lawfully" or otherwise. It is contemplated by the law that boards of supervisors shall keep books of record of their proceedings. By section 50 of the county law it is made the duty of their clerk to "record in books provided for the purpose all the proceedings of such board." This is for public information and for a source of authentic evidence as well. The record alone can show that a matter of special duty has been "lawfully committed" to a supervisor. It appears in the case by oral testimony that the service of each supervisor in such matters, called by them "committee work," was done in pursuance of a general understanding that each supervisor should look after the roads and other business in his own town and report from time

to time to the board, and such course was undoubtedly and in good faith pursued. But this course was not within the letter or even the spirit of the law, and their charges for such "committee work" were not properly made or allowed. It will be unfortunate for the defendants if this conclusion shall operate to deprive them of compensation for services rendered in good faith to the people of the county; but it is of the highest importance and quite essential for the protection and promotion of the public interests that at least substantial compliance with the forms and requirements of the law shall be had.

I am unable to assent to the proposition of the learned counsel for the defendants, in its application to the facts of this case, that what the board had the power to authorize in the first instance it could ratify after the service was rendered, and that the audit of a bill for services actually rendered and expenses actually paid in matters relating to the county and which were within the general supervision of the joint board was equivalent to original authority. I have dealt with the question as to the legality of the charges in the defendants' bills above referred to, not because their determination is essential to the decision of the case, but that the plaintiff may, if so advised, have the benefit of express findings thereon in the event that the judgment to be entered hereon shall be subjected to review.

The learned counsel for the plaintiff presents the proposition that, if the court shall conclude that the plaintiff is not entitled to recover as against all of the defendants, yet a judgment may be had against them severally for the moneys illegally received by each. Such is not the nature of the action; for, as has been pointed out, the action is based upon the alleged collusion or fraudulent concert of the defendants acting jointly as auditors, and not to recover from each defendant moneys illegally received by him from the county.

For the foregoing reasons, I am constrained to the conclusion that there must be judgment for the defendants, dismissing the plaintiff's complaint upon the merits, with costs.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, RICH, and MILLER, JJ.

Thomas Young, for appellant.

James W. Treadwell, for respondents.

PER CURIAM. Judgment affirmed, with costs, on the opinion of Mr. Justice Garretson at Special Term.

WOODWARD, JENKS, RICH, and MILLER, JJ., concur.
HIRSCHBERG, P. J., not voting.

(56 Misc. Rep. 186.)

HUNGERFORD v. VILLAGE OF WAVERLY et al.

(Supreme Court, Special Term, Tloga County. October, 1907.)

1. MUNICIPAL CORPORATIONS—PERSONAL INJURIES—PRESENTATION OF CLAIM.

Plaintiff sued a village and its trustees as individuals and also its street commissioners for injuries received by an alleged defective sidewalk. The verified statement of claim was not filed until 30 days after the expiration of the statutory period of six months, required by Laws 1897, p. 366, c. 414. The complaint alleged the physical incapacity of plaintiff to file the claim because of the injuries received, and also set up a conversation with one of defendant's trustees, a member of the committee on sidewalks, in which she requested the trustee to bring the matter before the board with a view to settlement, which he promised to do, that the matter was brought before the trustees and no damages allowed, but no information was given of the decision of the trustees until about the time of the filing

of the claim. *Held*, that the allegations were sufficient to meet the requirements of the statute as to the filing of a verified statement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1696-1707.]

2. SAME—DEFECTIVE STREETS—ACTION AGAINST VILLAGE TRUSTEES.

Where a village under the village law created a separate highway district, and its streets were placed under the exclusive control of the board of trustees, the street commissioners under their direction having supervision of the public streets, and being authorized to employ necessary laborers for that purpose, allegations in an action against the village and its board of trustees as individuals that the individual defendants knowingly permitted the sidewalk at the place where plaintiff was injured to remain in defective condition for a long time is sufficient to state a cause of action against them.

Action by Martha A. Hungerford against the village of Waverly and others. Demurrer to complaint. Overruled.

Charles C. Annabel, for plaintiff.

Frank A. Bell, for defendants.

LYON, J. The village of Waverly was incorporated under "An act in relation to villages, constituting chapter 21 of the General Laws." Laws 1897, p. 366, c. 414. The individual defendants, other than defendant Bingham, who is the street commissioner, comprise the board of trustees of the village. Each defendant demurs upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The complaint alleges that on the 21st day of June, 1906, the plaintiff, without any negligence on her part, was most seriously and permanently injured by stepping into a hole, of long standing, the existence of which had long been known to the defendants, in a badly defective sidewalk in the village; that her nervous system was seriously affected, and that she was unable to write or concentrate her mind upon any work for some time thereafter, as a result of the nervous shock, and that on the 3d day of January, 1907, she caused to be filed with the village clerk and the president and board of trustees of the village the duly verified claim required by the general village law; that the reason for not filing the claim before was the physical incapacity of the plaintiff by reason of said injuries and because of a conversation had by plaintiff with one of the defendant trustees, who was a member of the committee on sidewalks, in which she stated the nature and circumstances of her injuries, requesting the trustee to bring the matter before the board with a view of settlement, which he promised to do and inform her as to the decision; that, although the matter was brought before the trustees some time thereafter and no damages allowed her, yet that she was not informed by said trustee and did not learn of the decision of the trustees until about the time of filing her claim. It has long been settled that a demurrer admits all material facts well pleaded and that all reasonable intendments are to be indulged in support of a pleading demurred to.

As to the defendant village of Waverly, it is contended that the action cannot be maintained, for the reason that the written verified statement of the claim was not filed with the village clerk within six

months after the cause of action accrued, as required by statute. The injuries are alleged to have been received June 21st, and the statement of claim was not filed until January 3d following, or 13 days after the expiration of the six-month period of limitation. Concededly the Legislature had the power to impose the six-month requirement provided by the statute, and the same is valid and effective (*MacMullen v. City of Middletown*, 187 N. Y. 37, 79 N. E. 863), and the service of the required statement was a condition precedent to recovery (*Jewell v. City of Ithaca*, 72 App. Div. 220, 76 N. Y. Supp. 126). The plaintiff claims, however, that the allegation of the complaint as to the inability of the plaintiff, by reason of her injuries, to make out the required statement and the allegation as to an attempted compromise of her claim relieve the case at bar from the effect of those decisions. It was held in the cases of *Walden v. City of Jamestown*, 178 N. Y. 213, 70 N. E. 466, *Green v. Village of Port Jervis*, 55 App. Div. 58, 66 N. Y. Supp. 1042, and *Barry v. Village of Port Jervis*, 64 App. Div. 268, 72 N. Y. Supp. 104, that when a plaintiff by reason of injuries received is incapacitated from preparing and serving the statement within the time required by statute, but serves the same as soon as he is able to do so, the statement is served in time. In the case last cited, the statute required that the statement of injury be given within two days thereafter, and yet the court held that a statement served within five days was in sufficient time. In the case of *Forsyth v. City of Oswego*, 114 App. Div. 616, 99 N. Y. Supp. 1022, it was held by a closely divided court that, where the statute required a statement to be served within three months after the happening of the accident, it was served in time if served within three months after the physical incapacity preventing plaintiff from serving it had ceased. This case would seem to extend the period for serving the required statement to the very limit. In the case at bar the statement was served 13 days after the expiration of the statutory period of six months.

Under the allegations of the complaint hereinbefore referred to, proof could be given, not only that the inability of plaintiff to make and file the required statement existed more than the 13 days necessary to bring this case within the *Forsyth Case* but also under the allegation of the complaint "that the reason of not filing the claim before was because of the physical incapacity of the plaintiff" that the plaintiff filed the statement as soon as her physical incapacity was sufficiently removed. In view of these authorities, it must be held that the complaint alleges facts sufficient to meet the requirements of the statute as to the filing of a verified statement of claim.

It is unnecessary to discuss the subject of the liability of a village for injuries sustained by a person by reason of the failure of its board of trustees to exercise reasonable care to keep the sidewalks in the village in proper repair, although the exclusive control and supervision of the highways is placed with the board of trustees, as this question has long been settled. *Conrad v. Trustees of Village of Ithaca*, 16 N. Y. 158; *Saulsbury v. Village of Ithaca*, 94 N. Y. 27, 46 Am. Rep. 122; *Nelson v. Village of Canisteo*, 100 N. Y. 89, 2 N. E. 473; *Koch v. Village of Edgewater*, 18 Hun, 407; *Seymour v. Village of*

Salamanca, 137 N. Y. 364, 33 N. E. 304; *MacMullen v. City of Middletown*, 187 N. Y. 37, 79 N. E. 863.

As to the individual defendants, it is contended that the action cannot be maintained for the reason that the liability to the plaintiff, if any, is that of the village and not of its trustees and street commissioner. The village law constituted the village a separate highway district, and placed the streets under the exclusive control and supervision of the board of trustees, and provided that the street commissioner, under their direction, had supervision and charge of the repair of public streets and was authorized to employ the necessary laborers for that purpose. The law is well settled as to the duty of the person charged with the maintenance of sidewalks, holding them to the use of reasonable care in the discharge of their duties. The allegations of the complaint charge the defendants with having knowingly permitted the sidewalk at the place where the plaintiff was injured to remain in a badly defective condition for a long time, and such allegations are sufficient to constitute a cause of action against the defendants in case the defendants were charged with the maintenance of the sidewalks. These defendants by accepting these public offices impliedly bound themselves to the obligations attendant upon the proper discharge of the duties of those offices. Public officers charged with ministerial duties are answerable in damages to any one specially injured by their carelessness and negligent performance of, or omission to perform, the duties of those offices. *Hover v. Barkhof*, 44 N. Y. 113; *Bryant v. Town of Randolph*, 133 N. Y. 70, 30 N. E. 657; *Beardslee v. Dolge*, 143 N. Y. 160, 38 N. E. 205, 42 Am. St. Rep. 707; *Allen v. Sisson*, 66 Hun, 140, 143, 20 N. Y. Supp. 971. The duty of public officers is not less than the power. *Nelson v. Village of Canisteo*, 100 N. Y. 89, 2 N. E. 473; *Seymour v. Village of Salamanca*, 137 N. Y. 364, 33 N. E. 304. The mayor and aldermen, who are by law the commissioners of highways of a city, are liable for negligence in failing to keep the sidewalks in proper repair. *Piercy v. Averill*, 37 Hun, 360; *Koch v. Village of Edgewater*, 18 Hun, 407.

In the case of *Bennett v. Whitney*, 94 N. Y. 302, an action brought against the mayor and common council of the city of Binghamton, N. Y., who were by law the commissioners of highways of the city, and against the street commissioner, by a person who was injured by falling into an unguarded opening in one of the public streets of the city, the court held that one who assumes the duties and is invested with the powers of a public officer is liable to an individual who sustains special damage because of a neglect properly to perform these duties. While a nonsuit was granted as to the defendants mayor and common council, upon the ground that the evidence failed to establish actionable negligence against them, the case was submitted to the jury against the defendant street commissioner and a verdict rendered against him.

It is very possible that, when the case is brought to trial, the evidence may not warrant all the allegations of the complaint; but, as before stated, for the purpose of passing upon the sufficiency of the complaint, the court is bound to assume to be true all the allegations of the complaint material to the cause of action and all reasonable intend-

ments which may be drawn therefrom. So judged, I think the complaint states a cause of action against all the defendants, and hence the demurrer must be overruled.

Demurrer overruled.

(56 Misc. Rep. 285.)

ONTARIO FIELD CLUB v. McADOO.

(Supreme Court, Special Term, New York County. July, 1906.)

SUNDAY—VIOLATION OF SUNDAY LAW—INJUNCTION.

The police will not be restrained from preventing baseball playing on Sunday on the grounds of an athletic association, where those only are admitted who buy score cards at the ticket office at 25 cents each.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Sunday, § 11.]

Action by the Ontario Field Club against William McAdoo. Motion for temporary injunction denied.

Francis H. Boland, for plaintiff.

John J. Delaney, Corp. Counsel, for defendant.

BLANCHARD, J. The plaintiff is a membership association, duly incorporated under the laws of the state of New York. It was organized, according to the charter, for the purposes of promoting social and friendly intercourse among its members, and especially for the purpose of encouraging athletic sports, such as baseball, football, and other athletic pastimes and exercises. On several Sundays, to wit, May 28, June 4 and 11, 1905, the police force of the city interfered, and prevented the plaintiff from playing baseball on its grounds; and the plaintiff now asks the court for an order restraining the police from further interference. The contention of the plaintiff is that its athletic grounds are private, and that it does not propose to have any public exhibitions, nor to charge any admission fee. The defendants deny this, and allege that on June 10, 1905, the plaintiff advertised a game of baseball for the next day, which was Sunday; that persons to the number of 100 went to the ticket office of plaintiff just before the game was called, and each of them paid 25 cents for a score card; that the score card in each instance was handed to a man at the entrance gate, who tore a corner off the same, and returned the remainder to the person from whom he received it, and thereupon such person entered the premises through the entrance gate. A detective officer of the precinct in which the premises of the plaintiff are located deposes that he gained admission in the manner described. The plaintiff replies to none of these allegations. This is a new knock on an old door. Time and again the court has been asked for the relief sought herein, and it has been as often refused. It is not illegal per se to play baseball on Sundays, but it may become illegal by attending circumstances. It is illegal when carried on as a public sport, as, for example, when the public is invited by advertisements in the public press or otherwise, and an admission fee is charged or collected. A private club may play baseball or any other game on Sunday upon its own grounds, and the game may be wit-

nessed by all in view of it, provided no admission fee is charged or collected, and the game is not advertised, and is played in an orderly and quiet manner, without disturbing the peace of the day or the neighborhood. Attempts to evade the law by one device or another are becoming alarmingly frequent, and it is the duty of the courts to sustain the police force in all its proper acts, and to encourage it to enforce the law. There is nothing in the papers to indicate that the police have done anything unlawful or contemplate doing any unlawful act, and the motion for injunction must be denied, with \$10 costs.

(56 Misc. Rep. 222.)

In re PRINCE'S ESTATE.

(Surrogate's Court, Onelda County. October, 1907.)

1. EXECUTORS AND ADMINISTRATORS—PRESENTATION OF CLAIMS.

On presentation of a claim against a decedent's estate, where the personal representatives do not offer to refer it or dispute it, it acquires the character of a liquidated debt.

2. SAME—ADMISSIONS BY EXECUTOR.

On proceedings for the settlement of an executor's account, an admission by him in open court that he takes no issue with any creditor as to the amount due on his claim of the time when it accrued binds the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 832.]

3. SAME—PAYMENT OF DEBTS.

Testator gave his whole estate to his executors in trust, with power of sale to pay debts, etc., to be exercised when they deemed advisable. His real property was incumbered and unsalable, and the executors made no sale thereof for 10 years after his death, during which time they had no assets to pay debts. *Held*, that they were trustees of the creditors, so that limitations did not run until sale of the real estate.

4. SAME—LIMITATIONS.

Where creditors of an estate were told by an executor that their claims would be paid when the real estate was sold, the executor could not interpose the bar of limitations to such claims after the sale of the real estate.

In the matter of the judicial settlement of the estate of Daniel B. Prince, deceased. Decree rendered.

H. S. Bedell, executor in person, and by W. B. Bliss.

W. J. Cagwin, for Cornelia O. Prince, Ora C. Prince, and Flora Bell Crego.

W. W. Byam, for Charles Byam.

E. A. Rowland, for Glen W. Petrie and G. G. Clarabut.

John S. Baker, for N. C. Scudder, S. O. Scudder, John S. Baker, and J. J. Guernsey.

C. H. Dunning, for John Baynes, Bangs & Gaynor, and N. B. Rudd.

O. P. Backus, for Spencer & White.

John R. Edwards, in pro. per.

E. L. O'Donnell, for Augustus Prince.

J. P. Gubbins, in pro. per.

SEXTON, S. On June 14, 1894, the above-named Daniel B. Prince died at Rome, N. Y., leaving a will which was probated September 11,

1894. Harvey S. Bedell, George Barnard, and Willard H. Prince were named as executors and trustees. They all qualified and entered upon the discharge of their duties. Barnard died in 1896, since which time Bedell and Prince have managed the estate. The usual notice to creditors to present claims was published in 1894, and, on March 26, 1895, an inventory was filed, showing personal property in the amount of \$7,176.87, which consisted largely of old hotel furnishings. The claims of the creditors were all filed not later than 1896, and amounted to \$2,112.17.

Said executors, on December 19, 1906, voluntarily filed their first account of their proceedings in this estate, which showed a balance to the credit of the estate of \$99.36. In or about May, 1907, the real estate was sold by the executors, and a supplemental account filed, showing to the credit of said estate \$19,352.01, out of which was paid incumbrances, taxes, and other expenses, amounting to \$12,331.78, leaving in the executors' hands \$7,020.23 to be distributed. All of the creditors were cited, and they asked that their claims be directed paid on the accounting. The executors pleaded in bar the six years' statute of limitations. The court has jurisdiction to decide the question whether the claims of all these creditors had been admitted and allowed by the executors. *Matter of Miles*, 170 N. Y. 75, 62 N. E. 1084. The following questions are to be decided: First. Were the claims of all creditors admitted and allowed by the executors? Second. If admitted and allowed, is the statute of limitations a bar to their payment?

The claims of creditors were all filed with some one of the three executors before the close of 1896. After reasonable opportunity has been given for an examination into the validity and fairness of a claim which is presented, if the representative of the estate does not offer to refer it on the ground that he doubts its justice or disputes it as unjust, it acquires the character of a liquidated and undisputed debt against the estate. This should be so on principle. *Underhill v. Newburger*, 4 Redf. Sur. 499; *Magee v. Vedder*, 6 Barb. 352, are to that effect. There seems to be no authority to the contrary. *Lambert v. Craft*, 98 N. Y. 432.

The record shows that Executor Bedell stated in open court:

"We do not take issue with any creditor who has presented his claim as to the amount due upon his claim, as to the time when the claim accrued, as to the validity at that time of the claim."

If there was any doubt as to whether said claims were liquidated, it is removed by the binding admission, in open court, by Executor Bedell. This admission binds the estate, notwithstanding that there are two surviving executors, as the acts of one, where the estate is vested in two or more executors, are deemed the acts of all. *Wheeler v. Wheeler*, 9 Cow. 34; *Brennan v. Lane*, 4 Dem. 322, and cases cited. The allowance by an executor of a claim presented against an estate "establishes, *prima facie*, the accuracy of the items without other proof; and the opposite party is bound to show affirmatively a mistake or error." *Lambert v. Craft*, *supra*; *Matter of Warrin*, 56 App. Div. 414, 67 N. Y. Supp. 763. Whether a claim has been paid or not,

the principle is the same. *Matter of Warrin*, supra. There are liquidated debts against the estate amounting to \$2,112.17, and to the credit of the estate \$7,020.23; and it is therefore the court's duty to decree their payment in due course of administration. *Lambert v. Craft*, supra.

We now come to the second question, as to whether the statute of limitations bars the creditors from participating in the distribution of the funds of this estate. The will by its terms gave to the executors in trust all of the personal and real estate of the testator, for the purpose of paying all debts, funeral and testamentary expenses, legacies, etc., with a direction to sell, but at a time when, in their judgment, it would be for the best interests of the estate. The power was also given to them to use any or all of the personal estate for the purpose of taking care of the real estate until the same should be sold.

On the trial Executor Bedell testified:

"Down until the time the real estate was sold, which was recently, we did not at any time have any money that could be applied in payment of any of the creditors' claims that had been presented against the estate, after paying taxes and insurance, and sometimes we didn't have anywhere near enough to meet those without borrowing. If we had wanted to we never could have paid a dollar on any of the claims of the creditors consistently, as we had no surplus to protect the real estate from tax sale and foreclosure. We never had any opportunity of selling the real estate until we did sell it—never could get an offer. We tried from time to time to sell it, and sold it at the very first opportunity. There never was a time, after Mr. Prince's death, when a creditor could have collected a judgment against the estate, had he put his claim in judgment, prior to the time of the sale of the real estate, without selling the real estate subject to the incumbrances. If any of the creditors had sued their claims within the 7½ years, that would have prevented the statute of limitations from running, but could not have got the money without forcing a sale of the real estate."

There being a discretionary power of sale in the executors and trustees, a sale could not have been forced by the creditors, except upon a proceeding to force the executors to exercise their discretion, which would not have been entertained except upon proof of an abuse of that discretion. On the evidence, the real estate was mortgaged and undesirable; and, there being no one who could be induced to purchase the property, no court would have forced a sale, the effect of which would have been to wipe out substantially all equity which the estate had in the property.

The property in question was effectually devised, expressly charged with the payment of debts, funeral, and other expenses, and the will contained a valid power of sale for the payment thereof. Hence, prior to the amendment of 1904, the creditors could not have forced a sale of the real estate for the payment of their claims, under section 2757, subd. 4, of the Code. *Dennis v. Jones*, 1 Dem. Sur. 80; *Matter of Rosenfield*, 5 N. Y. St. Rep. 339, and cases cited; *Matter of Smith*, 19 N. Y. St. Rep. 898; *Matter of Hesdra* (Con. Sur.) 20 N. Y. Supp. 79, and cases cited. The evidence shows that there was at no time personal property in the hands of the executors, for the payments of debts, so that an application to the Surrogate's Court for an execution upon a judgment or decree would have been denied, and section 2552 of the Code would have been held inapplicable. *Matter of Monell*, 28 Misc.

Rep. 308, 59 N. Y. Supp. 981. The burden is upon the person seeking an execution upon a judgment recovered against a representative of an estate to show in the hands of such representative sufficient funds of the estate applicable to the payment of the judgment. *Matter of Gall's Estate*, 40 App. Div. 114, 57 N. Y. Supp. 835; *Matter of Lazelle*, 16 Misc. Rep. 515, 40 N. Y. Supp. 343. A creditor with a judgment would not be more strongly entrenched, legally, than a creditor with a liquidated claim, as the allowance of a creditor's claim is a determination that it is a valid and subsisting claim against the estate, entitled to share in the distribution of the proceeds of the estate. For that purpose it is just as effective, unless disproved as a judgment of a court of competent jurisdiction. *Matter of Warrin*, supra. Executors and administrators are but trustees to settle the estate under his or their direction or control, agreeably to the principles of the statute. Nothing is gained by obtaining a judgment against them, beyond the liquidation of the debt. A creditor gets no costs, except at the discretion of the court, and the result is the same whether the suit be defended or not. *Butler v. Hempstead*, 18 Wend. 666; *Mayor v. Gorman*, 26 App. Div. 191, 49 N. Y. Supp. 1026. When a claim has been allowed it is established. *McNulty v. Hurd*, 72 N. Y. 520. And it would be a contradiction in terms to say that an established claim can or should be litigated in an action or upon proceedings for an accounting. *Matter of Miles*, supra. Executors are not now the mere representatives of their testator or intestate, but stand in a different relation to creditors of deceased persons with whose estates they are intrusted than they formerly did. They are now constituted trustees; and the property in their hands is a fund to be disposed of in the best manner for the benefit of creditors, and not liable, as it once was, to be dissipated in bills of costs created by the anxiety of creditors to obtain the first judgment. *Dox v. Backenstose*, 12 Wend. 542. An executor holds, not in his own right, but as a trustee for the benefit (1) of the creditors of the testator, and (2) of those entitled to distribution under the will, or, if not all bequeathed, under the statute of distributions. *Blood v. Kane*, 130 N. Y. 514, 29 N. E. 994, 15 L. R. A. 490.

In the case at bar there never has been any accounting, and the executors occupy the same relation to the estate as they did at the time they qualified. Hence, their trust has been continuous, and, they not having openly or in any manner repudiated their trust, or taken any position hostile to the interest of the creditors or others interested in the estate, and having done no act to set the statute in motion since they allowed the claims herein, the statute of limitations does not apply, and is not a bar, on this accounting, to claims of creditors. *Matter of Camp*, 126 N. Y. 377, 27 N. E. 799; *Matter of Lyth*, 32 Misc. Rep. 608, 67 N. Y. Supp. 579. There was evidence in the case, given by several creditors, that they were told by deceased Executor Barnard that their claims were all right and would be paid when the real estate was sold. In view of this evidence, and of all the facts and circumstances in the case, as well as the provisions of the will, the statute of limitations should not be available as a bar. An executor or administrator may not, with impunity, admit and allow a claim for the purpose of lulling a creditor into a sense of security, until his strict

legal remedy is barred by the statute of limitations, and then, by filing an answer in such a proceeding as this (accounting), send the creditor out of court without remedy or redress into another forum, only to be met with a plea of the statute of limitations. *Matter of Miles*, supra. Law is founded on justice, and should have its eye on the equity side of every case.

If we assume that the statute does run in such a case, it cannot commence running until the creditor's right to call the representatives of the estate to an account has accrued. The right to call the executors to an account in the case at bar, for moneys received from the sale of the real estate, could not accrue until they had sold the real estate and received the money. Upon the evidence, no sale was ever had until in or about May, 1907. On the accounting herein, about \$99 of personalty, made up of rents, was shown to be a part of the estate subject to be wiped out by commissions and expenses of the accounting. The general rule is that the six years' statute of limitations applies to proceedings against executors and administrators brought to compel an accounting of the personalty. Such a rule cannot be invoked on a voluntary accounting of the proceeds of the sale of real estate only, particularly when such accounting is had within six years after the receipt thereof. *Matter of Sargent*, 42 App. Div. 301, 59 N. Y. Supp. 105.

There is another view of this case, which, if correct, excludes the statute of limitations as a bar: Where there is a general accounting of both real and personal estate, from the time the trust was created down to the time of the trial, there is no statute of limitations. *Young v. Young*, 2 Misc. Rep. 381, 21 N. Y. Supp. 1008; *Matter of Lyth*, supra. Accounting parties cannot petition for a voluntary settlement of their accounts and cite all parties in interest to appear upon the return day, and, when appearance is made and objections filed against the account so voluntarily rendered by them, then for the first time raise the statute of limitations as a bar. *Matter of Lyth*, supra.

In the case at bar I hold and decide that the statute of limitations, under the peculiar facts of this case and the language of the will, did not begin to run until the time of the sale of real estate, in or about May, 1907, and said statute is not a bar to any of the claims heretofore presented against said estate by the creditors. It therefore follows that the claims of all of the creditors which have been filed are valid and subsisting claims against the estate in their respective amounts. The claims, not having been rejected, must be deemed to have been allowed as of the time of the filing of same. The rule laid down in *Excelsior Terra Cotta Co. v. Harde*, 181 N. Y. 11, 14, 73 N. E. 494, 106 Am. St. Rep. 493, I think must control in this case on the subject of interest. Interest is allowed on each claim from the date of filing with the executor.

Decreed accordingly.

(122 App. Div. 805.)

In re MATTHEWS et al.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. WILLS—LEGACIES—ABATEMENT—GENERAL ASSETS—INSUFFICIENCY.

Testatrix, after bequeathing certain general legacies, directed the sale of her real estate, providing that one-half of the proceeds should be paid to her daughter, or to her surviving child or children, and that the balance should be retained by the executors in trust to pay the income to testatrix's son for life, remainder to the daughter, or, in the event of her death, to her surviving child or children. *Held*, that the bequest of the proceeds of the real estate was in the nature of a specific legacy, and that, the other assets being insufficient to pay debts and expenses of administration, the general legatees were not entitled to share in the proceeds of the sale of the real estate, under the rule that, where the personal property is not sufficient to pay debts and specific legacies, the general legatees must lose their legacies.

2. SAME—"SPECIFIC LEGACIES"—DEFINITION.

A specific legacy is a gift by will of a specific article, or part of testator's estate, which is identified and distinguished from all other things of the same kind, and which may be satisfied only by the delivery of the particular thing bequeathed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1939.]

Appeal from Surrogate's Court.

Judicial settlement of the accounts of Rosie Matthews, executrix, and Hyman Levi, executor of the estate of Sarah Waters, deceased. From a surrogate's decree of distribution, Rosie Matthews, a legatee, appeals. Reversed.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAMBERT, LAUGHLIN, and HOUGHTON, JJ.

David S. Myers, for appellant.

Philip Waters, for respondent.

McLAUGHLIN, J. Sarah Waters died on the 20th of May, 1905, leaving a last will and testament, executed a little over two years before her death, which was, on the 22d of June following, admitted to probate, and letters testamentary issued to the executors therein named; the accounting parties in this proceeding. Mrs. Waters by her will first directed that her debts and funeral expenses be paid, and then she gave the sum of \$300 each to the Montefiore Home for Chronic Invalids, Beth Israel and Mt. Sinai Hospitals in the city of New York, and then gave to her nephew, Philip Waters, \$1,000. In the sixth clause of her will she directed her executors to sell, at public or private sale, as soon as possible after her death, her real estate located at 68 Mott street, in the city of New York (which was all the real estate she had), and for that purpose she authorized and empowered them to make, execute, and deliver all necessary and proper papers. What she desired done with the proceeds derived from such sale is best stated in the language used by her in this clause of her will, viz.:

"Upon said sale of my said real estate I order and direct my said executors or the survivor of them to pay, out of the net proceeds of such sale, one-half thereof to my daughter Rosie Matthews, or in the event of her death at or before the said sale, to the surviving child or children of my said daugh-

ter. The balance of the remaining one-half of the net proceeds of said sale, I give, bequeath and devise to my said executors, or the survivors of them, in trust, to invest the same as they or the survivor of them deem prudent and to pay over the net income or revenue arising therefrom to my son Hymen Waters during his lifetime. Upon the death of my said son Hymen Waters, I direct and order my said executors or the survivor of them to pay over the whole principal of the sum so invested to my daughter Rosie Matthews, or in the event of her death before said Hymen Waters to her surviving child or children."

The executors, as directed, sold the real estate, and a substantial amount was realized therefrom. The entire personal estate of which the testatrix died possessed being insufficient in amount to pay the funeral and administration expenses and her debts, resort for that purpose was necessarily had to a portion of the proceeds derived from the sale of the real estate. There still remains, from such proceeds, in the hands of the executors for distribution, more than sufficient to pay the bequests to the several hospitals named and the nephew, Philip Waters. These legatees claim that the proceeds, or so much thereof as is necessary for the payment of their respective legacies, are applicable to their payment. The daughter, Rosie Matthews, claims that none of the proceeds is applicable to the payment of such legacies or any of them. The learned surrogate held that the proceeds of the sale of the real estate in the hands of the executors for distribution resulted from the exercise of a mandatory power of sale, and therefore such proceeds were available for the purpose of paying such legacies. It is from this portion of the decree that the appeal is taken.

The gifts to the nephew and the several hospitals are general legacies, not amounting to a bequest of a particular thing, or money, or of a particular fund designated from all others of the same kind. *Crawford v. McCarthy*, 159 N. Y. 514, 54 N. E. 277. This, however, is not true of the bequests contained in the sixth clause of the will. That clause, it is true, contains a mandatory power of sale; but this is for a specific and definite purpose, clearly expressed in the same clause that gives the power. That purpose was to produce a specific fund for the sole benefit of the daughter and son of the testatrix, and the executors were directed to divide the same between them in the manner there set out. The intent of the testatrix in this respect is clearly expressed, and cannot be misunderstood, if effect be given to the language used by her. The gift of the proceeds of the sale of the real estate is a specific bequest. It comes squarely within the definition of a specific legacy, which has been defined as:

"A gift by will of a specific article or part of the testator's estate, which is identified and distinguished from all other things of the same kind, and which may be satisfied only by the delivery of the particular thing." 18 Am. & Eng. Enc. of Law (2d Ed.) p. 714; *Crawford v. McCarthy*, 159 N. Y. 519, 54 N. E. 277.

Had the real estate been given, instead of the proceeds, no one, I take it, would seriously contend that the other legatees could compel a sale for the payment of their legacies. The fact that she directed a sale, and the net proceeds to be divided, in no way changed the situation. The proceeds of a sale of specified property, which is di-

rected by the will to be sold, is just as much a specific legacy as if the property itself had been given. *Crawford v. McCarthy*, 159 N. Y. 519, 54 N. E. 277; *Matter of Brett*, 57 Hun, 400, 10 N. Y. Supp. 871; *Boston Safe Dep. & Trust Co. v. Plummer*, 142 Mass. 257, 8 N. E. 51.

If the foregoing views be correct, then the legacies bequeathed to the several institutions and the nephew referred to must fail of payment, there being a deficiency of assets with which to pay the same in whole or in part, because a specific legacy is not subject to abatement with general legacies on a deficiency of assets (*Toch v. Toch*, 81 Hun, 410, 30 N. Y. Supp. 1003); or, in other words, as between specific and general legacies, where the personal property is not sufficient to pay the debts and the specific legacies, the general legatees must lose their legacies (*Wallace v. Wallace*, 23 N. H. 149; *Code Civ. Proc.* § 2721).

The decree, in so far as appealed from, is reversed, and the matter remitted to the Surrogate's Court to enter a decree in accordance with this opinion. All concur.

(57 Misc. Rep. 96.)

THOMAS RUSSELL & SONS V. STAMPERS' & GOLD LEAF LOCAL UNION NO. 22 et al.

(Supreme Court, Special Term, New York County. November 30, 1907.)

1. TRADE UNIONS—ACTIONS—SERVICE ON OFFICERS.

In a suit to restrain intimidation, etc., by members of a trade union during a strike, the unions, being voluntary associations, were properly made parties by service on their officers under *Code Civ. Proc.* § 1919, providing that an action or special proceeding may be maintained against the president or treasurer of an unincorporated association on any cause of action against all the associates, and a recovery had against them jointly or severally.

2. INJUNCTION—SCOPE—PERSONS RESTRAINED.

A strike injunction, issued against the officers and members of a labor union, was binding on each and every member of the union, though only the officers were served.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 27, *Injunction*, § 425.]

3. SAME—COMPLAINT—INJURY TO PERSON AND PROPERTY.

A complaint for a strike injunction against trade unions alleged that defendants had conspired by abuse, intimidations, threats, and violence to coerce and intimidate plaintiff's employes and to induce them to leave and force plaintiff to accede to the union's demands; that, with intent to injure and destroy plaintiff's business and property, defendant unions were committing and continued to commit acts of intimidation, abuse, and violence against plaintiff and its employes, followed by a recital of alleged acts of violations committed at the instigation of defendant unions and their officers and members. *Held*, that the complaint alleged a cause of action for threatened injury to person and property.

4. REFERENCE—FINDINGS—CONCLUSION.

A referee's finding, in a suit for injunction to restrain illegal acts of strikers, that certain of the acts were committed in the interest and for the benefit of defendant labor unions, was a conclusion of law, rather than a finding of fact.

5. CONSPIRACY—DEFINITION—PROOF.

A conspiracy, being a combination between two or more persons with the unity of design for a common purpose to do an unlawful act or a law-

ful act by unlawful means, cannot be sustained by evidence which would merely establish separate causes of action against several defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 28.]

6. INJUNCTION—TRADE UNIONS—STRIKES—VIOLENCE—CONSPIRACY—EVIDENCE.

In a suit to restrain certain labor unions and their members from committing acts of intimidation and violence during a strike, evidence held insufficient to warrant a finding that acts of violence already committed were for the benefit of the union, or that they were the result of a conspiracy to injure plaintiff or his business.

7. TRADE UNIONS—NATURE OF ASSOCIATION—RIGHTS.

A labor union is an entity recognized by law, endowed with the same right as an individual to threaten to do that which it may lawfully do.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade Unions, § 1.]

8. SAME—UNLAWFUL ACTS OF MEMBERS.

Unlawful acts of violence committed by one or more members of a trade union during a strike are not ipso facto binding on the union, in the absence of proof that the union as such, promoted or ratified the acts.

9. CONSPIRACY—EVIDENCE—SUFFICIENCY.

Though ratification by a trade union of acts of violence committed by its members during a strike may be proved by circumstantial evidence, where a conspiracy is alleged, the circumstances must be tantamount to direct proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 26.]

10. INJUNCTION—INTERFERENCE WITH BUSINESS—TRADE UNIONS.

An injunction will not lie against individuals who conspire to interfere with the trade, business, or occupation of others, unless some injury has been inflicted on the person or some right of property has been invaded, destroyed, or prejudiced; the conspirators being amenable to punishment for violation of Pen. Code, § 168, prohibiting such acts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 172, 174, 175.]

11. SAME—APPREHENSION OF INJURY.

Mere apprehension of injury by future wrongful acts of members of a trade union during a strike are insufficient to justify an injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 8-11.]

12. SAME—PRELIMINARY INJUNCTION—DOUBTFUL RIGHT.

Where, in a suit for a strike injunction against certain trade unions and their members, the evidence adduced before a referee did not sustain the allegation of conspiracy, nor show ratification by the union of acts of violence committed by certain of its members, an injunction pendente lite could only be granted against such members of the union as could be identified as having committed acts of violence or intimidation, under the rule that, where plaintiff's right to equitable relief sought is doubtful, the court will not grant an injunction pendente lite, containing the same relief that would be ultimately granted if plaintiff succeeded on the trial of the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 358.]

Action by Thomas Russell & Sons against the Stampers' & Gold Leaf Local Union No. 22 and others. On motion to continue a preliminary injunction pendente lite. Granted in part.

Alfred E. Ommen, for plaintiff.

Stuart G. Gibboney (John Brooks Leavitt, of counsel), for defendants.

DAYTON, J. Motion to continue preliminary injunction. The parties defendant are Local Union No. 22 of the International Brother-

hood of Bookbinders, with Joseph A. Prout, individually and as president and the business agent of said union, and all other officers and members of said union, their agents, servants, and associates; Local Union No. 1 of said brotherhood, with Joseph P. Hand, individually and as president of said union, Frank E. Carter, individually and as secretary thereof, and all other officers and members, their agents, servants, and associates, and Michael B. Newman. The complaint, summarized, alleges that prior to January 3, 1906, the plaintiff, a corporation, employed members of Union 22 and thereafter made its book-binding room "nonunion" and discharged the members of Union 22, except one girl; that prior to March 20, 1907, members of Union No. 1 were employed by plaintiff, but on that day declared a strike and required all its members to leave work, the object of which strike was to injure plaintiff's business, and to make the strike effective the defendant unions instigated, combined, and entered into an unlawful conspiracy by abuse, intimidations, threats, and violence to coerce and intimidate the other employes of the plaintiff, and to induce them to leave, and to force plaintiff to accede to the demands of said union; the plaintiff endeavored to fill with new men the places of the strikers, and could have done so, but for the malicious and unlawful interference of the defendant unions; that with intent to injure and destroy plaintiff's business and property the defendant unions are committing and intend to continue to commit acts of intimidation, abuse, and violence against the plaintiff and its employes. Here follows a recital of alleged acts committed at the instigation of the defendant unions, their officers and members: That on June 8, 1907, members of Unions Nos. 1 and 22 gathered in front of plaintiff's place of business, shouting opprobrious names, and in some instances following plaintiff's employes and threatening them with bodily harm; that prior to and since said acts the defendant unions endeavored to force plaintiff's employes to leave and to entice them away by abuse and threats of violence; that from the commencement of the lockout by Union No. 22 and the strike by Union No. 1 the defendant unions, their officers and members, in furtherance of a malicious and unlawful conspiracy to injure the plaintiff, have caused pickets and gangs of men placed at or near plaintiff's place of business by defendant unions, who demanded that plaintiff's employes join their unions, and that at the instigation of defendant unions gangs of men composed of members of defendant unions have lain in wait for and followed plaintiff's employes with threats and assaults, causing some of them to leave the city of New York; that women employes of plaintiff have been so threatened; that all the alleged acts were in furtherance of an agreement and unlawful conspiracy by defendant unions, their officers and members, to injure plaintiff's business and good will, and to force it to accede to the demands of defendant unions; and that plaintiff has been obliged to secure the services of special officers and to request police assistance, but all to no avail, and that none of the members of defendant unions have been abused or assaulted. The temporary injunction, issued ex parte, restrained the defendants, their officers, members, agents, servants, and associates: (1) From inducing or coercing, or attempting to induce or coerce, by any species of intimidation, threats, force, or fraud, any employé of

the plaintiff to quit the employment of the plaintiff; (2) from preventing or attempting to prevent, by any species of intimidation, threats, force, or fraud, any person from entering the employ of the plaintiff; (3) from any and all acts of intimidation, threats, force, or fraud toward any employé of the plaintiff; (4) from any and all unlawful interference with the property, property rights, or business of the plaintiff.

The defendant unions, being voluntary associations, were properly made parties under section 1919, Code of Civil Procedure, by service upon their officers, and an injunction issued against them and all their members was binding upon each and every member of the defendant unions. *Beattie v. Callanan*, 67 App. Div. 14, 73 N. Y. Supp. 518; *Horseshoers' Protective Ass'n v. Quinlivan*, 83 App. Div. 459, 82 N. Y. Supp. 288; *Davis Machine Co. v. Robinson*, 41 Misc. Rep. 329, 84 N. Y. Supp. 837; *People v. Marr*, 181 N. Y. 468, 74 N. E. 431, 106 Am. St. Rep. 562. The complaint sets forth a cause of action for threatened injury to person and property (*Davis v. Zimmerman*, 91 Hun, 489, 36 N. Y. Supp. 303; *Dueber Watchcase Co. v. Howard Watch & Clock Co.*, 3 Misc. Rep. 582, 24 N. Y. Supp. 647), and was accompanied by a large number of affidavits, which were replied to and contradicted by numerous affidavits on the part of the defendants. Reference was ordered to Hon. Roger A. Pryor, "for the information of the court, to determine and report upon all the questions of fact arising upon the affidavits presented upon said motion." Seventeen witnesses were examined and cross-examined before Judge Pryor, the record thereof being nearly 400 typewritten pages, and the learned referee reported as follows:

"First. That the defendant unions are voluntary associations composed of more than seven persons; the defendant Joseph A. Prout and Joseph P. Hand being their respective presidents.

"Second. The only persons served in the action with summons and complaint were Joseph A. Prout, Frank E. Carter, and Michael B. Newman, who, together with the said Hand, duly appeared therein.

"Third. Acts of violence and intimidation were committed on the employés of the plaintiff.

"Fourth. Said acts were committed by members of said unions.

"Fifth. Said acts were committed in the interests and for the benefit of said unions.

"Sixth. None of the defendants were parties to a conspiracy to commit said acts of violence and intimidation, or committed, authorized, or sanctioned said acts."

The first and second paragraphs of the report of the learned referee appear to be conceded as facts. The third paragraph is sustained by the proofs. The fourth paragraph is sustained by the proofs to the extent that Simon Kriedman, a member of Union No. 1, called Charles A. Kirchner a scab and other names, for which Kriedman was arrested and fined \$50 by a magistrate, and ——— Murray, a member of Union No. 22, followed Harry Erlander in the streets, for which said Murray was arrested and held in \$500 to keep the peace. The testimony of a number of witnesses shows that there were acts of disorder committed by persons who were designated by the witnesses as members of one or the other of these unions; but, beyond the statement that the assaulting parties were such members, no proof of identification was furnished.

Samuel D. Tharp testified that he entertained Mr. Newman at his house, and that on one occasion Newman indirectly threatened violence by saying:

"This strike means the life or death of the union. We have gone into it to win either by fair means— I do not mean to say we will resort to violence, but we have got to win this strike."

He also testified that he was threatened with violence by a committee of Union No. 1 at his (Tharp's) house; but he subsequently said that no such threat was made at his house, but at a saloon where he (Tharp) was not present—that they never made any threats to him (Tharp) personally. Herman Schiff testified that Newman said to him: "When you come Monday morning, Monday night I will kill you." Mr. Newman denied this positively; also that he was arrested for having made that statement and was discharged by the magistrate. Joseph Canawa testified that he was met by a man six feet high, who called him a scab and a rat and said he had been in the employ of the plaintiff, and was at that time a member of Local Union No. 1, and that while he was talking the big man and some others kicked him; that he did not know the name of the large man, nor the names of the others; that a man named Gibbs called him a scab and a rat; and that Gibbs was arrested and held to keep the peace.

In his lectures on "Law—Its Origin, Growth, and Function," the late James C. Carter, discussing trial by battle, says:

"However, with the progress of industrialism, the effort to prevent violence would increase, and, if an injured party refused to be pacified after his adversary had offered the customary redress, the remonstrances of the fellow tribesman would be employed, and, if these failed, intimations, or a plain declaration, would follow that the tribe was determined upon peace, and, if the obstinate party persisted in his purpose, he would encounter a force dangerous only to himself. There is but one answer to this: He must leave it to some third person to say what he shall do, and this is arbitration, the sole possible resort which the parties to a deadly strife can have and preserve the point of honor, when one refuses to accept the redress offered by another, and is made aware that persistence in his purpose to take revenge upon another will cost him a sacrifice he is not willing to make. This is a lesson which has been taught to contending individuals or families through many ages in the past. Nations are beginning to learn it."

It is not practicable to review the testimony minutely. The fifth paragraph seems to me to be a conclusion of law. I am not persuaded that such acts could possibly have been "in the interest of and for the benefit of said unions." Indeed, the converse of the proposition is the most reasonable. As to the sixth paragraph, whether or not it be regarded as a mixed conclusion of law or of fact, I am of opinion that the plaintiff has failed to show the conspiracy alleged, and I approve this paragraph or finding, with an amplification thereof by adding that neither Mr. Prout nor Mr. Newman committed or were responsible for the acts of violence charged. A conspiracy is defined to be a combination between two or more persons, with the unity of design for a common purpose to do an unlawful act or a lawful act by unlawful means, and cannot be sustained by proof tending to establish merely separate causes of action against several defendants. Plaintiff cites *Chalmers v. Reliable Lodge (C. C.)* 111 Fed. 264, where, in order to

transact business, the Chalmers Company was by the act of defendant obliged to keep its employes "within its premises as in a fortress," and it was there conceded that the pickets were appointed and directed by defendant's officers and members, a situation not presented by the facts here.

It seems to be clear that the plaintiff declined to consider the demands of the defendant unions, and that a lockout or strike might have been avoided had plaintiff permitted discussion. "Undoubtedly, if capitalists and laborers could truly see wherein their welfare respectively lies it would be found that there was an interdependence between them, and that what was for the permanent and substantial good of either would in the long run be for the benefit of both." *Macomber, J., Harvester Co. v. Meinherdt*, 9 Abb. N. C., at page 402.

Each of the defendant association unions is an entity recognized by law. "A labor union organization is endowed with precisely the same right as an individual to threaten to do that which it may lawfully do." *National Pro. Ass'n v. Cummings*, 170 N. Y., at page 331, 63 N. E., at page 373. No authority holding that the unlawful acts of one or more members of a voluntary association ipso facto bind the association has been brought to my attention. Conclusive proof should appear upon which to base the charge that the defendant associations, as such, promoted or ratified the acts complained of; and, while this may be done circumstantially where a conspiracy is alleged, the circumstances should be tantamount to direct proof. The rights and obligations of labor union associations are being discussed in the courts in the light of modern conditions. Until a labor union, as an association, shall be shown presumptively to have acted unlawfully, it is entitled to be regarded as a law-abiding body. Inferences solely from the acts of some of its members should not be sufficient to deprive it of that reputation, a status which plaintiff undoubtedly claims for itself. Is it the law that a presumption of guilt attaches to a labor union association?

This motion may be viewed in another aspect. In *Thomas v. M. M. P. Union*, 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175, Chief Judge Ruger said:

"Individuals who by unlawful combinations seek to interfere with the trade, business, or occupation of others, with a view of injuring or embarrassing them in the prosecution of such trade or business, are subject to the penalties of the criminal law and become liable to criminal prosecution on the part of the people. Pen. Code, § 168. These are the only modes of redress open to parties generally for injuries occasioned to them through the voluntary combination of others engaged in similar employments, with a view of influencing and controlling the general conduct and management of such trade or employment. * * * It is only when some injury has been inflicted on the person or some right of property has been invaded, destroyed, or prejudiced by the action of such corporation that a member is entitled to maintain an action in the courts for redress or protection."

In *Reynolds v. Everett*, 144 N. Y. 189, 39 N. E. 72, the complaint charged conspiracy among workmen to injure plaintiff's business by intimidation and threats. A temporary injunction was granted restraining the defendants from aiding the strikers. The court, by Judge Gray, said:

"The finding of the trial justice was, and it appeared upon the trial as an uncontroverted fact, that the so-called 'strike' began on a certain day and was then over, and there no longer existed that condition of things in which the complainants had sought the aid of a court of equity. * * * The mere apprehension of some future acts of a wrongful nature which might be injurious to the plaintiffs was not a sufficient basis for insisting upon the preventive remedy of a final injunction. Such a remedy becomes a necessity only when it is perfectly clear upon the facts that, unless granted, the complainant may be irreparably injured, and that he can have no adequate remedy at law for the mischief occasioned. * * * The discretionary exercise of a court's authority in dismissing the complaint could very well rest upon the failure to make out a case sufficiently strong to move the court to exercise its extraordinary equitable powers and be, in addition, justified by the discontinuance of the acts complained of."

Both sides have had an opportunity to produce witnesses before Referee Pryor. It is doubtful whether a trial of the action would adduce other testimony. "Where the plaintiff's right to the equitable relief sought is enveloped in doubt, the court will not grant an injunction pendente lite containing the same relief that could ultimately be granted if plaintiff succeeded upon the trial of the action." *Blanchard, J., Butterick Pub. Co. v. N. Y. Typo. Union No. 6*, 50 Misc. Rep. 1, 100 N. Y. Supp. 292. No proof was offered to show that the defendant unions or any of their members intend in the future to perpetrate any of the acts charged. The examination and cross-examination of Mr. Newman seem to demonstrate an intelligence quite remote from the intentions and acts alleged against him personally or officially. It is true that the lockout and strike referred to in these papers resulted in some disorder and in annoyance to the plaintiff. It is also true that many not members of either of these unions were participants; but this bare statement does not establish a rule that the defendant unions or their members generally are therefore amenable to this process. The members of either of these defendant unions who committed acts of violence should be severely disciplined, if not expelled from the unions and publicly prosecuted. No labor union association can maintain its self-respect, the respect of the community, obtain the protection of the law, or progress its cause, which does not denounce and punish any member who, directly or indirectly, countenances or encourages any violence or intimidation by word or deed.

It is argued that the continuance of this injunction order can do no harm, as it restrains only that which every law abiding citizen would not commit. I understand that this powerful remedy will not be issued except its "necessity is perfectly clear on the facts." If this be not so, an injunction order may be issued as a matter of course on any pretext—a proposition repugnant to the proper administration of justice.

All members of either of the defendant unions who can be named and identified as having committed acts of violence or intimidation should be enjoined. In other respects the motion to continue injunction order denied.

Settle order on notice.

(56 Misc. Rep. 572.)

CHURCH v. STEVENS.

(Supreme Court, Appellate Term. November 29, 1907.)

1. LIMITATION OF ACTIONS—ACCRUAL OF RIGHT OF ACTION—DEMAND NOTE.

The statute of limitations begins to run on a demand note immediately.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 259.]

2. SAME—REMOVAL OF BAR.

Where an action on a demand note was commenced in 1906, even if the note was made in 1898, it would not be outlawed, if there had been a payment on account within six years, or if the defendant made a written memorandum of indebtedness within that period, or if for any reason the running of the statute had been suspended.

3. SAME—PLEADING—ANTICIPATION OF DEFENSE.

The statute of limitations is an affirmative defense, and a plaintiff is not bound to anticipate a plea of the statute by setting forth facts to defeat it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 663-669.]

4. BILLS AND NOTES—ACTIONS—COMPLAINT—ISSUES.

A complaint on a note need only state facts sufficient to make out a cause of action; and if the answer sets up a defense which, if true, would destroy that cause, plaintiff may meet it by proof in rebuttal or avoidance.

5. LIMITATION OF ACTIONS—BURDEN OF PROOF.

Where a complaint on a note shows on its face that more than six years have elapsed since the cause of action accrued, and the answer sets up the statute of limitations, the burden is on plaintiff to show that the running of the statute has been suspended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 711-716.]

6. SAME—TRIAL—DISMISSAL BEFORE OPPORTUNITY FOR PROOF.

Whether an action on a note is barred is a matter of proof, and the mere allegation in a complaint as to the date of a demand note, indicating that the statute might have run, and the pleading of the statute in the answer, will not warrant dismissal of the complaint before plaintiff has had an opportunity to present his case.

7. PLEADING—ALLEGING DATE OF INSTRUMENT—MOTION TO MAKE DEFINITE.

Where the date of an instrument upon which a cause of action or defense is based is not given, the pleading is indefinite in that respect, and a motion to make it definite will lie.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1173, 1174, 1180.]

8. BILLS AND NOTES—ACTIONS—SUFFICIENCY OF COMPLAINT—DISMISSAL.

Where a complaint sets forth a written promise for value to pay money, and a breach of the promise, even though a failure to give the date of the promise amounts to a failure to set forth a cause of action on an unpaid negotiable instrument, it would not furnish ground for denial of any recovery for breach of the contract, and cannot justify a dismissal of the complaint.

9. SAME—VALIDITY OF NOTE—ABSENCE OF DATE.

Under the direct provisions of Negotiable Instruments Law, Laws 1897, p. 723, c. 612, § 25, the absence of a date on a note will not render it invalid; hence it is error to dismiss a complaint on a note for failure to give the date thereof.

10. SAME—DEMAND NOTES—NECESSITY FOR DEMAND.

No demand is necessary to a right of action on a demand note, since the word "demand" is not treated as part of the contract, but is used to

show that the debt is due, and demand is presumed to have been made at the date of the delivery of the note, at which time it became payable, and the right of action is complete.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1023.]

11. SAME—EFFECT OF PROVISION FOR INTEREST.

A mere provision for interest in a demand note does not make demand necessary to a right of recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1023.]

12. SAME—EXHIBITION OF NOTE AT DEMAND.

Failure to exhibit a demand note to the maker when demanding payment cannot be urged as a defense, since it is deemed to mature and become due at time of making.

13. LOST INSTRUMENTS—ACTIONS—LOST NEGOTIABLE NOTE—INDEMNITY—TIME FOR OFFER.

Under Code Civ. Proc. § 1917, providing that, when it appears that a negotiable note on which an action is founded was lost, etc., the contents may be proved by secondary evidence, and the owner may recover as if it were produced, but for that purpose he must give to the adverse party a written undertaking, etc., it is not necessary for plaintiff to offer indemnity before the action is brought, but that offer may properly be made in the first instance at the trial; hence, even though plaintiff admits upon the record that a note sued on is lost, but it does not appear when it was lost, it is error to dismiss the complaint at the opening of the trial for want of an indemnifying bond, before plaintiff has been given an opportunity to furnish it.

Appeal from City Court of New York, Trial Term.

Action by E. Bayard Church against Leslie Stevens. From an order dismissing the complaint, and from the judgment for defendant entered thereon, plaintiff appeals. Order reversed, judgment vacated, and new trial granted.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Dee and Donovan (Michael F. Dee, of counsel), for appellant.
V. Philip Mravlag, for respondent.

PER CURIAM. This is an appeal from an order of the City Court dismissing the complaint "upon the summons, complaint, and answer herein, and upon plaintiff's statement upon the record that the note herein sued upon is lost, and that no bond has been given by plaintiff to indemnify defendant," and also denying plaintiff's motion to set aside said dismissal and to grant a new trial, and from the judgment entered upon said order. This action was commenced in October, 1906, and is based on an alleged promissory note, payable on demand, made by defendant in 1898. The answer is a general denial and the statute of limitations.

It was admitted at the commencement of the trial that the note had been lost and that no bond had been given, as required by section 1917 of the Code, which provides therefor where it appears upon the trial of an action that a negotiable promissory note or bill of exchange, upon which the action or counterclaim is founded, has been lost. The five grounds urged at the trial in support of the motion to dismiss the complaint at the opening of the trial were: (1) The

statute of limitations; (2) the failure to allege specifically the date of the note, except the year 1898; (3) the failure to allege a demand for payment; (4) the failure to exhibit the note to the maker when demanding payment; and (5) the failure to comply with section 1917 of the Code, as the note was lost.

As the note was a demand note, the statute of limitations began to run immediately. *Smith v. Ijams*, 70 Hun, 160, 24 N. Y. Supp. 202, affirmed on opinion below 141 N. Y. 552, 36 N. E. 343. This note, however, though made in 1898, would not be outlawed, if there had been any payment on account within six years, or if the defendant had made any written memorandum of the indebtedness within said period prior to the commencement of the action, or if for any reason the running of the statute had been suspended. The statute of limitations is an affirmative defense, which must be pleaded, and a plaintiff is not bound to anticipate a plea of the statute by setting forth in his complaint the payments or memorandum that he intends to rely upon to take the case out of its operation. All that is required is that the complaint state facts sufficient to make out a cause of action, and if the answer sets up a defense which, if true, would destroy that cause of action, plaintiff may meet it by proof in rebuttal or avoidance. *Ramsey v. Barnes*, 16 Daly, 478, 12 N. Y. Supp. 726; *Met. Life Ins. Co. v. Meeker*, 85 N. Y. 614. Where a complaint shows on its face that more than six years have elapsed since the cause of action accrued, and the answer sets up the statute of limitations, the burden is on the plaintiff to show, if possible, that the running of the statute has been suspended. *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837. All this, however, would have been a matter of proof on the trial, and the mere allegation in the complaint as to the making of the note in 1898 and the pleading in the answer of the statute of limitations did not furnish cause for the dismissal of the complaint at the opening of the trial before plaintiff had had an opportunity to present his case.

The second ground urged in support of the motion at the trial has, apparently, been abandoned on the appeal; but we will briefly refer to it, and point out that the defendant could have moved to make the complaint definite, as it has been the uniform rule that where the date of an instrument, or a fact upon which the cause of action or defense is based, is not given, the pleading is indefinite in that respect, and therefore a motion will lie to make it definite. *Pigone v. Lauria*, 115 App. Div. 286, 288, 100 N. Y. Supp. 976. Apparently the defendant did not see fit to make such a motion. It may also be observed, as contended by the appellant, that the allegations of the complaint set forth a written promise for value to pay money, and the breach of such promise; and even assuming the failure to give the date of such promise in the complaint amounts to a failure to set forth a cause of action on an unpaid negotiable instrument, as contended by respondent, that fact does not furnish ground for the denial of any recovery for such breach of contract and cannot justify a dismissal of the complaint. Moreover, the absence of a date on the note would not render it invalid. *Neg. Inst. Law, Laws 1897, p. 723, c. 612, § 25.*

The third ground in support of the motion—i. e., the failure to allege a demand for payment—was not well taken. Where a note is payable on demand simply, with no qualifying provisions, the word "demand" is not treated as part of the contract, but is used to show that the debt is due. *McMullen v. Rafferty*, 89 N. Y. 459; *Smith v. Ijams*, supra. The demand is presumed to have been made at the time of the delivery of the note, at which time the note became payable and the right of action is complete, and a mere provision that the note bears interest does not change the rule. *Wheeler v. Warner*, 47 N. Y. 519, 7 Am. Rep. 478. The failure, therefore, to allege the making of a demand, did not furnish ground for a dismissal of the complaint.

Furthermore, in answer to the fourth ground urged in support of the motion, it may be said that a demand note is deemed to mature and to become due at the time of delivery by the maker to the payee, from whom payment is demanded—i. e., the maker—as required by the statute. *Neg. Inst. Law, Laws 1897, p. 737, c. 612, § 134.*

There is no merit in the fifth and last contention of the defendant; i. e., that the complaint was properly dismissed for plaintiff's failure to tender a bond of indemnity under section 1917 of the Code, as it is admitted that the note has been lost. It was not necessary that plaintiff should offer indemnity to defendant, under the statute in question, before the action was brought, as that offer could properly be made in the first instance at the trial. *Dupignac v. Quick*, 27 Misc. Rep. 500, 58 N. Y. Supp. 341; *Read v. Marine Bank*, 136 N. Y. 454, 32 N. E. 1083, 32 Am. St. Rep. 758. Here it does not appear when the note was lost, and at the trial the complaint was dismissed at the very opening of the trial, and before any opportunity had been given to plaintiff to furnish such indemnity.

The order dismissing the complaint must be reversed, and the judgment entered must be vacated, and a new trial granted, with costs to appellant to abide the event.

(122 App. Div. 560.)

DELAWARE TRUST CO. v. CALM et al.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

JOINT ADVENTURES—AGREEMENT BETWEEN PARTIES FOR PURCHASE OF INTEREST—ENFORCEMENT—DEMAND AND TENDER.

An agreement, reciting that defendants had invited plaintiff's assignors to join in the business venture of locating mineral lands, provided for payment by the assignors of half the expenses, and further provided that defendants would purchase the interest of the assignors at their request, paying the amount expended by them in the business. The interests of the parties were represented by shares. *Held* that, as the agreement did not relate to the purchase and sale of specific property, a notice to defendants by the assignors that they accepted the condition of the agreement for the repayment of the moneys advanced in the undertaking was a sufficient tender of their interest to call on defendants to perform.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Joint Adventures, § 6.]

Laughlin, J., dissenting.

Action by the Delaware Trust Company against Maximilian Calm and others. On motion for a new trial on exceptions directed to be heard in the first instance in the Appellate Division, after judgment of dismissal at the close of plaintiff's case. New trial ordered.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

George P. Breckinridge, for plaintiff.

Hoadley, Lauterbach & Johnson (Henry L. Scheuerman, of counsel), for defendants.

CLARKE, J. This is a motion for a new trial on exceptions directed to be heard in the first instance at the Appellate Division. The complaint was dismissed upon the trial at the close of the plaintiff's case. The action is brought by the plaintiff, as assignee of the interests of J. Ernest Smith, S. Rodman Smith, and Edward T. Canby, against the defendants, to recover the amount expended by the assignors in a venture with the defendants. On November 21, 1899, an agreement in writing was entered into between plaintiff's assignors as parties of the second part and the defendants as parties of the first part. This agreement, after reciting that the defendants have invited the plaintiff's assignors to go into a business venture in locating, taking up and acquiring ore lands and claims, and incidentally mineral and ore lands of every description, in the state of California, and that the defendants had secured the expert services of H. B. Stevens of Los Angeles, Cal., to exploit, discover, locate, take up, and prove such claims and lands, stated that the parties agreed to take hold and acquire all lands, claims, and rights of all kinds in the following shares and proportions: Two-eighths parts to H. B. Stevens, three-eighths parts to the Calms, and the balance, three-eighths parts thereof, to S. Rodman Smith, and J. Ernest Smith. It was further agreed that all expenses should be paid by the Calms, and that the Smiths would pay one-half thereof on presentation of statements, and that not more than \$4,000 should be expended. There are also clauses by which each party gives to the other an option to buy their interests. There was also in the original agreement a sixth clause on which this action is based, as follows:

"Sixth. The said parties of the first part further covenant, promise, and agree that they will at any time, within three years after this date, at the request of said parties of the second part, purchase for cash all the right and interest of said parties of the second part in said business and this agreement, paying them therefor the actual amount of cash paid out or expended by them in and about said business."

After the agreement had been entered into, the Smiths assigned one-third of their interests, or one-eighth of the whole, to Edward B. Canby, who agreed to pay his share of the expenses. This assignment is written on the agreement. The evidence satisfactorily establishes that the plaintiff's assignors had paid as their share of the actual amount of cash paid out and expended in and about the business \$2,142.83. Before the expiration of the three years, to wit, on November 18, 1902, plaintiff's assignors wrote to the defendants as follows:

"I have received a letter since the negotiations looking to the sale of the oil property from my brother, and he states that he thinks it would be best to close the whole matter up, and, to that end, he desires me to write you that we will accept the condition in our agreement of repayment by you of the moneys advanced in this undertaking. To this conclusion both Mr. Canby and I agree. This notice is given you in conformity with the contract which expires on the 25th of this month."

It is conceded that said letter was received by defendants on November 19th. No answer was returned to it, and it is to recover upon said agreement the amount indicated that the action was brought.

The complaint was dismissed at the close of the plaintiff's case upon the ground that there had been no tender or offer to return any advantage received by plaintiff's assignors under the contract. To support this ruling, the respondents cite *Taylor v. Blair*, 59 Hun, 347. In that case plaintiff had purchased stock and paid \$10,000 upon his subscription. To induce him to purchase this stock the defendants agreed that, if at the end of one year plaintiff should desire to sell the said shares at the price paid for the same by him, they would purchase the same, and pay to him the amount paid by him. The court held that under that agreement, before a recovery could be had, it was incumbent to prove that there had been an offer or a tender of transfer of those shares. They also cite *Lester v. Jewett*, 11 N. Y. 453. In that case, also, defendant agreed to purchase from the plaintiff shares of stock within one year at a fixed price. Under such circumstances it was held:

"A cash purchase can only be made by a payment of the purchase money on one side and a delivery of the thing purchased upon the other."

It seems to me that these authorities do not apply to the facts developed on this trial and under this contract. Here was a joint venture, the interest in which was divided into eight shares. The contract in the sixth clause provided for the purchase of "all the right and interest of the said parties of the second part in said business and this agreement." At the beginning, plaintiff's assignors held three-eighths interest and the defendants three-eighths, and the agent, whom the defendants employed to locate the property, the exploitation of which was the purpose of the enterprise, held two-eighths. Said agent having proved unsatisfactory, his two-eighths were recovered from him, and one of the eighths had been disposed of to another person. Evidently this provision in the contract was intended to be, and was, a guaranty of repayment in case the enterprise, into which the defendants had invited the plaintiff's assignors, should prove unsuccessful. It did not provide for the purchase and sale of specific property, shares of stock, or other tangible assets. It was to purchase the interest in the venture which was represented by the shares thereof which the defendants owned. Anything incidental thereto in the way of muniments of title as assignments of options, or locations which had been obtained, or even deeds of property, were all incidental to the real thing. This was the purchase of shares of the whole venture which the plaintiff's assignors owned, and which the defendants agreed to take back and return to plaintiff's assignors the amount they had expended. Under this agreement, all that the

plaintiff's assignors had to do, in my opinion, was to notify the defendants within the three years that they proposed to take advantage of the privilege reserved. After receiving said notice, the defendants could not sit by and do nothing. If they wished anything further, they should have said so. If there were any details necessary to insure complete possession of the shares, they should have asked for them. They should have done something to put the plaintiff's assignors in the wrong.

The interest in the venture was susceptible to purchase as such, as evidenced by the fact that one-eighth had been sold to one Elliott for \$1,500. This carried, as an incident thereto, a one-eighth interest in all the options, locations, etc., obtained. It is not pretended that there was any physical transfer to said Elliott of one-eighth of each of said things which now defendants claim should have been tendered to them. The character of the transaction precludes any idea of the strict tender or manual delivery of the component evidences of title of the things which entered into and made up the whole venture. When the defendants were notified that plaintiff's assignors accepted "the condition in our agreement of repayment by you of the moneys advanced in this undertaking," sufficient tender of their interest was made.

The dismissal of the complaint therefore was error, the exceptions should be sustained, and a new trial ordered, with costs to appellant to abide the event. All concur, except LAUGHLIN, J., who dissents.

DALLIN v. MAYER.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. SLANDER—WORDS ACTIONABLE PER SE.

To denounce another as a thief is actionable per se.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 46.]

2. SAME—ACTION—DAMAGES—EXCESSIVE.

A verdict of \$200 in slander for denouncing another as a thief is not such as to indicate any passion or prejudice or other improper motive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 353, 354.]

3. APPEAL—REVIEW—DISCRETION OF COURT—SETTING ASIDE VERDICT.

The action of the trial judge in setting aside a verdict, as a general rule, will not be interfered with, but there must be something to justify the exercise of the discretion beyond the mere fact that the trial judge does not agree with the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 8862.]

Houghton, J., dissenting.

Appeal from Trial Term.

Action by Nathan Dallin against Max Mayer. From an order setting aside a verdict for plaintiff, he appeals. Order reversed, and judgment ordered on the verdict.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAMBERT, LAUGHLIN, and HOUGHTON, JJ.

Nathaniel Levy, for appellant.
Harry J. Sondheim, for respondent.

LAMBERT, J. The plaintiff upon a conflict of evidence was given a verdict for \$200 in an action for slander. On motion of defendant, the learned trial court granted an order setting aside this verdict. An examination of the case, no exceptions appearing, shows that the plaintiff produced evidence tending to show that the defendant in a courtroom denounced the plaintiff, among other things, as a thief. This language is clearly actionable per se, and the verdict of the jury for \$200 was not such as to indicate any passion or prejudice or other improper motive. In such a case there is no legal justification for setting aside a verdict, unless the evidence to the contrary is so overwhelming as to make it reasonably certain that the jury has acted without proper regard for the evidence. As a general rule the action of the trial judge in setting aside a verdict, in the exercise of a discretionary power, will not be interfered with, but there must be something in the record to justify the exercise of the discretion beyond the mere fact that the trial judge did not agree with the jury in its verdict. The discretion is one that must be exercised within rules recognized within the jurisdiction, otherwise the verdicts of juries are, in contemplation of law, final in the absence of reversible error, or other conditions showing an abuse of the power vested in that body.

The order appealed from should be reversed, with costs and disbursements, and judgment ordered on the verdict, with costs. All concur, except **HOUGHTON, J.**, who dissents.

TIMPANO v. DAVID STEVENSON BREWING CO.

(Supreme Court, Appellate Division, Second Department. December 5, 1907.)

JUDGMENT—MATTERS CONCLUDED.

Where plaintiff, in a prior action against him by defendant, set up as a counterclaim the same claim on which his suit was brought, and the matter was there litigated to a conclusion, he was bound by the decree therein entered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1251.]

Appeal from Municipal Court of Brooklyn.

Action by Michael Timpano against the David Stevenson Brewing Company. Judgment for plaintiff, and defendant appeals. Reversed, and a new trial granted.

Argued before **HIRSCHBERG, P. J.**, and **WOODWARD, MILLER, JENKS**, and **HOOKER, JJ.**

Thomas J. Farrell, for appellant.
Charles J. Ryan, for respondent.

PER CURIAM. The claim upon which the judgment appealed from was rendered was clearly litigated between the parties in a prior action for the foreclosure of a mortgage in the Supreme Court, in

which suit the plaintiff herein was defendant. In his answer in that case, he set up as a counterclaim the same claim upon which the present suit was brought, and the matter was there litigated to a conclusion. The plaintiff herein is bound by that decree.

It follows that the judgment must be reversed, and a new trial granted; costs to abide the event.

WOODWARD, JENKS, HOOKER, and MILLER, JJ., concur.
HIRSCHBERG, P. J., not voting.

(56 Misc. Rep. 168.)

J. J. NEWMAN LUMBER CO. v. WEMPLE et al.

(Supreme Court, Special Term, Monroe County. October, 1907.)

1. STATES—MECHANICS' LIENS—PUBLIC BUILDINGS—STATE AS DEFENDANT.

Plaintiff sued to foreclose a lien on a balance due under a contract for the erection of a state building. The state was made a party defendant, before the passage of Laws 1906, p. 548, c. 255, amending Code Civ. Proc. § 8400, permitting the state to be made a party in such an action. In contemplation of such act the Attorney General stipulated that a demurrer previously interposed by the state on the ground that it could not be sued was withdrawn, and 20 days was given the state to answer. *Held*, that the state was not in a position to claim that it was improperly sued, or that plaintiff should have filed an additional notice of pendency after the passage of the act.

2. SAME—PROCEDURE.

Where an action has been brought to foreclose a mechanic's lien for a public improvement, in which all other persons having liens are parties, it is not necessary for the several defendants who have filed liens to file notices of the pendency of such action to continue their liens in force after three months.

3. SAME—DEFENSES—DELAY.

Where the state, under a building contract, was to furnish the contractors with certain articles, and failed so to do, and delays were caused by its failure so to do, it is not in a position to complain of delay.

4. SAME—CONTRACT—WAIVER OF CONDITIONS.

Where, after the time for the completion of a state building, the contractors continued the work, which was accepted by the state, which made payments, and delays were partially caused by the state, it waived the requirement that the work be completed before that time.

5. SAME—NOTICE OF CLAIM.

Where a notice of lien shows that it is a claim against the state as the owner of the real estate described, it is not invalid because of the subsequent statement in a printed form that a lien is claimed against the real estate.

Action by the J. J. Newman Lumber Company against J. Cady Wemple and others to foreclose a lien. Judgment for plaintiff.

Lewis & McKay, for plaintiff.

John Desmond, Deputy Atty. Gen., for the State.

CLARK, J. This is an action brought by the plaintiff to foreclose a lien filed against moneys due, or to become due, under a contract made between the board of managers of the State Industrial School and J. Cady Wemple and George W. Eycleshymer, composing a co-

partnership, doing business under the firm name and style of the "Schenectady Engineering & Construction Company." The contract was dated August 30, 1904, and was for the construction of 16 cottages and 16 barns on the State Industrial School property at Rush, N. Y., and the contractors were to receive for such work \$96,454.82. The contract was to be completed on or before the 31st day of May, 1905. The plaintiff's lien is one of about 84 liens filed against the same moneys, 16 of said liens being for materials furnished, and the balance were for labor. Two of the liens for materials and 7 for labor were not proven upon the trial, but all of the lienors were made parties defendant. The answers of each of the defendants, lienors, sets forth his lien, and seeks for a foreclosure of the same. The defendants, the state of New York and the board of managers of the State Industrial School, each appeared by the Attorney General, and by their answers they admit the making of the contract, and admit certain payments made to the contractors, and, as defenses, they allege that the contractors made default in not progressing with the work according to the terms of the contract, and that, because of such fact, the board of managers of the State Industrial School, after giving notice as required by the contract, canceled the same, and advertised for new bids, and completed the work at a large expense over and above the contract price, and that at the time of the filing of the several liens there was no money due to the contractors from the state of New York, and none to become due in pursuance of the terms of the contract. By the terms of the contract 85 per cent. of the value of the materials and work incorporated in the building, as certified by the state architect, was to be paid monthly as the work progressed, and the balance was to be paid upon the satisfactory completion of the contract, when so certified by the architect. This action was tried at the Monroe Equity Term in October, 1906, before Mr. Justice Dunwell, who died before rendering a decision in the case, and, by stipulation of all of the attorneys, it was submitted to the undersigned for decision. The first of the liens was filed July 29, 1905, and the last February 13, 1906, and this action was brought February 6, 1906. The defendant the people of the state of New York demurred to the complaint, on the ground that the court had no jurisdiction of the person of the defendant the people of the state of New York, and that the people of the state could not be sued without their consent, and that no consent had been given or alleged. Subsequently, and on the 5th day of May, 1906, a stipulation was entered into between the plaintiff's attorney and the Attorney General, representing the state of New York, to the effect that, inasmuch as an act had recently been passed by the Legislature permitting the plaintiff in an action of this character to make the state a party defendant, the demurrer above referred to was withdrawn, without costs to either party, and the defendant the people of the state of New York was given 20 days after the date of the stipulation within which to answer the complaint, and subsequently, and on or about the 11th day of May, 1906, the state of New York, by its Attorney General, appeared generally in the case, and served an answer in which nothing was said about the state not properly being

made a party, but setting up as a defense that the contractors failed to perform the contract according to its terms, and the board of managers of the State Industrial School canceled the contract, and that the contract was completed by other parties at an additional cost to the state of about \$40,000, and that at the time of the filing of the several liens referred to in the complaint there was no money due to the said contractors from the state of New York, nor did any become due thereafter in pursuance of the contract above referred to, and judgment was demanded in behalf of the people of the state of New York to the effect that the complaint be dismissed, with costs. At the conclusion of the plaintiff's evidence the Attorney General moved for a dismissal of the complaint upon three grounds, as follows: First, that the defendants, lienors, never commenced any action or served any notice of pendency on the Comptroller; second, that the plaintiff, lienor, failed to file a notice of pendency of this action after April 19, 1906, when the amendment permitting the state to be sued went into effect; and, third, that at no time was there any fund to which the liens could be attached.

Mechanic's liens are clearly the creature of the statute, and the general lien law, passed in 1855, did not apply to public property. By Laws 1897, pp. 514, 545, *ec.* 418, 419, the present lien law was enacted, and in 1902 section 5 of the lien law was amended as follows:

"A person performing labor for or furnishing materials to a contractor, his sub-contractor or legal representative, for the construction of a public improvement, pursuant to a contract, by such contractor, with the state or a municipal corporation, shall have a lien for the principal and interest of the value or agreed price of such labor or materials upon the moneys of the state or such corporation applicable to the construction of such improvement, to the extent of the amount due or to become due on such contract, upon filing a notice of lien as prescribed in this article." Laws 1902, p. 74, c. 37.

And by the same act it was provided that a person performing work or furnishing materials for a public improvement might file a notice of lien with the head of the department having charge of such construction, and with the Comptroller of the state. Section 16 of the lien law provides, among other things:

"That if a lienor is made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed in that section, the lien of such defendant is thereby continued, and such action shall be deemed an action to enforce the lien of such defendant, lienor."

Section 17 of the lien law, as amended by chapter 25, p. 31, Laws 1899, and as further amended by chapter 37 of the Laws of 1902, provides, among other things, as follows:

"If a lien is for labor done or materials furnished for a public improvement, it shall not continue for a longer period than three months from the time of filing the notice of such lien, unless an action is commenced to foreclose such lien, within that time, and a notice of the pendency of such action is filed with the comptroller of the state, or the financial officer of the municipal corporation, with whom the notice of such lien was filed, or unless an order be made by a court of record continuing such lien and a new docket be made stating such fact." Laws 1899, p. 31, c. 25; Laws 1902, p. 75, c. 37.

It is not pretended that any action excepting the present one was commenced to foreclose any of the mechanic's liens in question, and it is conceded that none of the defendants, lienors, filed notices of pendency with the Comptroller; the only notice of pendency that was filed at all being the one filed by the plaintiff at the time this action was commenced, making the other lienors defendants in the action.

The learned Attorney General insists that inasmuch as the defendants, lienors, filed no notice of pendency, their liens are nullities, and cannot be enforced, because they had not proceeded according to the express directions of section 17 of the lien law, as amended in 1902 (Laws 1902, p. 75, c. 37, *supra*), and he cites as his leading authority the case of *Danziger v. Simonson*, 116 N. Y. 329, 22 N. E. 570. That case, it seems to me, cannot be considered as a controlling authority here, for it construed a section of the New York consolidation act, which provided, among other things, as follows:

"And where a claimant is made a party defendant to any action, brought to enforce any other lien, a notice of the pendency of such action must be filed by him, or in his behalf." Laws 1882, p. 1, c. 410, as amended by Laws 1883, p. 310, c. 276.

In the *Danziger Case* the action was brought to foreclose a mortgage, and the defendant was an answering lienor who had not filed a notice of pendency, and the court held that, inasmuch as no notice of pendency had been filed by the defendant or in his behalf within the time prescribed by the consolidation act, the defendant's lien had expired, but a reading of section 17 of the lien law, as amended by chapter 37, p. 75, Laws 1902, will show that there is nothing in that section to indicate that when a claimant is made a party defendant to an action to enforce any other lien that he must file a notice of pendency of such action, or one must be filed in his behalf. The section of the consolidation act construed in the case of *Danziger v. Simonson*, *supra*, reads as follows:

"No lien provided for in this title shall bind the property therein described for a longer period than ninety days after the claim has been filed, unless an action be commenced within that time to enforce the same and a notice of the pendency of such action filed with the clerk of the county and an entry of the fact of such notice made on the lien docket. *And when a claimant is made a party defendant to any action brought to enforce any other lien a notice of the pendency of such action must be filed by him or in his behalf.*"

It will be observed that the words italicized in the consolidation act are significantly lacking in section 17 of the labor done or materials furnished for a public improvement lien law. The lien law (section 17) says:

"If the lien is for labor done or materials furnished for a public improvement, it shall not continue for a longer period than three months from the time of filing the notice of such lien, unless an action is commenced to foreclose such lien within that time, and a notice of the pendency of such action is filed with the comptroller of the state or the financial officer of the municipal corporation with whom the notice of such lien was filed," etc.

This language is strikingly similar to the language of the consolidation act above quoted, down to the words italicized and, if section

17 of the lien law had had a sentence similar to that above italicized in the quotation from the consolidation act, the case of *Danziger v. Simonson*, supra, cited by the Attorney General, would have been absolutely conclusive, but, in the absence of anything in the lien law (section 17) to the effect that, when "a claimant is made a party defendant to any action brought to enforce any other lien, a notice of the pendency of such action must be filed by him or in his behalf," I believe that sections 16 and 17 of the lien law should be read together; and section 16 distinctly provides as follows:

"If a lienor is made a party defendant to an action to enforce another lien, and the plaintiff, or such defendant has filed a notice of the pendency of the action within the time prescribed in this section, the lien of such defendant is thereby continued, such action shall be deemed an action to enforce the lien of such defendant, lienor," etc.

The main object of the filing of a notice of pendency is to furnish people who are interested in the property or fund affected with the knowledge of what is going on, and that certainly was done by the notice of pendency filed by the plaintiff, and I can see no reason why every man who had a lien and was made a party defendant in this action should file a notice of pendency so as to give notice precisely similar to the notice that was given by the plaintiff in the notice of pendency filed by him, and I do not think it was necessary for each of the defendant lienors to file separate notices of the pendency of action, but it was entirely sufficient if the plaintiff filed a proper notice, including the names of the defendants to save their rights as lienors. *McAllister v. Case*, 5 N. Y. Supp. 918; *Neuchatel Asphalt Co. v. Mayor*, 12 Misc. Rep. 26, 33 N. Y. Supp. 64, affirmed 155 N. Y. 373, 49 N. E. 1043. When one notice of pendency was filed with the proper officer—in this case with the Comptroller of the state—setting forth fully, among other things, the names of the defendants, lienors, so that anybody interested, by examining that document, could have knowledge of the pendency of the action, and that these several lienors had claims or liens upon the funds sought to be reached, that notice was sufficient, without requiring each defendant to do precisely the same thing the plaintiff had done when he filed his notice, for the filing of a *lis pendens* of each one of the defendants could not possibly afford greater notice to persons interested than was accomplished by filing of the *lis pendens* to the plaintiff. These defendants, lienors, had furnished materials for or performed labor upon buildings belonging to the state of New York. The state had had the benefit of these materials and this labor, and I do not think that any very nice rule should be applied for the purpose of spelling out some flaw by which the state of New York can defeat claims for labor performed and materials furnished of which it has had the full benefit. On the other hand, it seems to me that the section should be liberally construed, to the end that justice may be done to those who have parted with value, either by their personal labor or by the materials that they have furnished, and this is especially authorized by the lien law, which directs that it shall be liberally construed. *Lien Law*, § 22; *Brace v. City of Gloversville*, 167 N. Y. 452, 60 N. E. 779; *McDonald v. Mayor*, 170 N. Y. 409, 63 N. E. 437. A notice of the pendency of this

action, containing the names of all other lienors, was filed by this plaintiff with the Comptroller of the state of New York on the 6th day of February, 1906. There is no pretense but that it was sufficient to give notice that these various defendants, lienors, claimed to have liens upon the funds which had been appropriated for the purpose of constructing these buildings at Rush, and I believe a fair interpretation of both sections 16 and 17 of the lien law, in the absence of a positive statement that the defendants must each file a notice of pendency, or that one must be filed in their behalf, as was required in the consolidation act, requires the construction that it was not necessary for each defendant to file a notice of pendency in order to preserve his lien, but that as to all liens which were in life at the time of the filing of the plaintiff's notice of pendency, and which had been properly executed, that notice was sufficient to preserve their rights, without a separate notice being filed by each one of the defendants, lienors.

The learned Attorney General urges that at the time of the commencement of this action, February 6, 1906, this action could not be maintained against the state—that is, at that time the state could not be sued without its consent—and that, while the Code of Civil Procedure was amended permitting the state to be made a party defendant in an action to foreclose a mechanic's lien for materials furnished or labor performed for a public improvement, that amendment did not take effect until April 19, 1906, and that no notice of the pendency of this action was ever filed after that amendment took effect; consequently the notice of pendency filed by the plaintiff at the time of the commencement of this action was a nullity. It is true that at the time of the commencement of this action the state could not properly be made a party defendant in an action of this character, but authority to make the state a party defendant in such an action was given by the Legislature by chapter 255, p. 548, Laws 1906. Code Civ. Proc. § 3400, as amended April 19, 1906. Section 5 of the lien law distinctly provides, and did at the time of the commencement of this action, that a person might have a lien upon the moneys of the state applicable to the construction of the improvement upon which the labor was performed, or for which materials were furnished. Lien Law, § 5, as amended February 20, 1902, p. 74, c. 37. Section 12 provided for the notice of lien which was to be filed with the Comptroller, and section 17 provided for the duration of the lien; and section 3418 of the Code of Civil Procedure provided as follows:

"If, in an action to enforce a lien on account of public improvements, the court finds that the lien is established, it shall render judgment directing the municipal corporation to pay over to the lienors so much of the funds or money which may be due from the state, or municipal corporation, to the contractor, as will satisfy his lien."

Reading sections 3398 and 3418 of the Code of Civil Procedure in connection with the provisions of the lien law, expressly authorizing liens against the funds appropriated for public improvements, it is perfectly clear that it was the intention of the Legislature that an action could be maintained against the state for the foreclosure of a lien before the amendment of 1906, and that that amendment was designed to correct a manifest oversight.

Section 17 of the lien law states the duration of the lien for materials furnished or labor performed for a public improvement, and further provides that it shall not continue for longer than three months, unless an action is commenced to foreclose it, etc., so that we see the peculiar situation of the Legislature distinctly authorizing the assertion of a lien against funds appropriated for public improvements, without providing the means for enforcing that lien, so that the amendment of 1906 was merely a statute to afford lienors a remedy to enforce an absolute right previously granted to them by the Legislature. In other words, by section 5 of the lien law, liens upon funds appropriated for public improvements were distinctly authorized. Lien Law, § 5, as amended by Laws 1902, p. 74, c. 37. Section 12 of the same act provided when and where the lien was to be filed, and section 17 provided for its duration and specified when an action must be commenced in order to enforce it. There was an absolute right to a lien which had been conferred by the Legislature. and for some reason, probably an oversight, the remedy by which that right could be enforced had not been provided for, and the amendment of April 19, 1906, to section 3400 of the Code of Civil Procedure was designed to afford that remedy. It had relation solely to the remedy of lienors, and not to their right to a lien, and, it relating solely to the remedy, it was retroactive in its nature, and a person entitled to a lien prior to its enactment could maintain the action because the amendment of April 19, 1906, related back to the time of the conferring the right to a lien; this amendment being designed simply to afford the remedy to enforce that right and it was retroactive in its effect. 26 Am. & Eng. Encyc. of Law (2d Ed.) 625; *People v. Tibbets*, 4 Cow. 384; *People ex rel. Collins v. Spicer*, 99 N. Y. 225, 1 N. E. 680; *Lazarus v. Metropolitan Elevated R. R.*, 145 N. Y. 581, 40 N. E. 240; *Rouge v. Rouge*, 14 Misc. Rep. 421, 35 N. Y. Supp. 836. Moreover, I do not believe that the state is in any position to complain that the action was brought against the state before it could properly be sued. The action was commenced, making the state a party, and the summons and complaint were properly served and the Attorney General appeared and demurred, on the ground, among others, that the state could not be sued, and after the amendment to section 3400 of the Code of Civil Procedure had taken effect, April 19, 1906, the Attorney General withdrew his demurrer, and was permitted to do so without costs, and then appeared generally and answered in the case, making no reference in his answer to the fact that when the action was brought the state had improperly been made a party, and after all of that it seems to me that the state of New York is hardly in a position to claim that it was improperly sued, or that the plaintiff should have filed an additional notice of pendency after the amendment of April 19, 1906, had taken effect. It would have afforded no good purpose, it would have given the Attorney General no additional information, it would have been an entirely useless proceeding, and when the Attorney General appeared and answered in this case in May, 1906, without raising any question as to the right of the plaintiff to make the state of New

York a party defendant, that appearance and answer was equivalent to a new service of the summons. Code Civ. Proc. § 424.

The Attorney General also urges that at no time was there any fund to which the liens in question could attach. A great deal of evidence was offered by which it was attempted to show that the contractors had failed to perform the contract according to its terms, and that the state was justified in canceling the contract, but a careful reading of the evidence fails to convince me that the contractors were wholly at fault. By the terms of the contract certain window frames and other articles were to be furnished by the state from the prison department, and they were not furnished when the contractors were ready for them and needed them. They had notified the state authorities that these articles were needed, and by reason of certain delays, which are not satisfactorily explained, the contractors were delayed to some extent at least, and when the state of New York was to furnish certain articles for the use of these contractors and failed to do it when they were needed, and thus held up the work of the contractors, the state is not in position to say that the contractors must live up to the letter of the contract, but that the state could disregard it. This contract was for the sum of \$96,454.82, and was for the construction of 16 cottages and 16 barns scattered over a farm of 1,500 acres. The work was started promptly after the contract was made, and whatever delays there were were occasioned quite as much by the state authorities in failing to furnish materials that they were to furnish, at the proper time, and by holding up the pay of the contractors, as it was by any negligence or omission on the part of the contractors. This is one of those cases where perhaps both parties were more or less careless, and where neither party lived up strictly to the terms of the contract, but the delays in the first instance were occasioned by the failure when the contractors required them, and after that by various delays in paying the contractors as the result of which their credit was impaired and they were unable to pay their laborers, and the liens in question were filed, and the contractors were forced out and compelled to give up a contract which it seems they were ready and willing to perform. I have no doubt whatever from this evidence that if the moneys had been paid by the state as provided by the terms of the contract, without various delays and hold-ups which are not satisfactorily explained, and if the state had furnished the materials from the prison department when the contractors were in need of them and had called for them, that this contract would have been substantially carried out by the contractors, and now, after these delays both in furnishing the materials and in promptly paying the moneys that the contractors had earned, and after depriving them of the benefit of their contract and after having canceled it, I do not believe that the state is in any position to say that it will not pay for the labor performed upon and materials furnished in the construction of these various buildings.

The contract provides that the contractors were to be paid 85 per cent. of the value of the materials and work monthly as the work progressed. The moneys were not paid promptly even after the state architect had given his certificate to the effect that the contractors were

entitled to certain sums of money. The contract was to be completed May 31, 1905, but the state was at least partially to blame for these delays, and, long after the date on which it was to be completed, the contractors kept right on working, the state accepted their work, paid moneys after that date, and because of that fact, and also because of the fact that the delays were at least partially caused by the state itself, it should be deemed to have waived that part of the contract which required the work to be completed by the 31st day of May, 1905. At the time that the contractors were compelled to give up the work, two-thirds of it had been performed, and there is no good reason why, if the contractors had been permitted to continue, they would not have been able to have completed the contract within a reasonable time, and within the contract price, and it seems that the treatment of the contractors, both in the matter of withholding their moneys and in failure to furnish materials as they required them from the prison department, was at times unreasonable, and it seems to me that the liens which were properly filed, and which were in force at the time of the commencement of this action, and where the several defendants, lienors, answered, are enforceable against the fund appropriated for the public improvements upon which the labor and materials represented by the liens was expended, and not merely against the 15 per cent. reserve; for "a person performing labor for or furnishing materials to a contractor, his sub-contractor or legal representative, for the construction of a public improvement pursuant to a contract, by such contractor with the State or with a municipal corporation, shall have a lien for the principal and interest of the value or agreed price of such labor or materials, upon the moneys of the State, or of such municipal corporation applicable to the construction of such improvement, to the extent of the amount due or to become due on such contract, upon filing a notice of lien, as prescribed in this article." Lien Law, § 5, as amended by Laws 1902, p. 74, c. 37.

The objection raised to the liens of the Pennsylvania Lumber Company (No. 16), Queen City Brick Company (No. 4), C. E. Dibble Company (No. 3), Kellam & Shaffer (No. 5), and Hotchkiss Lumber Co. (No. 12) are overruled. The statute was substantially complied with in these several notices of liens as filed.

As to the lien of the C. E. Dibble Company, which it is claimed is of no value because it asserts a claim against real estate, an examination of the lien itself shows that the lien is claimed against the state of New York as owner of the real estate described in the lien; and, even though subsequently in the printed form there was a statement that a lien was asserted against the real estate, it was surplusage, and I think that the statement that the lien was asserted against the state of New York as owner of the property for which the materials had been furnished by the C. E. Dibble Company was sufficient. At all events, the lien was sufficient to give the State Comptroller notice of the claim of the Dibble Company, and it was entered by the Comptroller and state architect in their records as a lien, and it should be enforced. As to the lien of Kellam & Shaffer (No. 5), on August 17, 1905, the state architect issued his certificate stating that the contractors had performed work and furnished materials, and stated as follows:

"This certificate is made to satisfy a lien of Kellam & Shaffer, of Schenectady, if it is enforced," etc.

The amount of this certificate corresponds with the amount of the lien filed by Kellam & Schaffer, less interest, and it conclusively establishes the fact that, when it was issued, these contractors had earned and were entitled to that amount and it should be enforced.

With reference to the liens of the answering defendants hereinafter named, as well as the plaintiff, the lienors furnished labor or materials to the state of New York for the purpose of erecting the buildings on state lands at Rush. The state has had the benefit of their labor performed and materials furnished. The various liens filed substantially comply with the requirements of the lien law. They were sufficient to give ample notice to the state authorities that the various lienors had claims for the labor performed and materials furnished, and a liberal construction of the statute should be adopted to the end that when the lienors, as in this case, had in good faith either performed labor or furnished materials of which the state has had the benefit, that they may receive what is justly due them, and not be deprived of such moneys by a too nice and rigid construction of the lien law.

Judgment is therefore directed in favor of the plaintiff, and of the answering lienors, for the amounts established, in accordance with the findings herewith filed. The issues raised between the trustee in bankruptcy and the state of New York, by the answer of said trustee, and all questions of costs herein, are reserved, the same to be determined at Canandaigua, Monday evening, October 7, 1907, at 7 o'clock.

Let judgment be entered accordingly.

(56 Misc. Rep. 182.)

J. J. NEWMAN LUMBER CO. v. WEMPLE et al.

(Supreme Court, Special Term, Monroe County. October, 1907.)

1. COSTS—EXTRA ALLOWANCE.

The state unlawfully canceled a contract for the performance of certain work, and the other party to the contract sued to recover the amount earned under the contract to the time of cancellation. In the action, plaintiff was obliged to do a great share of the work in establishing liens of which the state had notice, but against which it did not defend. *Held*, that plaintiff would be granted, besides taxable costs, an extra allowance of 5 per cent. on all the claims established on the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, §§ 620-635.]

2. SAME.

In an action against the state to recover for work performed under contract illegally canceled, where several lienors established their liens against the state for labor, the usual costs will be allowed attorneys for each lienor represented up to the time of the trial and one trial fee.

Action by the J. J. Newman Lumber Company against J. Cady Wemple and others. Motion for costs and extra allowance. Motion granted in part.

Lewis & McKay, for plaintiff.

John Desmond, Deputy Atty. Gen., for the State.

CLARK, J. In the decision heretofore rendered in this action it was held that the contract in question was canceled by the state, without sufficient cause, on the 20th of January, 1906. The cancellation of the contract being unlawful, the state is precluded from recovering damages against the contractors, and they would be entitled to recover whatever amount had been actually earned upon the contract at the time of its unlawful cancellation by the state. If the amount which had been actually earned equaled the contract price, then the full amount could be recovered; and, if moneys had been actually earned under the contract at the time of the cancellation, the issuing of a certificate by the state architect certifying the amount due would not be necessary as a condition precedent to payment of such moneys earned, for, if the contractors had earned a certain amount of money, and then the contract was unlawfully canceled by the state, they are surely entitled to recover from the state the amount actually earned upon the contract at the time of its cancellation. If the state is seemingly compelled to pay more than the unpaid balance of the contract price, it is for the reason that the state continued payment to the contractors after liens were filed without protecting itself against liens, of which it had due notice.

In that view of the case, it seems to me that the amount earned at the time of the unlawful cancellation of the contract was as follows:

The amount of certificate No. 19, which had been issued by the state architect, but not paid, amounting to the sum of.....	\$ 7,452 77
The 15 per cent. reserve amounting, at the time, to.....	11,526 24
The value of the work performed during the month of January for which no certificate was issued.....	6,150 00
The value of the extra work occasioned by changes and deviations in the contract.....	1,162 00
Total	\$28,291 01
Add to this the amount heretofore paid upon the contract, which equals	73,419 52
Contract price.....	\$90,454 00
Extra work.....	1,162 00
	97,616 00
Excess	\$ 2,094 53
This excess deducted from.....	\$28,291 01
	2,094 53
Leaves a balance of.....	\$24,196 48

This amount the contractors had actually earned under their contract at the time of its unlawful cancellation, when they were driven from the work by the action of the state authorities.

The plaintiff and a large number of the defendants, lienors, ask for costs, and the plaintiff asks for an extra allowance. This case was in some respects difficult, and in a good many respects extraordinary. Costs are in the discretion of the court (Code Civ. Proc. §§ 3230, 3411), and it can also grant an extra allowance in cases of this character (Code Civ. Proc. § 3253; *Horgan v. McKenzie* [Com. Pl.] 17 N. Y.

Supp. 174). An extra allowance of 5 per cent. of the amount of the plaintiff's claim would be entirely inadequate compensation for the plaintiff for the extraordinary labor involved in the preparation and trial of this action; and I think the plaintiff should be entitled to, not only the regular taxable costs, but an extra allowance of 5 per cent. upon all of the claims established on the trial. The amount of all the liens was necessarily involved in the litigation, and the plaintiff was obliged to do a great share of the work in establishing them; and it seems that the extra allowance on the entire amount involved, being here the amount of the liens established, is just and proper, and the court has power to grant it. *Carney v. Reilly*, 18 Misc. Rep. 11, 40 N. Y. Supp. 1123. Messrs. Peck & Whitbeck appeared for a large number of labor lienors, and it was stated in open court that they performed a large amount of labor outside of making proof with reference to the various liens represented by them; and they are awarded the usual bill of costs for each lienor represented by them up to the time of trial, and one trial fee. *F. M. Whitney and James A. Van Voast*, respectively, are allowed taxable costs on each claim represented by them, and one trial fee, but no extra allowance.

As to the various other applications for allowances of costs in this matter, it appears that, excepting the counsel who have been granted allowances as above stated, their labors consisted of making formal proofs of the liens represented by them, and it does not seem to be proper to award costs, except as above. *Ottman v. Schenectady Realty Co.*, 119 App. Div. 736, 104 N. Y. Supp. 137.

While the case was difficult and extraordinary, the labor was performed very largely by the plaintiff's attorneys and by Messrs. Peck & Whitbeck, E. M. Whitney, and James A. Van Voast; and, so far as I am advised, the labors of other counsel engaged in the case were confined principally to making formal proofs of their respective claims, and for that reason costs should not be allowed.

As to the claim between the trustee in bankruptcy and the state, the jurisdiction of the court to pass upon that seems somewhat doubtful and it is therefore not determined here, but additional findings may be submitted, to the effect that on January 20, 1906, the state canceled the contract in question without good and sufficient cause, and that such cancellation was wrongful; also, that there became due to the contractor upon such cancellation sums which had been earned by them under the contract, and were unpaid, aggregating at least the sum of \$24,196.48, with interest thereon from the date of the cancellation of the contract. Costs to be allowed as above indicated.

DOWNS et al. v. LEHMAN.

(Supreme Court, Appellate Division, Second Department. December 5, 1907.)

SPECIFIC PERFORMANCE—ACTIONS—SUFFICIENCY OF COMPLAINT.

A complaint by vendor against purchaser for specific performance of a contract for the sale of real estate need not allege approval of the title by a title insurance company in compliance with a clause of the contract that title was to be so approved; such clause imposing no condition on vendor.

Appeal from Special Term, Suffolk County.

Action by Charles O. Downs and others against Edgar Lehman. Judgment for plaintiffs, and defendant appeals. Affirmed.

The complaint is by seller against purchaser for the specific performance of a contract for the purchase of real estate. The contract, which is made part of the complaint, contains the following separate clause: "The title to the premises above described to be approved by the Lawyers' Title Insurance Company." It is claimed that the complaint is insufficient for lack of an allegation of such approval.

Argued before JENKS, HOOKER, GAYNOR, RICH, and MILLER, JJ.

Boskowitz & Levy, for appellant.

• Timothy M. Griffing, for respondents.

GAYNOR, J. The rule requiring a complaint to allege performance by the plaintiff of all conditions precedent on his part to his right of action is ancient and undoubted. It has been incorporated in our code of practice by a provision that such requirement is sufficiently complied with by a general allegation that the plaintiff "duly performed all the conditions on his part." Code Civ. Proc. § 533. But the clause of this contract that the title is to be approved by the title insurance company imposes no condition on the plaintiffs' part. The title has to be examined by the defendant—by the purchaser, not by the sellers—and the meaning is that the said title company is to do it for him, if he chooses, and that he is not to be obliged to take the title unless it approves of it. It is a thing not uncommon for a purchaser of land, or of municipal bonds, and the like, to put in the contract of purchase a condition that title or validity is to be subject to the approval of a counsel named. That is not a condition precedent on the seller's part, i. e., for him to perform, or to be performed on his part. It is for the purchaser to have such counsel examine the title and approve or disapprove before the contract day, and that he disapproves is a defence to be pleaded. It is for the purchaser to object to title on the contract day on the ground of such disapproval, and failure to do so is a waiver. The seller may not even know that the counsel examined the title at all (and he may not have done so), much less be able to plead that he approved it. A plaintiff is only obliged to allege performance of conditions precedent on his part, i. e., to be performed on his part, and not conditions to be performed by the defendant, or which depend on him for performance. *McManus v. Western Assurance Co.*, 43 App. Div. 550, 48 N. Y. Supp. 820, 60 N. Y. Supp. 1143. The case of *Flanagan v. Fox*, 6 Misc. Rep. 132, 26 N. Y. Supp. 48, has no bearing whatever on this case. Here we have only a question of pleading, while there there was no question of pleading. There the title was examined and disapproved by the title company designated by the contract, and the purchaser then brought the action to recover back the amount he had paid on the contract, alleging such disapproval in his complaint, and recovered.

The judgment should be affirmed.

Judgment affirmed, with costs. All concur.

FANNING et al. v. LEHMAN.

(Supreme Court, Appellate Division, Second Department. December 5, 1907.)

Appeal from Special Term, Suffolk County.

Action by Joshua T. Fanning and another against Edgar Lehman. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before JENKS, HOOKER, GAYNOR, RICH, and MILLER, JJ.

Boskowitz & Levy, for appellant.

Ernest W. Tooker (Timothy M. Griffing, of counsel), for respondents.

PER CURIAM. Judgment affirmed, with costs. on the authority of *Downs v. Lehman* (decided herewith) 107 N. Y. Supp. 329.

HAPGOODS V. LUSCH.

(Supreme Court, Appellate Division, Second Department. December 6, 1907.)

1. CORPORATIONS—SUBSCRIPTIONS TO STOCK—STATUTES.

Statutes, and not common-law principles, regulate contracts for shareholding in corporations, and the omission to obey a statutory requirement of a payment in cash upon a stock subscription makes the subscription invalid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 206.]

2. SAME—PAYMENT BY NOTE.

Defendant's giving of his note as payment for 10 per cent. of the value of stock purchased by him was not equivalent to the cash payment of 10 per cent. required by Stock Corporation Law, Laws 1892, p. 1835, c. 688, § 41; the transaction not constituting a payment, but merely a promise to pay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 386.]

3. SAME—IRREGULAR ISSUE OF STOCK—CONSIDERATION FOR NOTE.

Plaintiff, a corporation, employed defendant for a term at a fixed salary and a percentage. Defendant purchased preferred stock of the plaintiff, to be paid for by his promissory note. Plaintiff agreed, in consideration and in part payment of services, that the purchase of the preferred stock should entitle defendant to a bonus of 100 per cent. of its common stock, to be delivered to him by plaintiff's president. *Held* that, though the agreement for the bonus and for employment was part of the consideration for defendant's note, yet, the contract being entire, another part of the consideration was the issuance of the preferred stock, and if defendant's stock was issued without the required cash payment of 10 per cent., its issue was invalid, and this part of the consideration for the note was void, and hence plaintiff could not maintain an action thereon.

4. APPEAL—REVIEW—DISCRETION OF COURT.

The question of additional allowance, being largely within the discretion of the trial court, will not be reviewed on appeal, except in cases where a clear abuse of that discretion appears.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3881-3888.]

Hooker, J., dissenting from order granting extra allowance.

Appeal from Special Term, Kings County.

Action by Hapgoods against R. Moffat Lusch on a promissory note. From a judgment for defendant, and an order granting him an extra allowance and denying plaintiff's motion for new trial, plaintiff appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and MILLER, JJ.

W. C. Reddy, for appellant.

Theophilus Parsons, for respondent.

JENKS, J. The appeal is by the plaintiff. The action is upon defendant's promissory note, which reads:

"\$2500.

New York, Oct. 27th, 1904.

"On Nov. 1st, after date, I promise to pay to the order of Hapgoods, Inc., twenty-five hundred dollars at their office, for 25 shares Hapgoods, Inc. stock.
Value received.
R. M. Lusch."

When it appeared on the trial that the note was given in payment of an original issue of stock in the plaintiff corporation, made to the defendant after the corporation was formed, and that the defendant had not paid in 10 per cent. cash, the court directed a verdict for the defendant. See section 41, Stock Corporation Law (Laws 1892, p. 1835, c. 688).

In this state the statutes, not common-law principles, regulate contracts for shareholding in corporations. General Electric Co. v. Wightman, 3 App. Div. 118, 123, 39 N. Y. Supp. 420. In this state it is settled that the omission to obey a statutory requirement of a payment in cash upon a subscription makes the subscription invalid, and not binding upon the subscriber. N. Y. & Oswego M. R. R. Co. v. Van Horn, 57 N. Y. 473; Cook on Corporations (5th Ed.) § 174; South Buffalo Natural Gas Co. v. Bain, 9 Misc. Rep. 425, 30 N. Y. Supp. 264, citing authorities. The giving of the note was not the equivalent of a cash payment of 10 per cent. In Excelsior Grain Binder Co. v. Stayner, 25 Hun, 91, and in Durant v. Abendroth, 69 N. Y. 148, 25 Am. Rep. 158, the reasoning which rejected checks as equivalent to cash is applicable to notes as well. Such a transaction is not a payment but a promise.

It is contended by the learned counsel for the appellant that Ogdensburg, Clayton & Rome R. R. Co. v. Wooley, *40 N. Y. 118, and s. c. 3 Abb. Dec. 398, is authority which renders it "doubtful whether the note would have been void." That case was cited to the Commission of Appeals by the appellant in N. Y. & Oswego M. R. R. Co. v. Van Horn, supra. It was to recover upon installments due upon a stock subscription. Originally the defendant had given his note for the 10 per cent. cash requirement. Afterwards the defendant gave two notes for a sum including the 10 per cent., and the original note was surrendered. The notes were negotiated and then put in judgment, which was satisfied. The defense to the action on the installments was the nonpayment of the 10 per cent. in cash. The court held that as the corporation had actually received the 10 per cent. in cash, and as the defendant thereupon became a stockholder, he could not repu-

diate that relation, and his consequent liability for the balance due upon his stock when action was brought subsequent to the realization upon the notes. But that judgment is not an authority upon the proposition that such a subscriber who does not pay 10 per cent. cash is nevertheless liable upon his subscription.

It was admitted that the note was made "pursuant to a contract" executed by the plaintiff and defendant on September 27, 1904. The agreement recited that, whereas, the plaintiff desired the defendant to work for it, and the defendant desired to work for it, in consideration of the premises, and in further consideration hereinafter mentioned, it was mutually agreed, etc. The plaintiff agreed to give such employment and to pay the defendant \$125 a month, and the additional sum of 10 per cent. of the net profits of the New York office. The agreement also provided:

"It is further agreed by the party of the first part that in consideration of and in part payment for the services rendered by the party of the second part that the stock purchased as above by the party of the second part shall entitle said party of the second part to a bonus of 100 per cent. of common stock to be delivered by Herbert J. Hapgood, of which 50 per cent. shall be delivered at the time the preferred stock is paid for in cash, and 50 per cent. one year from date of this contract, providing the party of the second part is employed with Hapgoods at that time."

The appellant urges that inasmuch as pursuant to the agreement the stock was to be delivered by Herbert J. Hapgood, not the plaintiff, which stock had been already issued, "this alone was sufficient to prevent the note from being void." But the stock for which the note was given is referred to in the undertaking of defendant in that contract, which reads as follows:

"To subscribe for and pay for 50 shares of the preferred stock of Hapgoods at \$100 per share, par value; 25 shares to be paid for by his certain promissory note given this day and due November 1, 1904. The balance of the 25 shares to be paid for on or before December 31, 1904."

It was admitted that the note was made pursuant to the contract. It appears then that the stock which was to be delivered by Herbert Hapgood was a bonus of common stock, not the stock in question, and, moreover, that "it was in consideration of and in part payment of the services." The stock in question is that referred to in the undertaking of the defendant quoted supra, and the express terms of its sale are that 25 shares thereof are to be paid for by his (the defendant's) promissory note given this day and due November 1, 1904. And the note expressly reads that it is given for such stock. The transaction between the parties then was this: The plaintiff employed the defendant for a term at a fixed salary and a percentage. The defendant purchased certain preferred stock to be paid for by the note in question. Plaintiff agreed in consideration and in part payment of services that the preferred stock so purchased should entitle the defendant to a bonus of 100 per cent. of the common stock to be delivered by Herbert J. Hapgood, who the record shows was its president. I fail to see how that bonus changes the character of the sale and purchase of the preferred stock, which admittedly was to be paid for by the note in suit; but, assuming that the agreement for the bonus and for

employment did constitute part of the consideration for the note in suit, yet, the contract being entire, another part of such consideration is the issuance of 25 shares of the preferred stock. Now it is enough to defeat the plaintiff if part of the consideration was illegal and void. *Crawford v. Morrell*, 8 Johns. 253; *Saratoga County Bank v. King*, 44 N. Y. 87; *Barton v. Port Jackson & Union Falls Plank Road Co.*, 17 Barb. 397, 406, 407; *Joyce on Defences to Commercial Paper*, note p. 367.

The question of the additional allowance was largely to be determined by the trial court, and I cannot say that the exercise of its discretion was so unwise as to justify any interference on our part.

Judgment affirmed, with costs.

WOODWARD and MILLER, JJ., concur. HOOKER, J., votes to modify the order by striking out the provision granting extra allowance. HIRSCHBERG, P. J., not voting.

HAPGOODS v. LUSCH.

(Supreme Court, Appellate Division, Second Department. December 6, 1907.)

1. NEW TRIAL—SURPRISE—EVIDENCE—APPLICATION FOR RELIEF AT TRIAL.

A plaintiff, who is surprised by evidence which he is not prepared to rebut, in order to be entitled to a new trial on the ground of surprise, must move for an adjournment or for leave to withdraw a juror, unless it appears that he has placed reliance upon statements made by defendant's counsel before the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 195.]

2. SAME.

The examination of a witness need not be disregarded, or a new trial ordered, because it appears that the opposite party failed to cross-examine the witness when he had an opportunity to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 195-198.]

3. SAME—DIRECTION OF VERDICT—POWER AND DUTY OF COURT.

Where, in a suit upon a note, the court had conceded before it all the evidence upon which the case in its opinion turned, and the issue thus complete involved no question of fact, it was the duty of the court to decide the case as matter of law, and surprise at the application of the law to the undisputed facts is not a ground for new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 187.]

Appeal from Special Trial Term, Kings County.

Action by Hapgoods against R. Moffat Lusch on a promissory note. From an order denying a motion to set aside the judgment for defendant on the grounds of surprise, and that the verdict was the result of a mistrial, plaintiff appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, MILLER, JENKS, and HOOKER, JJ.

W. C. Reddy, for appellant.

Theophilus Parsons, for respondent.

JENKS, J. The action was tried at Trial Term. It is insisted that the records clearly show occasion for surprise from the method

of the justice who presided. The records fail to show that the learned counsel for the plaintiff made any sign at the trial that he was surprised, or that he asked either for a continuance or for the withdrawal of a juror. In *Dixson v. Brooklyn Heights R. R. Co.*, 68 App. Div., at page 308, 74 N. Y. Supp. 49, we held that:

"The rule is well settled that a plaintiff who is surprised by evidence which he is not prepared to rebut should move for an adjournment or for leave to withdraw a juror; otherwise he is not entitled to a new trial on the ground of surprise. *Baylies N. Tr. & App.* 531, and cases there cited; *Messenger v. Fourth Nat. Bank of City of New York*, 6 Daly, 190; *Soule v. Oosterhoudt*, 20 Wkly. Dig. 67; *Glendening v. Canary*, 5 Daly, 489, affirmed, 64 N. Y. 636. It is true that this rule is not inflexible, as where reliance is placed upon statements made by the defendant's counsel before the trial. Unfortunately for the plaintiff, however, nothing whatever is here shown to justify a departure from the general rule."

The record which is before the court reveals that the action is upon a promissory note. The defendant denied that there was any consideration for the note, alleged fraud in its inception, pleaded that the note, given under a written agreement incorporated in the answer, was for a stock subscription which was void and unenforceable, in that the defendant had not paid the 10 per cent. in cash therefor, as provided by section 41 of the Stock Corporation Law (Laws 1892, p. 1835, c. 688), that the defendant had never made any cash payment, and that the note, being dependent on and a part of this void and unenforceable agreement, is also unenforceable. The answer fully informed the plaintiff of the defense, and the course of the trial did not deviate from the issues tendered. The plaintiff read the note in evidence, proved nonpayment, and rested. The court denied the defendant's motion for dismissal and directed the defendant to proceed. During the course of the direct examination of the defendant, the learned court asked whether the note was in pursuance to the agreement set up in the answer. The plaintiff's counsel replied, "Undoubtedly," and then the court asked if the only consideration was the promise to give 25 shares of stock of the company. The counsel replied that it was not quite that way, that the note was in part payment of the subscription; the agreement being that the stock should be held as collateral until the note was paid. The court asked if the transaction was not void, and the counsel answered that it was not, stating that there was authority to the contrary. After further colloquy, the court expressed a doubt whether the action lay, but asked for any further suggestion, whereupon the question was further argued. The court then said, if it was necessary to put in something else to present the question thoroughly to do so, saying:

"It is agreed, is it not, that this note was the entire consideration for 25 shares of stock? Counsel: As expressed in the agreement. * * * The agreement on its face says it is part consideration. Counsel for the defendant: No. Counsel: I am willing to put on the record such a stipulation as this: That this note was made pursuant to the terms of the agreement, a copy of which is attached to the answer; that upon the completion of the transaction the stock was made out and was held as collateral to the note. Counsel for the defendant: We don't admit that. The Court: Put your witness on the stand and prove it."

Thereupon the president of the plaintiff was called to the stand. When a conversation between the witness and the defendant was called for, the court said:

"Just confine yourself to the point indicated. If it becomes necessary to try the question of fraud, I will try it; but now I want all the evidence bearing on the question whether this action can be maintained in view of this statute. Counsel: I want to have him state the conversation which occurred when this transaction was made. The Court: You mean when the note was given? Q. Tell what took place when the note was given. A. When the contract was signed, the stock certificate made out, the note was signed, and we were told to hold— The Court: Who told you? Witness: Mr. Lusch told me to hold the stock until the note was paid as security for the note. Q. And that was done? A. That was done. By the Court: Q. You didn't give it to him at all? A. It was tendered to him, but he did not indorse it. I think it was in his hands. The papers were all on the table, and I think the stock was in his hands. The stock was made out at that time, sealed. Q. You still got it as security for the note? A. Yes, sir. Q. And no cash payment was ever made on account of the stock? The price of the stock was \$2,500? A. Unless it was in connection with his services. Q. Except as it would appear from the agreement? A. Except as set out in the contract. It was admitted by the plaintiff that the stock in question had not before been issued. The Court: I think that is a good defense. I don't think you can maintain this action. Gentlemen, you will find a verdict for the defendant. Counsel: Note an exception. The Court: You have no other evidence bearing on this phase of the case? Counsel: No."

* The point is made that the plaintiff was deprived of the right of cross-examination of the defendant, but it does not appear that the plaintiff ever asked for it. If it had done so, and it had been denied, then a different question would have been presented. Surely the examination of a witness need not be disregarded, or a new trial ordered, because it appears that the opposite party failed to cross-examine a witness whom he could have then examined. The record shows that the case was decided upon the facts elicited by the court, which were either shown by documentary proof, or were not disputed, and that the learned court expressly inquired whether the plaintiff had other evidence upon the phase of the case, and that the plaintiff said it had not. And no request was made for any submission to the jury. When the court had concededly before it all of the evidence upon which the case in its opinion turned, the court had the right to dispose of it as matter of law without further delay. If the court had all of the evidence upon what it judged was the turning point in the case, and if the issue thus complete involved no question of fact, then it was the duty of the court in the due dispatch of litigation to take the case in hand and to end it by a direction, as it did in this case. Surprise at the application of the law to the undisputed facts is not a ground for a new trial.

Order affirmed, with \$10 costs and disbursements. All concur, except HIRSCHBERG, P. J., not voting.

(56 Misc. Rep. 201.)

FARMERS' LOAN & TRUST CO. v. SHAW et al.

(Supreme Court, Special Term, New York County. October, 1907.)

1. WILLS—CONSTRUCTION—POWER OF APPOINTMENT.

Testator devised his residuary estate in trust to pay the income for life to A., and, on her decease, to convey the estate, or so much thereof as might remain, in trust to such persons as A. should have directed by her will, and, in default of a will, to convey on further trust to the same persons and in the same shares as if testatrix had died intestate. *Held*, that there was a general power of appointment in A. without limitation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1854.]

2. SAME.

A will established a trust, and gave a power of appointment to A., the beneficiary of the trust. A. died, leaving a last will under which the trustee of the first will was appointed executor and by which A. exercised in full the power of appointment. *Held*, that the power of appointment "to such persons and in such manner as she shall have directed" was not limited to natural persons, but included a foreign charitable corporation.

3. PERPETUITIES—SUSPENSION OF POWER OF ALIENATION.

Where a will created two separate trust funds for the benefit of persons in being at the time of the death of testatrix, such disposition was not invalid; the power of alienation not being suspended for a longer period than during the continuance and termination of two lives in being at the death of testatrix.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 89, Perpetuities, §§ 46-48.]

4. WILLS—NATURE OF ESTATE—TRUST.

Though a gift to a foreign corporation expresses a desire on the part of testatrix that the fund should be treated as a memorial of one deceased, and used as a scholarship fund, it does not in any way limit or qualify the absolute gift, and is not a trust not authorized by law.

5. SAME—CAPACITY TO TAKE BY DEVISE—FOREIGN CORPORATIONS.

Laws 1894, p. 271, c. 136, providing that foreign corporations may take by devise any real estate in the state and hold it for not more than five years from the time the right of possession accrues, authorizes a foreign charitable corporation to hold real estate devised under a will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 19, 21.]

6. SAME—RESTRICTIONS—DEVISE TO CHARITY.

Laws 1860, p. 607, c. 360, prohibiting the disposition of more than one-half an estate to charitable institutions, cannot be considered as affecting the validity of a devise by testatrix holding a power of appointment under a will under which she was a beneficiary authorizing the disposition of the trust fund, on the complaint of her husband, testatrix not disposing of her own property, but of the property of the original testatrix under the power of appointment.

7. TRUSTS—ACCOUNTING BY TRUSTEE.

Where a will creates a trust fund, the income to be paid to the beneficiary for life, with power in the beneficiary to dispose of so much as may remain in the manner that the beneficiary may by will direct, on stating the account of the trustee under the first will, there should be turned over to him an amount sufficient to pay the debts of the beneficiary, the transfer tax on the property passing under her will and the expenses of administration.

Action by the Farmers' Loan & Trust Company against W. A. Shaw and others to construe a will. Judgment rendered.

Turner, Ralston & Horan, for plaintiff.
A. C. Cowan, for defendants.

BISCHOFF, J. Under the will of Catharine Ann Ten Eyck, so far as material to be considered, testatrix gave her residuary estate to plaintiff in trust to invest and pay over the net income during life to Mary E. Shaw, and in trust upon the decease of Mary E. Shaw to "dispose of, convey and pass over all and singular the said trust estate, or so much thereof as may then remain, and to be held upon trusts herein declared, to such person or persons, and in such manner as she, the said Mary E. Shaw, shall have directed and appointed by any last will and testament duly executed by her, and in default of such will, or as to any of the trust property not disposed of by such will, upon the further trust to convey, pass over and distribute the said trust estate, or so much thereof as may then remain, to the same person or persons, and in the same shares and proportions as the law of the state of New York would designate, appoint and regulate had I then died intestate, and to his, her or their respective heirs, executors, administrators and assigns forever." Catharine Ann Ten Eyck died, leaving certain of the defendants who would come within the clause to take in case of Mary E. Shaw's failure to exercise the power of appointment given her and hereinabove quoted, and to whom the former gave life legacies under her will. The plaintiff, as trustee, received from the executors of Catharine Ann Ten Eyck both personal and real property. Mary E. Shaw died about March 10, 1905, leaving her last will and testament under which plaintiff was appointed executor, and which was admitted to probate in New York county, and under which plaintiff has qualified. She owned no real property, and her personal property was less in amount than debts due from her. A transfer tax of \$2,274.69 was fixed upon the property of Catharine Ann Ten Eyck which passed under the will of Mary E. Shaw. Under her will Mary E. Shaw exercised the power of appointment given her, and disposed of the whole estate over which she had authority.

The principal controversy is raised by the contention of certain of the defendants who would take under the will of Catharine Ann Ten Eyck and the statutes of distribution, provided the will of Mary E. Shaw does not pass, by virtue of the power given her, the remainder of the estate of the testatrix, and largely to determine as to whom plaintiff should distribute and pay over such residuary estate this action has been brought. In the absence of any statutory limitation of the power, it is clear that the language of the will of Catharine Ann Ten Eyck must be given its plain and ordinary meaning, and that such leaves it open to Mary E. Shaw to direct the transfer of any part or all of the fund referred to in the quoted paragraph of Catharine Ann Ten Eyck's will, "upon the decease of said Mary E. Shaw to dispose of, convey and pass over all and singular the said trust estate, or so much thereof as may then remain and be held upon the trust herein declared to such person or persons, and in such manner as she, the said Mary E. Shaw, shall have directed and appointed by any last will and testament duly executed by her," is plain, clear,

and in no way ambiguous. This appointment must be read in determining its effect, as though it had been incorporated in the original will; the rule being that:

"The question of the validity of an appointment is to be determined by reading it as though contained in the original instrument conferring the power of appointment." *Maitland v. Baldwin*, 70 Hun, 287-272, 24 N. Y. Supp. 29, 32.

There does not seem to be the slightest indication, so reading the original will and that of Mary E. Shaw, of an intention on the part of Catharine Ann Ten Eyck to limit this power of appointment to her heirs at law and next of kin. She did, it is true, provide for her heirs at law and next of kin in the contingency of the nonexercise of the power of appointment by will, or as to any of the trust property not disposed of by such will, and, indeed, expressly said that "in default of such will, or as to any of the trust property not disposed of by such will," the property should be held upon the further trust to convey, pass over, and distribute to the certain heirs at law and next of kin or class as therein specified. It was therefore a general power of appointment without limitation. *Cutting v. Cutting*, 86 N. Y. 522. The intent of the testatrix, Catharine Ann Ten Eyck, to give this unlimited power of appointment to Mary E. Shaw is so clear in view of the language used that the citation of further authorities seems needless, particularly under the well-settled rule that effect must be given to the clear intent of a testator as indicated by the language used. The contention that the residuary property could be paid over only to natural persons who were nominated as remaindermen by Mary E. Shaw also seems to be entirely disposed of by the language of the fourth clause of the will of Catharine Ann Ten Eyck, which says, "to such person or persons, and in such manner as she, the said Mary E. Shaw, shall have directed," and which can have no limitation to natural persons only in the absence of language expressly so limiting the meaning of the word "person." *Matter of Fox*, 52 N. Y. 530, 11 Am. Rep. 751; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 189, 8 Sup. Ct. 741, 31 L. Ed. 650. In the last case cited it is said:

"Under the designation of person there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose and permitted to do business under a particular name and have a succession of members without dissolution. As said by Chief Justice Marshall, 'the great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men'"—citing *Providence Bank v. Billings*, 4 Pet. (U. S.) 514, 7 L. Ed. 939.

The testatrix, Catharine Ann Ten Eyck, created two separate trust funds of the sum of \$10,000 each for the benefit of the defendants Annie Johnson and Sarah Porter, both of whom were conceded to have been in being at the time of the death of Catharine Ann Ten Eyck, one of whom was the mother of Mary E. Shaw, and the other a beneficiary under the Ten Eyck will. These dispositions were valid under the statutes, and the power of alienation was not suspended beyond the statutory period computed from the time of the death of Catharine Ann Ten Eyck; that is, for a longer period than during the continuance and until the termination of not more than

two lives in being at the date of the instrument containing such limitation or condition, or, as in the case at bar, for not more than two lives in being at the death of the testatrix. 1 Rev. St. (1st Ed.) p. 773, pt. 2, c. 4, tit. 4, §§ 1, 2; Real Prop. Law, Laws 1896, p. 583, c. 547, § 158; *Hillen v. Iselin*, 144 N. Y. 365, 39 N. E. 368.

The contention that the gifts of remainders after the life estate of Mary Johnson and Sarah Porter to the Tuskegee Normal and Industrial Institute are void as being trusts not authorized by the statutes of this state seems to have no merit. The gifts to the Tuskegee Institute of the two remainders, one of \$5,000 and the other of \$10,000, are by the terms of the will absolute gifts, and without qualification. There is nothing to indicate by the terms of the will that the Tuskegee Institute was not to become the absolute owner of these residuary funds. It is true that a clause in the will relates to treating this fund as a memorial to Ethel Shaw, and to its use as a scholarship fund, but such can be considered as nothing more than the expression of the desire on testatrix's part as to the use to which such money was to be put, and it does not in any way limit or qualify the absolute gift. *Raney v. Laing*, 58 Barb. 453; *Matter of Zimmerman*, 84 N. Y. St. Rep. 395, 50 N. Y. Supp. 395. This gift being absolute, the contention that the institute is not authorized to take the property for any such limited purpose falls, as well as the question raised that, if male students are entitled to attend the institute, the limitation of the use of such property to female students renders the bequest void. The fact that chapter 136, p. 271, Laws 1894, which provides that "any foreign corporation * * * may take by devise any real property situated within this state and hold the same for not exceeding five years * * * from the time when the right to possession thereof passed into such devisee and convey it by deed or otherwise in the same manner as a domestic corporation," was in effect at the time of the death of Mary E. Shaw, and that the possession of the real property in question herein was then in the Farmers' Loan & Trust Company, as trustee, effectually disposes of the contention that the Tuskegee Institute was not competent to hold real estate because it was a foreign corporation. It certainly cannot by any rule of construction be claimed that the Tuskegee Institute took any interest or estate, either present or by way of remainder, in this property until after the act of 1894 had gone into effect, as it took by virtue of the will of Mary E. Shaw, and Mary E. Shaw died in 1905. *Matter of Stewart*, 131 N. Y. 274, 30 N. E. 184, 14 L. R. A. 836; *Richards v. Hartshorne*, 110 App. Div. 650, 97 N. Y. Supp. 754. Mary E. Shaw's husband, whom she left surviving, has no right to invoke to his advantage chapter 360, p. 607, Laws 1860, which prohibits the disposition of more than one-half of an estate under certain conditions to charitable and benevolent institutions, Mary E. Shaw not disposing of her property, and the statute in question could have no application to her applying the power of appointment given to her under the will of Catharine Ann Ten Eyck. The statute invoked provides that:

"No person having a husband * * * shall by * * * her last will * * * devise or bequeath to any benevolent, charitable, literary, scientific,

religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half and no more."

Mary E. Shaw was not disposing of her property, but was by her power of appointment disposing of the property of Catharine Ann Ten Eyck. The object of this statute undoubtedly is to protect the persons who would be the natural recipients of the bounty of the testators, and would benefit by an intestacy on the part thereof, and hence can have no application to the case of an exercise of a power such as was given to Mary E. Shaw. The mere fact that Mary E. Shaw had this power of appointment over the property gave her no estate therein. She was not the owner of the property, and could convey the fee only in the exercise of the power given by the will. *Dana v. Murray*, 122 N. Y. 604, 26 N. E. 21; *Eells v. Lynch*, 8 Bosw. 465.

No other question presented by defendants requires serious consideration, and findings should be submitted providing for a referee to take and state the account of plaintiff as trustee under the last will and testament of Catharine Ann Ten Eyck in the usual form, and for turning over to the plaintiff an amount sufficient to pay the debts of Mary E. Shaw, the transfer tax upon the amounts passing under her will, and sufficient to pay the expense of the administration of the estate of Mary E. Shaw to the Farmers' Loan & Trust Company as executor of the last will and testament of Mary E. Shaw, and providing for the distribution of the balance of the funds as directed in the last will and testament of Mary E. Shaw.

Judgment accordingly.

(122 App. Div. 208.)

TRUSTEES OF VILLAGE OF SARATOGA SPRINGS v. SARATOGA GAS, ELECTRIC LIGHT & POWER CO.

(Supreme Court, Appellate Division, Third Department. November 20, 1907.)

1. CONSTITUTIONAL LAW—LEGISLATIVE POWER—REGULATION OF RATES OF PUBLIC SERVICE CORPORATION.

The power to establish a tariff of rates for a public service corporation is a legislative, and not an executive or judicial, function.

2. SAME—DELEGATION OF POWERS.

The legislative function of fixing a tariff of rates for a public service corporation may be delegated to an administrative body, with power to fix rates in conformity with a standard established by the Legislature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 89-102.]

3. SAME—LEGISLATIVE DISCRETION OF ADMINISTRATIVE BODY—STATUTES.

Laws 1905, p. 2092, c. 737, establishing the commission of gas and electricity, and authorizing it to fix, after hearing, "within the limits prescribed by law," the maximum price for gas and electricity furnished by any public service corporation, is not invalid on the ground that the determination of the commission is not controlled by a standard prescribed in the statute, and no legislative discretion is delegated to the commission, since the quoted words fix the standard, by requiring that the rates shall be reasonable to the public and to the corporation, or, if it be conceded that the quoted words do not add anything to the statute, the commission must be guided by the common law.

4. SAME.

The Legislature has power to authorize the commission of gas and electricity, created by Laws 1905, p. 2092, c. 737, and empowered to fix maximum rates for gas and electricity furnished by any public service corporation, to receive ex parte and hearsay evidence, and to base its decision thereon, although the review provided for is only by appeal from a determination so made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 89-102.]

5. SAME—DUE PROCESS OF LAW.

To make effectual the constitutional guaranty of due process of law, one must have the right to appeal to the court whenever it is claimed that his constitutional rights are invaded.

6. SAME.

Laws 1905, p. 2092, c. 737, creating the commission of gas and electricity, with power to fix maximum rates for gas and electricity furnished by any public service corporation, is not invalid as depriving a corporation of its property without due process of law, though the remedy of appeal from a determination of the commission may not be adequate to preserve to the corporation the constitutional protection, since it has the concurrent remedy of injunction to restrain the enforcement of any improper order of the commission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 925-929.]

7. STATUTES—CONSTRUCTION—INVALIDITY IN PART.

The court must so construe a statute, if possible, as to make it conform to constitutional requirements, and must disregard such parts of it as are in violation of the Constitution, where the statute is separable and a substantial part thereof was lawfully enacted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 58-66.]

8. CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAW.

Laws 1905, p. 2092, c. 737, creating the commission of gas and electricity, with power to fix maximum rates for gas and electricity furnished by any public service corporation, is not invalid on the ground that the provision that the price fixed by the commission shall be the price for a term of three years, and thereafter until, on complaint, the commission shall fix a new price, denies to such a corporation the equal protection of the law, in that it makes a rate which may within three years become confiscatory by reason of an increase in price of materials used in making gas and electricity, since the corporation may in such a case either appeal to the Legislature or to the courts for relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 691, 847.]

9. GAS—RATES—ESTABLISHMENT BY COMMISSION—REVIEW.

The court, in determining whether the rates for gas and electricity furnished by a public service corporation, as fixed by the commission of gas and electricity created by Laws 1905, p. 2092, c. 737, are reasonable, must presume in favor of the validity of the order of the commission.

10. SAME.

The stockholders of a public service corporation furnishing gas and electricity are not entitled to require the public to pay dividends on fictitious stock or for their extravagance or waste; but the corporation is entitled only to a fair return on the actual value of its property devoted to the public use, after paying expenses and liabilities reasonably charged against the same, and what is a fair return must depend ultimately on the judgment of the court.

11. SAME.

The rates established by the commission of gas and electricity created by Laws 1905, p. 2092, c. 737, for gas and electricity furnished by a public service corporation, *held* not, under the facts, unreasonable.

Kellogg and Sewell, JJ., dissenting.

Appeal from Special Term.

Proceedings by the trustees of the village of Saratoga Springs to require the commission of gas and electricity to fix the price to be charged by the Saratoga Gas, Electric Light & Power Company for gas and electricity. From a determination of the commission fixing the maximum price, the company appeals. Affirmed.

The proceeding arose under chapter 737, p. 2092, of the Laws of 1905, creating the commission of gas and electricity and prescribing its powers and duties. Under section 15 of that act the trustees of the village of Saratoga Springs made complaint in writing that the price charged for gas and electric current by the defendant was excessive. Notice was given, pursuant to section 17 of the act, and after a hearing duly had the order was made from which this appeal was taken. Further facts appear in the opinion.

Argued before SMITH, P. J., and CHESTER, KELLOGG, COCHRANE, and SEWELL, JJ.

Edgar T. Brackett (John B. Stanchfield, of counsel), for appellant.
Frank Gick (John L. Henning, of counsel), for respondent.

Briefs were submitted by the Attorney General and by the Public Service Commission for the Second District of the state.

SMITH, P. J. This commission has assumed to fix a maximum charge for gas and electricity within the village of Saratoga Springs. By this appeal their right so to do is challenged, upon the ground that such power is legislative, and cannot be delegated to a commission. The question raised is an important one, as it goes to the foundation of a policy which has been adopted by the state, and which, if such power be denied, is of little efficacy. That the power to fix a tariff of rates for a public service corporation is executive will not be contended. That such power as an original power is not judicial will be admitted. In *Interstate Commerce Commission v. Railway Co.*, 167 U. S. 499, 17 Sup. Ct. 896, 42 L. Ed. 243, Justice Brewer, in writing for the court, says:

"The power to establish a tariff of rates for carriage and by a common carrier is a legislative, and not an administrative or judicial, function."

In *C., B. & Q. R. R. Co. v. Jones*, 149 Ill. 377, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278, it is said:

"The power to regulate and control the charges of railroad companies or other agencies engaged in public employments is legislative, and not judicial."

Further authority might be cited to the same effect. The pivotal contention here is as to whether this function is so purely legislative that it cannot in any degree be delegated to an administrative body, as a commission named as provided in this statute.

In determining this question, we are aided by well-considered au-

thority. In *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 29 L. R. A. 636, decided in 1886, the action was brought by the Farmers' Loan & Trust Company to enjoin the Railroad Commission of Mississippi from enforcing against the Mobile & Ohio Railroad Company the provisions of the statute of Mississippi entitled "An act to provide for the regulation of freight and passenger rates on railroads in this state, and to create a commission to supervise the same." It was claimed in that case that the act conferred both legislative and judicial powers on the commission, in violation of the Constitution of Mississippi. The Supreme Court of the United States reversed the decree of the Circuit Court, and remanded the cause, with instructions to dismiss the bill. In *State of Minnesota v. Railway Co.*, 38 Minn. 281, 37 N. W. 782, the statute of the state had created a railroad and warehouse commission, with authority to determine reasonable and just rates for transportation of freight and passengers by the roads within the state. The respondent railroad company had refused to comply with the order of the commission as to the rate fixed. Proceedings were commenced to enforce obedience. The court held:

"The authority thus given to the commission to determine in the exercise of their discretion and judgment what are equal and reasonable rates is not a delegation of legislative power."

In discussing this objection, Mitchell, J., in writing for the court, says:

"The difference between the power to say what the law shall be, and the power to adopt rules and regulations, or to investigate and determine the facts in order to carry into effect a law already passed, is apparent. The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and the conferring of an authority or discretion to be exercised under and in pursuance of the law."

After discussing the necessity of leaving the application of such a law to some administrative body, the opinion proceeds:

"The Legislature itself has passed upon the expediency of the law and what it shall be. The commission is intrusted with no authority or discretion upon these questions. It can neither make nor unmake a single provision of law. It is merely charged with the administration of the law and with no other power. Whether the charges of a railway in any particular case are or are not equal and reasonable is a fact left by the law for them to determine. If the commission find them unequal and unreasonable, and declare other rates to be equal and reasonable, the law itself declares the former unlawful, and allows the railway to charge only the latter."

The writ of mandamus asked for was awarded. This case was carried to the United States Supreme Court, and is there reported in 134 U. S. 418, 10 Sup. Ct. 702, 33 L. Ed. 970. The case was there reversed, upon the ground that the Supreme Court of Minnesota had held that the statute precluded any judicial review of the determination of the commission. No question was made as to the validity of the delegation of such power, if the right of judicial review had not been taken away. Justice Miller, in writing a concurring opinion, stated two propositions of law:

"First. In regard to the business of common carriers limited to points within a single state, that state has the legislative power to establish the rates of

compensation for such carriage. Second. The power which the Legislature has to do this can be exercised through a commission, which it may authorize to act in the matter, such as the one appointed by the Legislature of Minnesota by the act now under consideration."

Justice Bradley wrote a dissenting opinion in that case, in which Justices Gray and Lamar concurred. In that dissenting opinion he said:

"I think it is perfectly clear, and well settled by the decisions of this court, that the Legislature might have fixed the rates in question. If it had done so, it would have done it through the aid of committees appointed to investigate the subject, to acquire information, to cite parties, to get all the facts before them, and, finally, to decide and report. No one could have said that this was not due process of law. And if the Legislature itself could do this, acting by its committees and proceeding according to the usual forms adopted by such bodies, I can see no good reason why it might not delegate the duty to a board of commissioners, charged, as the board in this case was, to regulate and fix the charges so as to be equal and reasonable. * * * In the Railroad Commission Cases, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636, we held that a board of commissioners is a proper tribunal for determining the proper rates of fare and freight on the railroads of a state. It seems to me, therefore, that the law of Minnesota did not prescribe anything that was not in accordance with due process of law in creating such a board and investing it with the powers in question."

In *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294, decided in 1892, the court had under consideration provisions of an act of Congress authorizing the President to suspend by proclamation the free introduction of certain commodities when he became satisfied that any country producing such articles imposed duties or other exactions upon the agricultural or other products of the United States which he may deem to be reciprocally unequal or unreasonable. In this case the Supreme Court held that Congress could not under the Constitution delegate its legislative power to the President, but that the provision referred to was not a delegation of legislative power. The principles there enunciated are in line with the reasoning of the cases before quoted.

In *N. Y. & N. E. Ry. Co. v. Town of Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269, the headnote in part reads:

"Railroad corporations are subject to such legislative control as may be necessary to protect the public against danger, injustice, or oppression; and this control may be exercised through a board of commissioners."

In that case the court had under review a statute of the state of Connecticut relating to railway grade crossings.

In *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014, decided in 1894, the court had under review a statute of the state of Texas which created a railroad commission with various powers, among others the right to regulate rates and charges for transportation. The Circuit Court restrained the railroad commission from establishing any rates whatsoever under and by virtue of the act. The Supreme Court reversed the decree in so far as it restrained the railroad commission from establishing rates and regulations, but sustained the decree as to certain powers given by the act. In referring to other provisions of the act, Justice Brewer, in writing for the court, says:

"Applying this rule, the invalidity of these two provisions may be conceded without impairing the force of the rest of the act. The creation of a commission, with power to establish rules for the operation of railroads and to regulate rates, was the prime object of the Legislature. This is fully accomplished, whether any penalties are imposed for a violation of the rules prescribed, or whether the rates shall be conclusive or simply *prima facie* evidence of what is just and reasonable."

In *Interstate Commerce Commission v. Cincinnati, etc.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243, decided in 1897, it was decided that the Interstate Commerce Commission was not authorized under the act, expressly or impliedly, to fix and establish rates. Justice Brewer writes this conclusion after an extended argument. The decision assumes that, if that power had been given, it would have been constitutional.

In *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154, decided in 1899, the Legislature of California had authorized the board of aldermen, or other legislative body of any city or county, to fix the rates to be charged by water companies for the furnishing of water. This statute was held constitutional.

In *C., M. & St. P. Ry. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417, decided in 1900, the Legislature of South Dakota had provided for the appointment of a board of railroad commissioners and had authorized such board to make a schedule of reasonable maximum fare and charges for the transportation of passengers, freight, and cars on the railroads within the state. The railroad commission had made a schedule, and the bill was filed in the Circuit Court to restrain the enforcement of the schedule. The complaint made was that the rates were unjust and unreasonable. The Circuit Court dismissed the bill. This decree, however, was reversed by the United States Supreme Court, and the case remanded to a competent master, to report fully upon the facts. This direction would have been wholly unnecessary if the act had been unconstitutional, as is claimed by the appellants here.

In *Minneapolis & St. Louis R. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151, decided in 1902, the court had under consideration the act of the Legislature of the state of Minnesota creating a railroad and warehouse commission and authorizing that commission to fix rates. The action was brought to compel the plaintiff in error to comply with those rates. The decree was rendered as asked in the Supreme Court of Minnesota, and the decree of that court was affirmed by the United States court. In this case the constitutionality of the act was not discussed, but was assumed.

In *Stanislaus County v. San Joaquin, etc., Co.*, 192 U. S. 201, 24 Sup. Ct. 241, 48 L. Ed. 406, decided in 1904, a statute of California permitting boards of supervisors to fix water rates, was sustained. In *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525, the act of Congress known as the "Tea Inspection Act" was under examination. That act authorized the Secretary of the Treasury to establish fixed and uniform standards of purity, quality, and fitness for consumption. The court held that the statute was not unconsti-

tutional, as vesting an executive officer with legislative power. Justice White, in writing for the court, said:

"We may say of the legislation in this case, as was said of legislation considered in *Field v. Clark*, that it does not in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessity of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted. * * * The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute."

In *Atlantic Coast Line v. Florida*, 203 U. S. 256, 27 Sup. Ct. 108, 51 L. Ed. 174, decided in 1906, a statute of Florida was held constitutional which created a board of railroad commissioners and provided that the rates for transportation as fixed by that board should be *prima facie* just and reasonable. The same rule was held in *Seaboard Air Line Ry. v. Florida*, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. Ed. 175.

In *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523, decided in 1907, the headnote in part reads:

"Congress, in enacting that navigation be freed from unreasonable obstructions arising from bridges which are of insufficient height or width or span, or are otherwise defective, may, without violating the constitutional prohibition against delegation of legislative or judicial power, impose upon an executive officer the duty of ascertaining what particular cases come within the prescribed rule."

The opinion states with approval the remarks of Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253, to the effect that although Congress could not delegate to the courts or to any other tribunals powers strictly and exclusively legislative, and although the line had not been exactly drawn that separates the important subjects which must be entirely regulated by the Legislature itself from those of less interest "in which a general provision may be made, and powers given to those who are to act under such general provisions to fill up the details," yet Congress may certainly delegate to others powers which the Legislature may rightly exercise itself, and "the maker of the law may commit something to the discretion of the other departments."

In *Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, decided in 1907, the statute of North Carolina created a corporation commission with power to fix rates. The plaintiff had questioned the power, which had been sustained by the Supreme Court of North Carolina. The Supreme Court of the United States affirmed the decision of the state court. Mr. Justice White, in writing for the court, says:

"The elementary proposition that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject as to their state business to state regulation, which may be exerted either directly by the legislative authority, or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine."

In *Chicago & N. W. Ry. Co. v. Railway Commissioners* (C. C.) 35 Fed. 866, the court had under review an act of the state of Iowa authorizing railroad commissioners to fix maximum charge for transportation. The opinion was written by Mr. Justice Brewer. In part he says:

"Hence counsel conclude that the Legislature is the only body which can fix rates, and that it may not abdicate its functions and delegate this legislative power to another body. Of course, this question is pivotal; for, if the Legislature alone can fix rates, the railroad commissioners are exercising functions which do not belong to them, and, if the rates proposed infringe upon the property rights of the complainant, it may insist that such unauthorized action of the commissioners be stayed. * * * There is no inherent vice in such a delegation of power; nothing in the nature of things which would prevent the state, by constitutional enactment at least, from intrusting these powers to such a board; and nothing in such constitutional action which would invade any rights guaranteed by the federal Constitution."

It will be noticed that Justice Brewer, who wrote in this case, eight years later wrote the opinion in the *Interstate Commerce Commission* Case above cited, in which he assumes the constitutionality of such delegated power. Similar holdings are found in *Tilley v. Savannah, Florida & Western R. R. Co.* (C. C.) 5 Fed. 641, and *New Memphis Gas & Light Co. v. City of Memphis* (C. C.) 72 Fed. 952. In *People v. Harper*, 91 Ill. 357, the court states the first point urged that the authority granted to the railroad and warehouse commissioners by the state of Illinois to fix the rates for charges for the inspection of grain and compensation of officers is an unwarrantable delegation of legislative power. In that case the validity of the statute was upheld.

In *C., B. & Q. R. R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278, a statute of the state of Illinois authorizing the board of railroad commissioners to fix rates, was upheld. The opinion in part reads:

"It has been held in a number of cases that statutes which create boards of commissioners and authorize them to make schedules of rates for railroad companies are not invalid for the reason here urged. The doctrine of these cases is that the functions of such boards are administrative rather than legislative, that the authority conferred upon them relates merely to the execution of the law, that a grant of legislative power to do a certain thing carries with it the power to use all proper and necessary means to accomplish the end, and that, as the reasonableness of rates changes with circumstances and Legislatures cannot be continuously in session, the requirement that the statute itself shall fix the charges might preclude the Legislature from the use of the agencies necessary to perform the duty imposed upon it by the Constitution; in short, that the Legislature may authorize to do things which it might properly, but cannot conveniently or advantageously do itself."

In *State of Minnesota v. Great Northern Ry. Co.*, 100 Minn. 445, 111 N. W. 289, the statute of Minnesota authorizing the railway commission to determine whether a railway corporation may increase its stock was under consideration. That part of the statute was held to

be unconstitutional, because the matter was left entirely to the discretion of the railway commission, without any standard by which they should be guided, and it was thus held to be a delegation of legislative power. The headnote in part reads:

"In the exercise of this right the Legislature may enact a statute providing generally for what purposes and upon what terms, conditions, and limitations an increase of capital stock may be made, and confer upon the commission the duty of supervising any proposed increase. It may also delegate to the commission the duty of finding the facts in each particular case, and authorize and require it, if it finds the existence of facts that bring the case within the statute, and allow the proposed increase; otherwise, to refuse it."

In the opinion we find:

"The rule was reaffirmed in the case of *State ex rel. v. Railway Co.*, 38 Minn. 281, 37 N. W. 782. The statute considered in that case (section 8, c. 10, p. 53, Gen. Laws 1887), which authorized the Railroad and Warehouse Commission to find and determine whether the tariffs of rates, fares, charges, or transportation, or any part thereof, filed or published by any common carrier, were equal and reasonable, and, if they were not, to compel the carrier to make them so. The question whether this statute delegated legislative power to the commission was raised, and this court held that there was no attempt to delegate to the commission the power to determine what the law should be, and that in this respect the statute was constitutional."

After quoting from the opinion of Justice Mitchell in that case, the opinion proceeds:

"The court then proceeded to apply the test indicated to the statute then under consideration, and held that it did not attempt to delegate legislative powers to the commission, or to invest it with any discretion as to what the laws should be, but simply charged it with the administration of the statute, which became a complete law upon its enactment; or, in other words, the Legislature by the statute declared that all freight and passenger rates should be equal and reasonable, and merely imposed upon the commission the administrative duty of determining whether the charges of a carrier in any particular case were or were not unequal or unreasonable—that is, to determine whether it was or was not obeying the law, and, if not, to compel its obedience by enforcing rates which the facts found might show to be reasonable."

The same rule has been held in *State of Nebraska v. Fremont, Elkhorn & Missouri Valley Railroad Company*, 22 Neb. 313, 35 N. W. 118; in *Georgia Railroad v. Smith et al.*, *Railroad Commissioners*, 70 Ga. 694; in *McWhorter et al.*, as *Railroad Commissioners of Florida*, *v. Pensacola & Atlantic Railroad Co.*, 24 Fla. 417, 5 South. 129, 2 L. R. A. 504, 12 Am. St. Rep. 220; in *Stone v. Y. & M. V. R. R. Co.*, 62 Miss. 607, 52 Am. Rep. 193; in *Atlantic Express Co. v. Wilmington & Weldon R. R. Co.*, 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393, 32 Am. St. Rep. 805. In the brief presented by the Public Service Commission is also found a quotation from the opinion given by Attorney General Moody to Congress, in which he reaches two conclusions:

"(1) There is a governmental power to fix the maximum future charges of carriers by railroads vested in the Legislatures of the states with regard to transportation exclusively within the states, and vested in Congress with regard to all other transportation.

"(2) Although legislative power, properly speaking, cannot be delegated, the lawmaking body, having enacted into the statute the standard of charges which shall control, may intrust to an administrative body, not exercising in the true sense judicial power, the duty to fix rates in conformity with that standard."

In the same brief 22 states are named which have similar statutes.

In the courts of this state this question has not been directly decided; but the principle is, I think, established in analogous cases. See *Matter of N. Y. Elevated R. R. Co.*, 70 N. Y. 327; *Matter of Gilbert Elevated Ry. Co.*, 70 N. Y. 361; *People ex rel. Steward v. Commissioners*, 160 N. Y. 202, 54 N. E. 697; *People v. Long Island R. R. Co.*, 134 N. Y. 506, 31 N. E. 873.

It will thus be seen that the assumption of this power by the commission is justified by convincing authority. Not a decision is cited in the state or federal courts which questions the power, provided the determination of the commissioners is directed by some standard which is presented in the statute.

It is strongly insisted that the statute fixes no such standard. If in this the appellant be correct, the authorities cited are claimed to establish the unconstitutionality of the act. The power of the commission is given in these words:

"After such hearing and upon investigation as may have been made by the commission, or its officers, agents or inspectors, the commission within the limits prescribed by law may fix the maximum price of gas or electricity, which shall be charged by such corporation or person in such municipality. * * *"

The commissioners are not required in explicit terms to fix a reasonable rate, nor a just rate, nor an equal rate. They are given no standard as a percentage of profits, by which they are to fix the rate. Their only guide is to fix the rate "within the limits prescribed by law." The law is settled by repeated adjudication that the Legislature itself cannot fix a rate which would be confiscatory of the property of the corporation. The law is equally well settled that a public service corporation has not the right of a purely private corporation to charge what it will for its product, but must serve the public at just and reasonable rates. In *Brooklyn Union Gas Co. v. State of New York*, 115 App. Div. 70, 100 N. Y. Supp. 625, Judge Gaynor, in writing for the Appellate Division of the Second Department, says:

"The rule is that public service corporations may charge only a reasonable rate and the courts may ascertain such rate in a given case."

See, also, *Killmer v. N. Y. C. R. Co.*, 100 N. Y. 395, 3 N. E. 293, 53 Am. Rep. 194.

The determination of this commission is made subject to review by the Appellate Division, which must be guided in its review by what shall upon the evidence appear to be a reasonable rate, which the public have the right to demand, and which shall not be so low as to render valueless the property of the corporation. With the law thus established and the rule defined under which their decisions must be tested upon an appeal, the words "within the limits prescribed by law" can have only one significance. The standard which is to guide this commission in the exercise of its administrative duties in fixing rates is a reasonable charge for the product of the public service corporation—one reasonable to the public and reasonable to the corporation. Such a standard is sufficiently defined, within the authorities which have been referred to.

But it is insisted by appellant that, without these words in the statute, the commission would be required to fix the rates within the limits required by law, and that such words, therefore, add nothing to the statute and fix no standard which the commission would not otherwise have. The rate, when fixed by the Legislature, cannot be reduced by the court as in excess of reasonable charges. *Brooklyn Gas Co. v. City*, 188 N. Y. 334, 81 N. E. 141. Without these words of limitation, the act might be deemed to give to the commission the power possessed by the Legislature. A complete answer, however, is that it cannot matter whether the standard by which the commission is to be guided be fixed by common law or by the statute. In either case no legislative discretion is delegated to the commission. Without such discretion, their functions will be held administrative, and not legislative.

The appellant makes further criticism of this statute upon the ground that the commission is authorized to receive *ex parte* and hearsay evidence and to base its decision thereupon, and that the court review provided is only from a determination so made. But this procedure the Legislature could adopt. Such legislative power as is delegated to boards of supervisors may be so exercised. In proceedings for equalization of taxes by the State Board of Assessors, evidence which would not be admissible in a court of law is admissible upon which they may base their determination. It will not be questioned that the appellant's property can only be taken by due process of law. To make effectual this constitutional protection the appellant must have the right to appeal to the court whenever it is claimed that its constitutional rights are invaded. By the statute itself an appeal is given to the Appellate Division of the Supreme Court from the determination of this commission. That appeal must be heard upon the record, and the determination upon that appeal must be upon what, after full disclosure by the service corporation, is shown by fair proof to be the rate which ought reasonably to be charged. It is contended that this right of appeal does not give to appellant the protection guaranteed by the Constitution, as this review must be of a determination made partly upon hearsay evidence. Granting, for the argument, that the right of appeal given by this statute is not adequate to preserve to the corporation its constitutional protection, in that case it must be held that the right of appeal is not an exclusive remedy, but that concurrent therewith there is at all times the right of the corporation to proceed by affirmative action to enjoin the enforcement of the commission's order. In such an action the rights of the corporation can be certainly safeguarded. Our duty has been many times declared to so construe a statute, if possible, as to conform to constitutional requirement, and to disregard such parts of a statute as are in violation thereof, where the statute is separable and a substantial part thereof was lawfully enacted.

Again, the act requires that the price thus fixed by the commission "shall be the maximum price to be charged by such person or corporation for gas or electricity in such municipality for a term of three years," and thereafter until, upon complaint, the commission shall fix a new price. It is insisted that this refuses to the corporation the

equal protection of the law, and makes a rate which may within that three years become confiscatory by reason of an increase in price of materials used in making gas and electricity. But to this it may be answered that if such prices were fixed by the Legislature itself it must remain a maximum price until the Legislature should again meet, unless modified by the court, at which time an application might be made for a modification thereof. So here the corporation may apply to the Legislature at any time for relief. Moreover, the affirmance by the court of the rate fixed by the commission is simply an affirmance of the reasonableness of that rate at the time of the determination. If at any time thereafter facts should arise which would make such rates confiscatory, the courts are always open to relieve the service corporation or person from the restriction of those rates. It would have been better if the act had provided for a remedy by the commission itself upon an application by the service corporation, in case of a change in condition; but, as it is, the provision that the rate fixed shall continue for three years is harmless to deprive the corporation of its right of property, because of the right still left in the corporation to apply either to the Legislature or to the court for relief.

It is unnecessary here to consider the criticism of the act as to the original power given to the court on appeal. That question will become material only when the court assumes to exercise some such power; nor is it necessary to consider the criticism as to the unreasonableness of the penalty whereby, for an overcharge, the just claim for compensation is forfeited. If invalid, it does not affect those provisions of the act which govern the determination of the order here appealed from. After considering all of the objections urged, our conclusion is that the challenge to the constitutionality of the act should not be sustained, and there remains only to consider whether the determination of the commissioners has been unreasonable and unjust.

In determining this question we are fully instructed as to the rule which is to govern us. That the presumption is in favor of the order appealed from is held in *Chicago Ry. Co. v. Tompkins*, 176 U. S. 173, 20 Sup. Ct. 336, 44 L. Ed. 417, and *Milwaukee E. & L. Co. v. City of Milwaukee* (C. C.) 87 Fed. 577. In *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154, it is said that:

"Judicial interference should never occur, unless the case presents clearly and beyond all doubt such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use."

In *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 363, 14 Sup. Ct. 1059, 38 L. Ed. 1014, it is said:

"It is unnecessary to decide, and we do not wish to be understood as laying down an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable."

In *Covington Turnpike Co. v. Sanford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560, it is said:

"The public cannot properly be subjected to unreasonable rates in order that the stockholders may earn dividends."

In *San Diego Loan & Trust Co. v. Jasper*, 189 U. S. 439, 23 Sup. Ct. 571, 47 L. Ed. 892, it is said:

"It no longer is open to dispute that under the Constitution what the company is entitled to demand in order that it may have just compensation is a fair return upon the reasonable value of the property at the time it is being used for the public."

In *Smyth v. Ames*, 169 U. S. 543, 18 Sup. Ct. 434, 42 L. Ed. 819, the opinion reads:

"We hold, however, that the basis of all calculation as to reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public; and in order to ascertain that value the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by the statute, and the sum required to meet operating expenses, are all matters for consideration and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is the fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

In *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92, in discussing the decisions of the Supreme Court in regard to the reasonableness of rates, it is said:

"It is declared that the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered."

In *Brymer v. Butler Water Co.*, 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, the court held:

"A system of water rates that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, and provide a suitable sinking fund for the payment of debts and pay a fair profit to the owners of the property is not unreasonable, so that the rates can be reduced by the court. * * * Ordinarily that is a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for. Then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will earn it, not less than the legal rate of interest."

It thus appears that the stockholders of a public service corporation are not entitled to require the public to pay dividends upon fictitious stock or for their extravagance or waste. Such a corporation, however, is entitled to a fair return upon the actual value of its property that it is devoting to the public use, after paying all expenses and liabilities reasonably charged against the same. What is deemed a fair return must depend ultimately upon the judgment of the court. In 1886 the committee of the Senate of the state recommended for

a gas company in New York a return not exceeding 10 per cent. upon its investment. The New York Mutual Gas & Light Company by its charter is permitted to earn dividends to the extent of 10 per cent. The Senate committee of 1905 assumed a return of 8 per cent. as proper, and the gas commission in 1906 found that 8 per cent. was a reasonable return upon the actual value of complainant's property used in gas manufacture. The railroad law of the state (Laws 1890, p. 1096, c. 565, § 38) permits the Legislature to reduce the rate of freight or fare; but the same shall not without the consent of the corporation be so reduced as to produce less than 10 per cent. per annum on the capital actually expended. An investor may loan his money upon sure security, and is allowed by law to charge 6 per cent. for the loan. The investment in a gas and electric light company, however, is not secured, as is a loan, upon abundant security. There is in it a greater risk of loss, and upon all economic principles the investment should for that reason be entitled to a greater rate of return than an investment loan upon approved security. If the court should allow to these investors only the same or a less return than is obtained for a loan upon approved security, no capital would henceforth be advanced for these enterprises, and the public would either be deprived of their advantages or the municipality would be compelled to build for itself. Both upon principle and necessity, then, a fair return upon the value of the property actually used is such a return as shall be fair compensation for the risk assumed by the investor in permitting his money to remain in such an enterprise. The public cannot fairly question this application of the rule, and must pay such rates as will ordinarily yield such return to the stockholders of the public service corporation. The court is charged, not only with the duty of protecting the public interest, but also with a duty no less solemn of protecting the property rights of those whose moneys are invested in public service corporations.

Applying these rules to the case at bar, this appellant has not made clear to us that the rate fixed will not yield to its stockholders a fair return upon the value of its property. Evidence has been adduced of the value of its property, of the amount of output of gas and electric current, of the cost of its production, of the receipts in gross from each source. One more factor is needed, however, for the problem—the loss of income which the reduced maximum rate will cause. This factor is not found in appellant's brief, and after a careful review of the evidence I have been unable to find any figures from which this factor can be fully deduced. If the rate of gas were uniform, at \$2 or \$1.75 per 1,000 cubic feet, and the price be reduced to \$1.45 per 1,000, we could at once ascertain to what extent the new rate would reduce the income. But the rate is not uniform. The superintendent swears that the rate charged was all the way from \$2 to 95 cents. The reduction made by the commission would simply cause loss upon the output of gas which has heretofore been sold for a price exceeding \$1.45 per 1,000.

In the report of the appellant to the gas commission for the year ending June 30, 1906, we find that only a little more than 18,000,000 cubic feet of gas was being sold for \$2, or a net price of \$1.75, so

that the diminution of income caused by the reduced rate of gas would be less than \$6,000. As to the reduced income in the sale of electric current caused by the rates fixed, we are left wholly in the dark. The maximum charge has been 12 cents per kilowatt hour. If the price were uniform, a reduction of the price to 8 cents would mean a definite loss of income, which would be easily ascertainable. The average price received for the sale of electric current, as sworn to by appellant's expert, was $5^{42}/_{100}$ cents per kilowatt hour— $2^{88}/_{100}$ cents below the maximum fixed by the commission. The record contains no evidence from which can be ascertained how much of that output has been selling for a price to exceed 8 cents, or how much, therefore, will be the loss of income in conforming to the commission's rates. The only loss, then, established, which would be caused by adopting the commission's rates, and of which this court can take cognizance, is this loss of less than \$6,000. The commission might properly estimate that this loss would be substantially reduced by new customers which the reduced rate would naturally bring. But, aside from this consideration, we are satisfied that with prudent management the company may still return to the stockholders a reasonable percentage upon the value of this property, even under the reduced income. It will hardly be profitable in this opinion to discuss each item of valuation of the appellant's properties and of cost of production. The valuations of appellant's expert are based upon the cost of reproduction, with no allowance for depreciation, except in one or two minor items, and yet he charges to the expense account a large contingent liability, not only for current repairs, but for final replacement. Again, it appears that gas is being sold to some parties for less than the cost of the manufacture. To one customer electric current is furnished for $11\frac{1}{2}$ cents a kilowatt hour, and a substantial amount of electric current is sold for less than cost. It is not apparent why some customers should be charged an exorbitant rate to compensate for loss suffered in the sale to others. After an examination of the record presented, aided by exhaustive and able briefs of counsel, we are not convinced that the rates established by the order appealed from are either unjust or unreasonable to this appellant. The order should, therefore, be affirmed.

Order affirmed, with costs.

CHESTER and COCHRANE, JJ., concur.

JOHN M. KELLOGG, J. (dissenting). The Legislature has the power to prescribe a reasonable rate at which an individual or corporation engaged in a public service business shall serve the public. *Lake Shore, etc., Railway Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858; *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460; *Budd v. New York*, 143 U. S. 468, 12 Sup. Ct. 468, 36 L. Ed. 247.

"If unhampered by contract, there is no doubt of the power of the state to provide by legislation for maximum rates of charges for railroad companies, subject to the condition that they must be such as will admit of the carrier earning a compensation that under all the circumstances shall be just to it

and to the public, and whether they are or not is a judicial question. If the rates are fixed at an insufficient amount, within the meaning of that term as given by the courts, the law would be invalid, as amounting to the taking of the property of the company without due process of law." *Lake Shore, etc., Railway Co. v. Smith*, 173 U. S. 687, 19 Sup. Ct. 566, 43 L. Ed. 858.

We must know the source of such power, in order to understand its extent and limitations, and in order to determine whether the legislation in question is within or beyond the legislative right. This power does not come from the character of the person performing the service, but from the nature of the service performed. A corporation is a person within the constitutional provisions guaranteeing the property rights and equal protection of the law to all persons. *Id.*, 173 U. S. 690, 19 Sup. Ct. 565, 43 L. Ed. 858.

The Legislature, therefore, cannot prescribe a rate for corporations which is not prescribed for individuals in the same class of business. The statute in question applies in terms to corporations and individuals alike.

"The power of regulation in these cases does not turn upon the fact that the entities affected by the legislation are corporations deriving their existence from the state, but upon the fact that the corporations are common carriers, and therefore subject to legislative control. The state, in constituting a corporation, may prescribe or limit its powers and reserve such control as it sees fit, and the body accepting the charter takes it subject to such limitations and reservations, and is bound by them. The considerations upon which a corporation holds its franchise are the duties and obligations imposed by the act of incorporation. But, when a corporation is created, it has the same rights and the same duties, within the scope marked out for its action, that a natural person has. Its property is secured to it by the same constitutional guaranties, and in the management of its property and business is subject to regulation by the Legislature to the same extent only as natural persons, except as the power may be extended by its charter. The mere fact of a corporate character does not extend the power of legislative regulation. For illustration, it could not justly be contended that the act of 1888 would be a valid exercise of legislative power as to corporations organized for the purpose of elevating grain, although invalid as to private persons conducting the same business." *People v. Budd*, 117 N. Y. 21, 22 N. E. 677, 5 L. R. A. 559, 15 Am. St. Rep. 460. "The attempts made to place the right of public regulation in these cases upon the ground of special privilege conferred by the public on those affected cannot, we think, be supported. The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation." *Id.*, 117 N. Y. 27, 22 N. E. 679, 5 L. R. A. 559, 15 Am. St. Rep. 460.

"The power to enact legislation of this character cannot be founded upon the mere fact that the thing affected is a corporation, even though the Legislature has power to alter, amend, or repeal the charter thereof. The power to alter or amend does not extend to the taking of the property of the corporation either by confiscation or indirectly by other means. The authority to legislate in regard to rates comes from the power to prevent extortion or unreasonable charges or exactions by common carriers or others exercising a calling and using their property in a manner in which the public have an interest." *Lake Shore, etc., Railway Co. v. Smith*, 173 U. S. 693, 19 Sup. Ct. 571, 43 L. Ed. 858.

All the authorities referring to the subject rest this power of regulation solely upon the police power of the state, which is the right to legislate concerning the public welfare, the public safety, and the

public health. The constitutionality of this act depends upon the question whether it is a valid exercise of the police power.

"To justify the state in interposing its authority in behalf of the public, it should appear, first, that the interest of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for interference with the parties, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609; *Lawton v. Steele*, 152 U. S. 133, 137, 14 Sup. Ct. 499, 38 L. Ed. 385.

"The legislative determination as to what is a proper exercise of the police power is subject to the supervision of the court, and in determining the validity of an act it is its duty to consider, not only what has been done under the law in a particular instance, but what may be done under and by virtue of its authority. Liberty, in its broad sense, means the right, not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." *Fisher Co. v. Woods*, 187 N. Y. 90, at pages 94, 95, 79 N. E. 836, at page 837.

"It cannot be reiterated too often that the police power must be exercised within its proper sphere and by appropriate methods. Whenever a statute arbitrarily strikes down private rights, invades personal freedom, or confiscates or destroys private property, it is repugnant to the Constitution, and should not be permitted to stand no matter how laudable its purpose or beneficial its effect." *Wright v. Hart*, 182 N. Y. 330, at page 344, 75 N. E. 404, at page 400, 2 L. R. A. (N. S.) 338.

"In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the federal Constitution is sought, the question necessarily arises: 'Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which might seem to him appropriate or necessary for the support of himself and family?' Of course, the liberty of contract relating to labor includes both parties to it. One has as much right to purchase as the other to sell." *Lochner v. New York*, 198 U. S. 45, 56, 25 Sup. Ct. 539, 543, 49 L. Ed. 937.

"The provisions of the state and federal Constitutions protect every citizen in the right to pursue any lawful employment in a lawful manner. He enjoys the utmost freedom to follow his chosen pursuit, and any arbitrary distinction against or deprivation of that freedom by the Legislature is an invasion of the constitutional guaranty." *People v. Williams*, 189 N. Y. 131, 134, 81 N. E. 778, 779.

"In a broad sense, whatever prevents a man from following a useful calling is an invasion of his liberty, and whatever prevents him from freely using his lands or chattels is a deprivation of his property." *People v. Haynor*, 149 N. Y. 195, 199, 43 N. E. 541, 542, 31 L. R. A. 689, 52 Am. St. Rep. 707.

The Legislature cannot declare it a misdemeanor for a real estate agent to sell land in first and second class cities without written authority (*Fisher Co. Case*, above); nor declare fraudulent, as to creditors, a sale of merchandise in bulk unless certain conditions are complied with (*Wright Case*, supra); nor prohibit an employer from requiring that his employes shall not join a labor union (*People v. Marcus*, 185 N. Y. 257, 77 N. E. 1073); nor prescribe the hours which a baker shall be employed (*Lochner Case*, supra); nor provide that a woman shall not work in a factory between 9 p. m. and 6 a. m. (*Williams Case*, supra); nor require railroad companies to issue mileage books (*Lake Shore, etc., Railway Co. v. Smith*, supra).

The above authorities, and the cases referred to by them, show that

the Legislature has no power to determine at what price a merchant shall sell his dry goods or groceries, upon what terms a farmer shall sell his horse or farm produce, nor how long a laborer shall work, or what he shall receive for his work.

Gas and electricity are the commodities which the defendant sells, the products of its labor and its property, and the constitutional rights above referred to surround it and protect its property and business in the same way that the property and business of an individual are protected. It is just as much for the public welfare, the public safety, and the public health to have cheap bread, milk, groceries, and clothing as cheap gas, electricity, and railroad fares. By what right, then, may the Legislature regulate the price of the latter, and be powerless to interfere with that of the former? The answer to this question is so easy and is so well understood that it is usually overlooked, and lawyers and judges have sought for more remote and complicated reasons, which are alike unconvincing and irrelevant. The reasons usually assigned are the power to regulate corporations, supposed grants and benefits received from the public, the right to regulate monopolies, and a dedication of the property to the public; i. e., an unnatural partnership, by which one partner is to furnish the capital and the labor and the other partners direct him how to carry on his business and take his product at a price fixed by them. If these reasons, or any of them, are valid, it would naturally follow, as many of the earlier cases suggested, without deciding, that the only remedy against oppressive regulation is an appeal to the Legislature or an abandonment of the business.

If the party engaging in such service has agreed in advance that the Legislature may regulate the manner in which his business shall be conducted and fix the price of his product, he is not in a position to complain of unreasonable legislation in those respects. In *Purdy v. Erie Railroad Co.*, 162 N. Y. 43, 56 N. E. 508, 48 L. R. A. 669, it was held that the mileage book law, which had been declared unconstitutional as to existing railroads, was valid as to companies beginning their business after the passage of the law; Judge Cullen saying, at page 49 of 162 N. Y., page 510 of 56 N. E. (48 L. R. A. 669):

"Therefore a regulation as to the price of transportation, which would be an illegal exaction when sought to be imposed on existing corporations solely by legislative fiat, may, in the case of future corporations, be the mere performance of the obligation of a contract."

Mr. Justice Brewer, in *Cotting v. Kansas City Stockyards*, 183 U. S. 79, 91, 22 Sup. Ct. 30, 35; 46 L. Ed. 92, says:

"There has been no further ruling than that the state may prescribe and enforce reasonable charges."

"From the earliest period of the common law it has been held that common carriers were bound to carry for a reasonable compensation. They were not at liberty to charge whatever sum they pleased, and, even where the price of carriage was fixed by the contract or convention of the parties, the contract was not enforceable beyond the point of reasonable compensation. From time to time statutes have been enacted, in England and in this country, fixing the sum which should be charged by carriers for the transportation of passengers and property, and the validity of such legislation has not been questioned.

But the business of common carriers, until recent times, was conducted almost exclusively by individuals for private emolument, and was open to every one who chose to engage in it. The state conferred no franchise and extended to common carriers no benefit or protection, except that general protection which the law affords to all persons and property within its jurisdiction." *People v. Budd*, 117 N. Y. 19, 22 N. E. 676, 5 L. R. A. 559, 15 Am. St. Rep. 460.

And at page 20, 117 N. Y., and page 677, 22 N. E. (5 L. R. A. 559, 15 Am. St. Rep. 460):

"The principle of the common law that common carriers must serve the public for a reasonable compensation became a part of the law of this state, and from the adoption of the Constitution has been a part of our municipal law."

Before the day of railroads private individuals operated stage coaches and performed the duties of common carriers. The common law determined that the calling was affected with a public interest, and charged upon it the duty of furnishing to all the public alike a reasonable service at a reasonable price. Of course, the operators used the public roads. So did every one, and in every business. If the stage driver owned the right of way upon which he traveled, he was still a common carrier and was charged with the duties pertaining to that calling.

The following situation illustrates that the duty arises from the nature of the calling, and not otherwise. A man owns a large tract of land, with a manufacturing plant in the center. A railroad runs across each end of it; he having conceded the right of way. Upon a private right of way he runs stage coaches and a trolley line for hire between the railroad stations. He also builds a road connecting those points, and along the road he builds houses and rents them to his employes and others, and a village thus grows up; he owning all the land and all the houses. His plant is furnished with an electric light system, from which he sells electricity to the villagers; but the wires extend along the private right of way and do not approach or cross the road. He operates the meat market, the milk route, supplies ice, and a general store. The reasons usually assigned, above stated, as the basis for a legislative regulation of prices are all found wanting here. But in running stages and trolley cars for a fare, and selling electricity, he enters upon a calling which the common law has regulated, and he cannot control the price. In the other matters the price is subject to the agreement of the parties, and he may refuse to sell except at his own price.

Supplying the public with gas and electricity for a price (*People ex rel. Woodhaven Gas Co. v. Deehan*, 153 N. Y. 528, 533, 47 N. E. 787), and operating public elevators for profit, and certain other callings, have been determined to be so affected with a public interest that they are charged with the common-law rule, applicable to common carriers, that the service must be reasonable to all alike and at a reasonable price, and those engaging in such calling are charged with that duty, and are deemed in advance to agree to such conditions.

The fact that the person rendering the service has the right to make reasonable regulations with reference to his business resulted in the public permitting him to fix the rate. This often led to exorbitant

charges and extortion, and called with a loud voice for a remedy. While the person performing the service had the legal right to receive a reasonable rate, he had not the right arbitrarily to fix that rate. Having agreed to render the service at a quantum meruit, it is repugnant to the law governing such transactions that one party may arbitrarily and conclusively fix the price. It is therefore reasonable for the Legislature, in the exercise of its police power, to reverse the situation and name a reasonable price. But it is as clearly illogical and unfair that the public shall fix a final and conclusive price as it would be to permit the person furnishing the service so to do. A reasonable price fixed by either party invades no right. An unreasonable price fixed by either party is illegal at common law. Before any statute was passed regulating the rate to be charged, every patron of such a service, and the party furnishing it, had the common-law right at any time to bring the other into a court of justice and have the reasonableness of the rate adjudicated. The common law imposes the duty of a reasonable rate. No other could be exacted. But the law did not execute itself, and it is necessary and proper for the Legislature to require an observance of the common-law contract price. In other words, no new regulation infringing upon property rights is necessary or proper; but a regulation is necessary and proper to administer and carry into effect the common-law rate. Strictly speaking, it is a mistake to say that the Legislature, or a commission created by it, may in any case fix the rate. The common law fixes the rate. The Legislature or the act of the commission is simply an enforcement of the common-law rate.

"In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rate at will, and compel the public to yield to his terms, or forego the use." *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. Ed. 77.

"To limit the rate of charges for services rendered in a public employment or a use of property in which the public has an interest was only changing regulation which existed before, and established no new principle in the law, but only giving new effect to an old one." *Budd v. New York*, 143 U. S. 517, 538, 12 Sup. Ct. 468, 474, 36 L. Ed. 247.

In speaking of the common-law duty to furnish service at a reasonable price, Mr. Justice Brewer, in *Cotting v. Kansas City Stockyards, etc.*, supra, at page 97 of 183 U. S., page 38 of 22 Sup. Ct. (46 L. Ed. 92), says:

"The authority of the Legislature to interfere by a regulation of rates is not an authority which destroyed the principles of these decisions, but simply to enforce them, though its prescription of rates is prima facie evidence of their reasonableness."

Prima facie the maximum rate as fixed by the Legislature is reasonable. *Lake Shore, etc., Railway Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858.

It is manifest that while the reasoning of the cases as to the basis of the rule are not at all times harmonious or satisfactory; the result of all is that the price must be reasonable; that is, the common-law price. Therefore it follows that this common-law duty and right is the real source of the power to regulate rates. At the time the statute in question was passed the defendant was engaged in a business the na-

ture of which charged it with the duty, and gave it the property right, of furnishing gas and electricity at a reasonable price, and gave it the right to have the reasonableness of the price determined by the adjudication of the courts in case it was controverted. Any legislation which imposes an unreasonable price upon it, or deprives it of its right to have the reasonableness of the price determined by a court of justice, deprives it of its property without due process of law, and denies it the equal protection of the law. The law is forcibly and concisely stated in 8 Cyc. p. 1067:

"The Legislature, itself or through a railroad commissioner, etc., prescribes the rates. The courts decide whether it is so unjust and unreasonable as to conflict with the constitutional guaranties. The Legislature cannot say finally that a rate is just and reasonable; nor can the court revise or change the rates, or say what would be a reasonable and just rate."

We must not be misled by the use of the term "maximum rates" in this class of legislation. There can be but one reasonable price for the same article at the same time in the same place. A reasonable price cannot be so unreasonable that another and different reasonable price can take its place at the caprice of one of the contracting parties. As the contract between the producer and the public is that he shall have a reasonable price for such service as is required of him, and the Legislature has fixed the price, it is presumed that the price so fixed is a reasonable price, which does not admit of another so-called reasonable price. *Brooklyn Union G. Co. v. City of New York*, 188 N. Y. 334, 81 N. E. 141. A proper construction of the words "maximum rate" is that it is the reasonable rate, with permission to the party furnishing the service to do business at an inadequate profit, or at a loss, if he desires. A person has the legal right to furnish such service at less than its reasonable value, or even to give it away; and so long as reasonable service is furnished, and all are treated alike, he is within his constitutional rights, unless his creditors or the lunacy authorities interfere. An attempt to fix a maximum price so large that under the most unfavorable conditions it will produce a reasonable price to the producer would clearly be an unreasonable price under the most favorable conditions, or under ordinary conditions.

It is not conceivable that in a great state like this the Legislature can prescribe a uniform price for supplying gas and electricity in every locality. The various climatic conditions, the distances of the various plants from the supply of coal and oil and from the factories producing its appliances and machinery, and the amount of service required, the price of labor, and the various other conditions which readily occur to the mind, show clearly that a reasonable price in some large cities might be a very unreasonable price in some small villages. It would seem that a statute declaring a uniform rate throughout the state, applicable to every locality and every plant, would upon its face be unreasonable. These conditions render it not only reasonable, but almost a necessity, if any regulation as to price is to be made by the public, that each locality shall be treated by itself, and an administrative commission, which may visit the various localities, take evidence, make investigations in various ways, and ascertain the exact

situation in each locality, is a most just and effective means of determining in the first instance what price shall be charged in a particular place.

The legality of such commissions has been sustained by the courts of many of the states and by the Supreme Court of the United States. Changing conditions from time to time determine what is a reasonable rate, and an order of an administrative commission can better enforce such rate than an act of the Legislature. Such legislation is a reasonable exercise of the police power. Legislation gives the power to the commission; but its duties are administrative only, viz., to compel an observance of the existing laws. It is the proper function of the Legislature, and of the Legislature alone, to impose upon property and persons duties not already existing. If the common-law rule that parties engaged in this service must serve all alike, and give a reasonable service at a reasonable price, does not apply to parties engaged in a service of this kind, and is not the foundation of this class of legislation, then the regulation of rates as to such service is a legislative act, and the duty imposed springs from legislation alone; and it is difficult to understand how the Legislature may delegate its functions and allow some other body to impose a new duty upon persons and property. If the power to regulate arises only from an understanding that the person will carry on his business subject to legislative control, this means that he is willing to take the judgment and discretion of the Legislature on each particular subject in which he is sought to be controlled. The legislative judgment and discretion which he contracted for does not allow the Legislature to impose upon him the judgment and discretion of an unknown commission. The act of the commission in fixing the rates is legislative, if in the absence of such act no legal limit as to rate existed. It is administrative, if there was a legal regulation of the rates, and the commission is simply to name and enforce the common-law rate. The common-law duties, as stated, furnish a broad and secure foundation upon which may rest all legislation necessary and proper to protect the public interests. In the absence of such duties, the right in each case is problematical, and the act of such commissions of doubtful validity.

Like every administrative board or executive officer, the commission must know the facts upon which it is to act, and it may grant hearings, take testimony, and do various acts which naturally pertain to a court of justice; but it is not thereby made a court of justice. Its acts are still administrative, and not judicial. *People ex rel. Lodes v. Dept. of Health*, 189 N. Y. 185, 190, 82 N. E. 187. The Legislature may, through its various committees, grant hearings, determine facts, and make regulations based upon its conclusion therefrom. It does not thereby become a court, nor its acts judicial. The hearing is one step in acquiring the necessary information upon which the commission may in part base its administrative order. In *Chicago, etc., Railway Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 702, 33 L. Ed. 970, the Minnesota statute sought to make the order of such a commission a final decision of the rights of the parties; but the court

held it an unreasonable exercise of the police power, saying at page 457 of 134 U. S., page 466 of 10 Sup. Ct. (33 L. Ed. 970):

"It deprives the company of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

A reading of the statute considered in that case shows that notice was contemplated and served, and the company appeared and was heard.

In *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014, a Texas statute provided for a hearing after notice, that the order of the commission should be conclusive, and be deemed and accepted to be reasonable and fair, and should not be controverted until finally found otherwise in an action brought against the commission in a court of competent jurisdiction in Travis county, Tex. The statute then regulated the action by which such decision should be reviewed. It was held that an action could be maintained in the United States court for an adjudication that the rate so fixed by the commission was unreasonable; the court saying at page 397 of 154 U. S., page 1054 of 14 Sup. Ct. (38 L. Ed. 1014):

"It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative, rather than a judicial, function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into the matter and to award to the shipper any amount exacted from him in excess of a reasonable rate, and also, in a reverse case, to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the Legislature, instead of the carrier, prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a Legislature or a commission. They do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers. They do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a Legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation."

And again, at page 398 of 154 U. S., page 1054 of 14 Sup. Ct. (38 L. Ed. 1014):

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring the process of law for its determination."

And at page 399 of 154 U. S., page 1055 of 14 Sup. Ct. (38 L. Ed. 1014):

"These cases all support the proposition that, while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates,

operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every Constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held."

Again:

"The Legislature has the power to fix rates, and the extent of judicial interference is protection against unreasonable rates." *Chicago, etc., Railway Co. v. Wellman*, 143 U. S. 339, at page 344, 12 Sup. Ct. 400, at page 402, 36 L. Ed. 176; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, at page 398, 14 Sup. Ct. 1047, at page 1054, 38 L. Ed. 1014; *Smyth v. Ames*, 169 U. S. 466, at page 524, 18 Sup. Ct. 418, at page 425, 42 L. Ed. 819; *Lake Shore, etc., Railway Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858.

This judicial review means due process of law.

"Due process of law 'means law in its regular course of administration through the courts of law' (2 Miller on the Constitution, p. 604); or 'a regular trial according to the course and usage of the common law' (4 Lincoln's Const. Hist. p. 37)." *People v. Johnson*, 185 N. Y. 219, 228, 77 N. E. 1164, 1167.

"To say, as has been suggested, that 'the law of the land,' or 'due process of law,' may mean the very act of legislation which deprives the citizen of his rights, privileges, or property, leads to a simple absurdity. The Constitution would then mean that no person shall be deprived of his property or rights, unless the Legislature shall pass a law to effectuate the wrong; and this would be throwing the restraint entirely away. The true interpretation of these constitutional phrases is that, where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him, not by an act of the Legislature, but in the due administration of the law itself, before the judicial tribunals of the state. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or, at least, it cannot be created by a legislative act which aims at their destruction. Where rights of property are admitted to exist, the Legislature cannot say they shall exist no longer; nor will it make any difference, although a process and a tribunal are appointed to execute the sentence." *Wynehamer v. People*, 13 N. Y. 378, 392, 393.

"It is plain, therefore, both upon principle and authority, that these constitutional safeguards in all cases require a judicial investigation, not to be governed by a law specially enacted to take away and destroy existing rights, but confined to the question whether, under the pre-existing rule of conduct, the right in controversy has been lawfully acquired and is lawfully possessed." *Id.* 395.

In *Brooklyn U. G. Co. v. City of New York*, supra, it was held, the plaintiff having furnished and the defendant having received gas pursuant to a statute fixing the price, that the defendant could not question the reasonableness of the price for the gas so received. If we

reverse the situation, it may follow that, if defendant furnishes gas pursuant to a statute fixing the price, it cannot thereafter make a claim against the purchaser for the gas so furnished at other than the price so fixed. In such cases the parties by furnishing and receiving gas may be held to have assented to the price. It may be that a rate so fixed must be challenged in a direct action or proceeding to have the rate declared void, and that the parties cannot contest the statutory price for gas which has been furnished and used, presumably, under the terms of the statute. It is not material here to consider what the particular remedy is. That there is a legal remedy in the courts is beyond question.

It follows, from this reasoning, that before the enactment of the statute in question the defendant was by common law charged with the legal duty and clothed with the legal right of receiving a reasonable compensation for its service, and the courts of justice were always open to it to protect such rights. To prevent extortion, and to force upon the defendant the performance of its legal duty, the observance of its contract with the public, the Legislature may name a reasonable rate, or may create an administrative committee charged with that duty. When fixed, such rate is binding until it is adjudged to be unreasonable by a court of competent jurisdiction. Where A. seeks in the courts to require B. to observe his legal duty and carry out his contract to A., the questions of confiscation and destruction of property are not discussed. The only question is, what are the contract obligations of the parties? And when those obligations are determined, the judgment of the court follows. That is the situation here. The defendant is the owner of its plant, and may carry on its business in its own way, subject, however, to the duties and contract obligations it owes to the public. The nature of its calling charges upon it, and its property, only the obligation of furnishing gas and electricity to all alike, in a reasonable manner, and at a reasonable price. That is the only contract between the parties. If the public seeks to enforce upon it obligations and conditions beyond that duty, and beyond the terms of the contract, it is a proper question for the courts to decide just what the contract is, and to require its performance according to the letter and the spirit thereof. No legislation can destroy or change the effect of the contract between the parties, or deprive either of them of the right to have the courts adjudge the obligations and duties arising under such contract.

The legislation in question, passed while the defendant was engaged in its present business, is not a reasonable exercise of the police power, and imposes upon defendant obligations beyond and outside of its legal duty, and is therefore unconstitutional. The provision of the statute that the commission fix a rate "within the limits prescribed by law" requires it to fix a reasonable rate, and recognizes that the common law prescribes a rate. The provision that the commission shall give notice and hold a public hearing, and after such hearing, "and upon such investigation as may have been made by the commission, or its officers, agents or inspectors," may fix the maximum price, etc., would be a proper procedure for a purely administrative commission, but not for a court. The statute provides:

"The price so fixed by the commission shall be the maximum price to be charged by such person or corporation for gas or electricity in such municipality for a term of three years and until, after the expiration of such term, such commission shall upon complaint, as provided in this section, again fix the price of such gas or electricity."

The complaint referred to is a complaint made by the consumers, or by the local authorities, only. It is further provided that the orders of the commission may be enforced by mandamus, and that upon proof that the order has been made and has not been complied with, after notice thereof, the court may issue a mandamus to enforce it. The word "may," in a public statute giving a remedy of this kind, means "must."

It is evident that these provisions of the statute attempt to fasten upon the defendant the order of this administrative commission as a final and conclusive determination of its rights. The only defense admissible in the mandamus proceeding is either that the order was not made or that it has been complied with. The order may be based, not only upon the evidence and proceedings had before the commission at the public hearing, but upon an ex parte statement of the officers, agents, and inspectors of the commission, or one of the commissioners, as to what they discovered upon a private investigation of the plant, books, and method of such corporation, and which investigations the statute contemplates shall be made before the notice and public hearing. The defendant has no means of knowing what such ex parte reports are, and consequently it has no opportunity of controverting the conclusions reached by such officers or agents, or examining them with relation thereto. Until the judge presiding at a trial may adjourn court and take the ex parte statements of the sheriff, the stenographer, the deputy sheriffs in attendance, and the other officers and employes of the court, this investigation cannot be considered as due process of law.

It is against the common-law rights of the defendant, which is entitled to receive a reasonable price for its product, as conditions change from time to time, that the Legislature may dictate a price binding upon it for three years, and perpetually unless the local authorities or the customers desire a change. Heretofore, when the producer fixed the price, we may assume that the margin of profit was so large that it was not seriously affected by the change in the cost of the different items going to make up its product. But now a change has taken place, and it is assumed that the price of gas and electricity will be regulated so as to give only a fair profit from the business. The difference between a profit and a loss to the producer may be made up entirely by the changes in the price of wages, material, coal, oil, copper, and other things entering into the expense account. The experience of the last three years has demonstrated that what was a reasonable price three years ago is an unreasonable price now. The commission is not required to fix a present reasonable price for gas and electricity, but a price which will be reasonable for a period of three years, allowing them to forecast the future and to determine at their will, whether times will be good or bad during that time. A conscientious commission, under this statute, is not performing its duty by consid-

ering the mere cost at the present time; for the rate to be fixed extends into the future, and we do not know whether it is decreed by this order that prices of everything shall go still higher or that they shall recede to the basis of three years ago. The provision that the consumers, or the municipality, after three years, may make complaint and have the price again adjusted, but giving the producer no right to a rehearing, denies to the defendant the equal protection of the law. The plain meaning of the statute is that, if anything going to make up the price of gas and electricity falls in the market, the public may have a reduction in the price, but, if everything advances, the defendant must perpetually serve at the same price.

An appeal to the Appellate Division is permitted, in which case the commission appears by the Attorney General as a party to the litigation. The right to appeal from the act of an administrative board does not make the act of that board, or the result of the appeal, due process of law, or make final an order which is only *prima facie* evidence of reasonableness. We have seen that it is not a part of the duty of the court to prescribe rates, but that its full duty is performed when it decides whether a given rate is reasonable or unreasonable. The Appellate Division has no knowledge as to how far the things seen by one of the commissioners, or their officers, agents or inspectors, have entered into the determination. It is evident that the decision of an appellate court upon such a record is not the judicial investigation which is the common-law right of the defendant. If this court were to go outside of its functions and undertake the administrative duty of fixing a rate, it is bound by the provision of the statute which, in substance, requires a rate to be fixed which shall be reasonable for three years, and as against the company forever, unless the other party to the controversy asks to have it changed. It follows that if the order of the commission is improper, for the reasons suggested, no action of the Appellate Division can give it validity, and this court may well refuse to become an administrative commission. The court may properly limit its inquiry to a review of the order of the commission, and give judgment affirming or annulling it.

Reference is made to the public service commission law (chapter 429, p. 889, Laws of 1907), which went into effect shortly after the order in question was made; and it is urged that the defendant is not injured by this order, even if the provisions of the statute under which it was made are unconstitutional. The new statute permits the commission to grant rehearings upon its orders. It is not given the power to grant rehearings upon orders made by the former commission. There is no provision in the new statute which relieves the defendant from the force of the order appealed from. Its only remedy is the judgment of the court. The validity of the present order must be determined by the terms of the statute under which it was made.

The contention that, if the order of the commission is void, we have no right to review it, is unsound. The statute, so far as it creates a commission, is valid, and that commission has the right to make various orders, many of which are proper, and an appeal is permitted to this court from any of its orders. The rule in the Purdy Case, *supra*, indicates the validity of such an order, if made as to a business estab-

lished after the statute was passed. The question here presented is whether the order in question is one which the commission was authorized to make.

In my judgment, the order is invalid. It should therefore be annulled, with costs.

SEWELL, J., concurs in this dissent.

(56 Misc. Rep. 116.)

PEOPLE *ex rel.* DARLING *v.* DOOLING *et al.*, Board of Elections.

(Supreme Court, Special Term, New York County. October, 1907.)

ELECTIONS—NOMINATIONS—FILING.

A certificate of nomination of a justice of the Municipal Court was not presented for filing until seven days after the time prescribed by Laws 1899, c. 473, § 10. *Held*, that the county clerk would not be ordered to receive and file it, nor the board of elections of the city of New York be required to print the name on the official ballot, though the minutes of the district convention showing the nomination were filed with the board within the time for filing the certificate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 127.]

Application by the people, on the relation of Joseph F. Darling, against John T. Dooling and others, as commissioners, etc., constituting the board of elections of the city of New York, to review certain proceedings. Application denied.

See 106 N. Y. Supp. 430.

Augustus N. Hand, for petitioners.

Terence Farley, Asst. Corp. Counsel, for board of elections.

William A. McQuaid and Robert L. Luce, for objector.

FITZGERALD, J. It appears from the record presented in this case that up to midnight on the 11th day of October, 1907 (which was the last day for filing party certificates), no certificate of nomination declaring the relator, Joseph F. Darling, to be the candidate of the Republican party for the office of justice of the Municipal Court of the city of New York, borough of Manhattan, Fourth district, had been filed with the board of elections of the city of New York. There was, however, filed with the said board on October 11th the minutes of the Fourth Republican Municipal Court District Convention, from which it appears that Joseph F. Darling and William H. Kelly were declared the nominees of that convention for justices of the Municipal District Court for the Fourth Municipal Court district. On October 18, 1907, there was presented to the board of elections a paper which was described as the original certificate of nomination of Joseph F. Darling as candidate, nominated by the Republican Fourth Municipal Court Convention, held on the 11th day of October, 1907, which certificate was rejected by the board of elections. The relator seeks, first, a peremptory writ of mandamus requiring the respondents to accept the certificate which was presented to said board on October 18, 1907; and, second, for an order upon a review of the proceedings of the commissioners and a direction to the said commissioners to place the

name of Joseph F. Darling on the Republican ticket upon the official ballot to be used at the coming election as a candidate for justice of the Municipal Court, city of New York, borough of Manhattan, Fourth district.

Section 10, c. 473, p. 993, Laws of 1899, known as the "Primary Election Law," provides the method of procedure of conventions, and, among other requirements, is the provision that:

"The permanent officers shall keep the records of the convention and within forty-eight hours after the adjournment thereof shall certify and file the same in the office of the custodian of primary records."

The election law, being chapter 909, § 56, of the Laws of 1896, is in part as follows:

"The party certificate whereby such party nominations are certified shall contain the title of the office for which each person is nominated. * * * It shall be signed by the presiding officer and the secretary of such convention or primary. * * * A certificate of nomination filed pursuant to this section may upon its face appoint a committee of one or more persons for the purposes specified in section 66 of this act."

The filing of the minutes of the convention, as provided for by the primary law, cannot be construed as a certificate of nomination under the election law. It was merely one of the acts required to be done by section 10 of the primary law, the purpose of which section was to declare the manner in which the business of a convention was to be conducted. To entitle a person to a place on the official ballot there must be filed, as provided by section 56 of the election law, a certificate of nomination. The attempt to amend a certificate which was never filed must fail. It has been held in *Matter of Cuddeback*, 3 App. Div. 103, 39 N. Y. Supp. 388, that "statutory provision in respect to the time when the certificate of nomination must be filed is mandatory and must be complied with, and after the time has passed a county clerk has no right to receive and file certificates of nomination." *Matter of Halpin*, 108 App. Div. 271, 95 N. Y. Supp. 611. "The time within which certain acts are required to be done under the election law is an essential and all-important element in the orderly conduct of nominating and electing public officers. To permit a departure from the law in this respect would lead to the greatest confusion and to the subversion of the plain purposes of the law. The provisions of the statute with respect to the time of filing nominations are clear." *Matter of McDonald*, 25 Misc. Rep. 80, 54 N. Y. Supp. 690.

Applications denied.

PEOPLE *ex rel.* HUNTER v. NATIONAL PARK BANK OF NEW YORK.
(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. MANDAMUS—CORPORATIONS—ACCESS TO CORPORATE BOOKS.

While a stockholder may enforce his right to inspect corporate books by mandamus, yet the writ of mandamus is in the discretion of the court, and it will not be granted when the application is not made in good faith for a legitimate object.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 264.]
107 N.Y.S.—24

2. SAME.

It is sufficient in the first instance for a stockholder, seeking mandamus to enforce his right to inspect corporate books, to show a clear legal right; but if in the answer facts are presented from which it may be inferred that the application is not in good faith for the protection of the stockholder or the corporation, but is for some improper purpose, the burden is on the stockholder to show affirmatively that he is acting in good faith for a legitimate purpose.

8. SAME.

In mandamus to enforce the right of a stockholder given by Stock Corporation Law, Laws 1890, p. 1070, c. 564, § 29, as amended by Laws 1901, p. 965, c. 354, to inspect and make extracts from the corporate stock book, it appeared that the attorney who represented the applicant had for over a year before the applicant acquired his stock made demands on the corporate officers for a list of stockholders, refusing to state for whom he made the demand, or the object thereof; that the demands were refused, and that the applicant purchased four shares of stock of the corporation; that the applicant was a clerk in the office of a firm of attorneys who shortly thereafter made a demand for inspection of the stock book, refusing to state the purpose for which information was desired; that the applicant was accompanied in making his demand by the attorney who had insisted on obtaining his information for undisclosed clients. *Held* to require the applicant to freely disclose his object in making the application, or mandamus would be denied.

4. SAME.

Stock Corporation Law, Laws 1890, p. 1070, c. 564, § 29, as amended by Laws 1901, p. 965, c. 354, requiring every stock corporation to keep a stock book containing the names of its stockholders, etc., and authorizing the stockholders to make extracts therefrom, does not give a stockholder the absolute right to compel by mandamus the officers to permit him to examine the stock book, but the court has discretion, and may refuse mandamus where the application is not made in good faith, but for an ulterior purpose; and where facts justify an inference that the application is not made in good faith, the court should, before granting mandamus, require the applicant to frankly state whether he is acting at the instigation of persons undisclosed, and the purpose for which the application is made.

5. SAME.

Where, in mandamus by a stockholder to compel the officers of the corporation to permit him to inspect corporate books, the answer sets forth facts justifying an inference that the application is not made in good faith, the stockholder, to show his good faith, may be required to submit replying affidavits, or the court may appoint a referee to take proof of the facts and report to the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 83, Mandamus, § 379.]
Houghton, J., dissenting.

Appeal from Special Term.

Mandamus by the people, on the relation of William R. Hunter, against the National Park Bank of New York, to compel defendant to allow relator to make a list of names of stockholders of the bank. From an order granting a peremptory writ, defendant appeals. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, HOUGHTON, and SCOTT, JJ.

Louis F. Doyle, for appellant.
Henry B. Culver, for respondent.

INGRAHAM, J. The relator in his petition makes this application under the provisions of section 29 of the stock corporation law (chapter 564, p. 1070, of the Laws of 1890 as amended by chapter 354, p. 965, of the Laws of 1901). That section provides that:

"Every stock corporation shall keep at its office * * * a book to be known as the stock book, containing the names alphabetically arranged of all persons who are stockholders of the corporation, showing their places of residence, the number of shares of stock held by them respectively, the time when they respectively became the owners thereof, and the amount paid thereon. The stock book of every such corporation shall be open daily during at least three business hours for the inspection of its stockholders and judgment creditors, who may make extracts therefrom"

—and imposes a penalty for a neglect or refusal to comply with these provisions.

The petition upon which this proceeding was instituted alleges that the petitioner is the proprietor, owner, and holder of record of four shares of the capital stock of the National Park Bank, the certificate of ownership being dated the 1st day of February, 1907; that the National Park Bank is a corporation organized under the acts of Congress relating to the establishment of national banks and has its principal place of business in the city and county of New York; that on three occasions before the 6th day of May, 1907, the petitioner demanded an inspection of the stock book of defendant, with which demand the president of the defendant corporation refused to comply. The first demand seems to have been made on the 18th day of February, 1907, and on the 6th day of May, 1907, petitioner made an absolute demand, which was refused; whereupon the petitioner, by notice of motion dated May 10, 1907, applied for a mandamus demanding that the defendant permit the relator to have undisturbed inspection of the stock book of the defendant during at least three business hours daily.

In answer to this application there were submitted affidavits from which it appeared that the attorney for the relator called upon the attorney for the defendant prior to January 1, 1906, stating that he wished to inspect and copy the list of stockholders of the National Park Bank; that he claimed the right to a copy of the list as a stockholder of the bank, and that his object in seeking the information was to purchase stock in the National Park Bank; that subsequently he again called on the attorney for the defendant bank, but then declined to say for what purpose he desired the list, intimating that he was not acting for himself, but declined to say for whom he was acting; that he made subsequent demands upon the attorney for the bank, but always refused to state whom he represented in applying for the information; that the relator did not become a stockholder of the bank until February 1, 1907, more than a year after his attorney's first application for leave to examine and copy the list of stockholders; that the petitioner is a clerk employed by a law firm who is engaged in collecting and adjusting claims against banks and serving papers; that he has acted in various cases as plaintiff on assigned claims brought by different firms of attorneys; and that the same attorney had acted for others, who had obtained a small num-

ber of shares of stock in other national banks, in making similar applications for lists of stockholders of such banks.

In the affidavit of the president of the defendant bank it appeared that in December, 1905, the present attorney for the petitioner called upon him and requested an inspection of the list of stockholders, claiming to be a stockholder or to represent stockholders, declining to state, however, whom he represented or for what purpose he desired the list of stockholders; that the capital stock of the National Park Bank is divided into 30,000 shares, of the par value of \$100 each, and is held by about 800 stockholders residing in many different states of the Union and in foreign countries; that upon his knowledge acquired as president of the defendant bank, and the nature of the stockholders of defendant bank, he believes and charges it to be the fact that the relator in this proceeding is not a bona fide stockholder of the bank, and does not desire a list of the stockholders for any proper or legitimate purpose, or for the protection of any proper or legitimate interest of any stockholder in the said bank, but seeks to obtain this list for some ulterior and improper purpose, which may, and probably would, be detrimental to the interests of the stockholders of the National Park Bank, and desires an opportunity to show that this inspection is not sought for a legitimate or proper purpose, but on the contrary, is sought for an improper and unlawful purpose; that he therefore desires that a reference be ordered to inquire into the facts of the relator's good faith and for the purpose of his application and the bona fides of the ownership of the stock, and if such reference is ordered the defendant will pay the expenses thereof. There were no answering affidavits, and these allegations remain undisputed.

There is no express provision of law authorizing a mandamus to enforce the provisions of section 29 of the stock corporation law; but, when a stockholder of a corporation shows a legal right to an inspection of the books of the corporation, he is entitled to enforce that right by mandamus. This rule, however, is subject to the qualification that the granting of a mandamus is always in the judicial discretion of the court and a strict legal right will not be enforced when it appears that the application is not made in good faith for a legitimate and proper object. It is sufficient in the first instance to show the existence of a clear legal right to the relief demanded; but if, in answer to the application, facts are presented to the court from which the inference can fairly be drawn that the application is not made in good faith, for the protection of the applicant or of the corporation, but is made for some ulterior or improper purpose, especially when it appears that a small number of shares of stock of an important financial corporation have been acquired for the express purpose of making an application for a list of the stockholders of the corporation, which are not to be used by the owners of the stock making the application, but for others whose names are not disclosed and for purposes not disclosed, the burden is cast upon the party making the application to affirmatively show that he is acting in good faith, for a legitimate purpose and his own or the corporation's protection. In this case it appears that the attorney who is representing

the plaintiff had, for over a year prior to the time when the relator acquired his stock, made persistent demands upon the president of this corporation for a list of stockholders, refusing to state for whom he made the demand or the object for which he required this information. These demands being refused, there were purchased four shares of stock of the defendant corporation, which were transferred to a clerk of the office of a firm of attorneys, who shortly thereafter made a demand for an inspection of the stock book as a stockholder, persistently refusing to state the purpose for which he desired the information, whether or not he was acting for others, or for whom he was acting. He was accompanied in making this demand by the attorney who had insisted upon obtaining the information for undisclosed clients, and was represented by the same attorney in instituting these proceedings to enforce his rights as a stockholder. These facts, I think, required from the relator a free and frank disclosure of his object in making the application, the use to which he wished to put the information that he required, whether or not he was acting on his own behalf, or on behalf of others whose names were not disclosed, as well as the object in seeking to obtain information to which persons who are not stockholders are not entitled.

There is no question in this case of any misuse of its corporate franchises by the defendant, and there is no fact stated which shows any necessity for the intervention of the stockholders in the management of the bank. The application is based upon the assertion of the relator's right as a stockholder to the inspection of this stock book. The assertion of the right is met by facts tending strongly to show that the application is not made in good faith by the petitioner, but that this small number of shares of stock was acquired by him for the purpose of obtaining information which had been requested some time before he purchased the stock by an attorney refusing to state the names of those he represented or the purpose for which he wished the information; a situation which, unexplained, if it did not justify a denial of the application, at least required the court to refuse it until there had been a full and frank disclosure of the persons, if any, back of this application and the purposes for which the information was desired. The courts have always held that applications of this kind are addressed to the sound discretion of the court, and should not be granted for an ulterior or improper purpose. In the Matter of Steinway, 159 N. Y. 250-263, 53 N. E. 1103, 1107, 45 L. R. A. 461, it was said:

"A stockholder has the right at common law to inspect the books of his corporation at a proper time and place and for a proper purpose, and if this right is refused by the officers in charge a writ of mandamus may issue, in the sound discretion of the court, with suitable safeguards to protect the interests of all concerned. It should not be issued to aid a blackmailer, nor withheld simply because the interest of the stockholder is small; but the court should proceed cautiously and discreetly according to the facts of the particular case. To the extent, however, that an absolute right is conferred by statute, nothing is left to the discretion of the court; but the writ should issue as a matter of course, although even then, doubtless, due precautions may be taken as to time and place, so as to prevent interruption of business or other serious inconvenience."

And in speaking of the provisions of this section 29 of the stock corporation law it is said:

"The statute merely strengthened the common-law rule with reference to one part thereof, and left the remainder unaffected. It dealt with but a single book. As to that it amplified the qualified right previously existing, by making it absolute and extending it to judgment creditors. The stock book has no relation to the business carried on by a corporation, and the change was doubtless made to enable stockholders to promptly learn who are entitled to vote for directors, and judgment creditors to learn who are liable as stockholders for a failure to comply with the provisions of the act."

In *People ex rel. Lorge v. Consolidated National Bank*, 105 App. Div. 409, 94 N. Y. Supp. 173, this court, while upholding the right of a stockholder to an inspection of the stock book and the making of extracts therefrom, said:

"Doubtless the court has power to withhold an inspection for an illegitimate purpose, and may regulate the time when the inspection shall be made. But where it is sought for a legitimate purpose, and the application is made during business hours, the right to such inspection is mandatory."

While the Court of Appeals in the *Steinway Case*, *supra*, speaks of the absolute right of a stockholder to an inspection of this stock book prescribed by section 29 of the stock corporation law, I do not think it was intended to hold that the court had no discretion to refuse a mandamus, where the application was not made in good faith, but for an ulterior purpose, and to aid undisclosed persons in undisclosed schemes against a corporation. Where facts are stated which justify an inference that the application is not made in good faith, for the protection or purposes of the applicant, but for the benefit of undisclosed persons for undisclosed purposes, the court has power, and should, before granting the application, at least require the applicant to frankly state whether or not he is acting at the instigation of others, who are undisclosed, and the purpose for which the application is made. This may be accomplished by requiring the relator to submit replying affidavits or appointing a referee to take proof of the facts and report to the court.

It follows that the order appealed from should be reversed, with \$10 costs and disbursements to the prevailing party by the final order, and the case remitted to the Special Term for further action in accordance with the views here expressed.

PATTERSON, P. J., and McLAUGHLIN and SCOTT, JJ., concur.

HOUGHTON, J. (dissenting). I agree that the rule should be as stated by Mr. Justice INGRAHAM; but it seems to me the Legislature has made it different, and the remedy is with it rather than the courts. Section 29 of the stock corporation law provides that the stock book of every stock corporation "shall be open daily during at least three business hours for the inspection of its stockholders and judgment creditors." Of course, this privilege is granted to a small stockholder, as well as to a large one. The bald right to inspect is given, and the statute makes no mention of his motive in

exercising that right. He has it because of his ownership of the stock. The statute gives him no right to inspect the general business books of the corporation, and his right to such an inspection comes from the common law, and is discretionary, and good motive toward the corporation must exist. With respect to inspection of the stock book, however, the Legislature has seen fit to give him an absolute right of inspection, and I understand the decisions to be that his motive in exercising that privilege is immaterial. *Matter of Steinway*, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461; *People ex rel. Clason v. Nassau Ferry Co.*, 86 Hun, 128, 33 N. Y. Supp. 244; *People ex rel. Gunst v. Goldstein*, 37 App. Div. 550, 56 N. Y. Supp. 306; *People ex rel. Callanan v. K., etc., R. R. Co.*, 106 App. Div. 350, 94 N. Y. Supp. 555; *People ex rel. Fennelly v. Amalgamated Copper Co.*, 110 App. Div. 892, 96 N. Y. Supp. 1141, affirmed 184 N. Y. 573, 77 N. E. 1193; *Same v. United Copper Co.*, 110 App. Div. 892, 96 N. Y. Supp. 1141, affirmed 184 N. Y. 578, 77 N. E. 1194.

In the *Amalgamated Copper Case*, supra, the relator owned 2 shares, of \$100 each, out of \$155,000,000 and the order directing a mandamus to compel inspection of the stock book was affirmed by this court and the Court of Appeals, in spite of voluminous allegations that the inspection was desired from selfish and improper motives; and the *United Copper Case*, supra, presented substantially the same facts and was similarly decided. However bad the rule may be, I can hardly see how the decisions and the statute can be ignored. It does not seem to me to be an answer to say that the issuing of a mandamus is discretionary, and hence discretion will be exercised against a stockholder with a bad motive. If he has the right, irrespective of motive, there is no room for the exercise of discretion.

The relator was clearly within his statutory rights, and the court below simply followed the statute, and I think its order should be affirmed.

(122 App. Div. 602.)

In re GRANT.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

EXECUTORS AND ADMINISTRATORS—TEMPORARY ADMINISTRATOR—ACCOUNTING—LIABILITY OF SURETIES—MATTERS OCCURRING PRIOR TO SURETYSHIP.

A surety on the bond of a temporary administrator who replaced a former surety was entitled, in a proceeding to charge the administrator with a devastavit of the estate in regard to a stock exchange seat, to show that, if there was such a devastavit, it took place prior to the time he became a surety, and for that purpose have the account filed by the temporary administrator referred back to the referee to whom it was originally referred, to admit evidence in relation to the Stock Exchange seat controversy.

Appeal from Surrogate's Court.

Proceedings for the judicial settlement of the accounts of Frederic Grant, as temporary administrator of James Grant, deceased. From an order of the Surrogate's Court denying a motion of a surety on the bond of the accounting temporary administrator to amend an order referring back the account filed by the temporary administrator to a

referee to whom it was originally referred, said surety appeals. Modified.

Argued before PATTERSON, P. J., and McLAUGHLIN, INGRAHAM, HOUGHTON, and SCOTT, JJ.

Richard O'Gorman, for appellant.

Arthur L. Marvin, for respondent.

McLAUGHLIN, J. James Grant died on the 22d of April, 1895, leaving a last will and testament, which was on the 29th of November of the same year admitted to probate, and letters testamentary issued to the executors therein named. A contest was had over the admission of the will to probate, pending which temporary letters of administration were issued to Frederic Grant, a brother of the intestate; he having given a bond with the American Surety Company as surety. On December 7, 1895, the temporary administrator filed his accounts in the Surrogate's Court, but which did not include a seat in the New York Stock Exchange, which stood in the name of the deceased, and which it was claimed was an asset of his estate. Objection was made to his accounts upon this as well as upon other grounds. About this time the American Surety Company applied to be released from its bond. The objections made to the accounts were referred to a referee, but all of them seem to have been then or thereafter withdrawn, except the one relating to the Stock Exchange seat. While the proceeding was pending before the referee, and in November, 1896, something over a year after the accounts were filed, the American Surety Company was released and a new bond given in the sum of \$20,000. One of the sureties upon the new bond was this appellant. He was not nominally a party to the proceeding before the referee, and had no notice thereof, except so far as the same may be inferred from the fact that he took the place of the American Surety Company. The referee on the 12th of April, 1897, filed his report, in which he held that the temporary administrator should be charged with the value of the seat on the Stock Exchange which he fixed at \$18,000. His report, however, was not confirmed; the surrogate denying a motion for that purpose, and directing that the matter be sent back to the referee "for the purpose of taking such proper and legal testimony as may be offered in support of the temporary administrator's claim that the seat in the New York Stock Exchange, for which a certificate stood in the name of the testator at the time of his death, is in fact a firm, and not an individual asset." This order was made in April, 1898, and thereafter no proceedings were taken before the referee until March, 1906, when the attorney for the contestant in the Surrogate's Court served a notice of hearing. In July, 1906, the appellant obtained permission from the Surrogate's Court to intervene as a party to the proceeding, and the following October an attempt was made to bring on the hearing before the referee, when the appellant obtained a stay, and moved that the order referring back the accounts to the referee be amended so as to admit evidence, not only in regard to the Stock Exchange seat, but also as to any matter which the parties might think material upon any of the issues raised by the objections to the

accounts. The motion was denied; and it is from this order that the present appeal is taken.

I think the order was properly denied as to all matters, except those relating to the Stock Exchange seat, the sale and disposition of that, and the proceeds derived therefrom. The appellant, being one of the sureties upon the bond of the temporary administrator, if there has been a devastavit of the estate, so far as the Stock Exchange seat is concerned, or the proceeds derived from the sale of the same, ought to be afforded an opportunity of proving that it took place prior to the time he became a surety; otherwise, he might be charged with such loss, when, in fact, it occurred prior to the time he became a surety. To this extent the order appealed from should be modified.

As to the other objections made to the accounts, and which were withdrawn, the order is right. The accounts of the temporary administrator were filed nearly 12 years ago, and the appellant became a surety nearly 10 years ago. No facts are stated which would have justified the surrogate in opening up the entire accounts when the objections which had been originally filed had been withdrawn.

The order appealed from, therefore, should be modified as stated in this opinion, and, as thus modified, affirmed without costs to either party. All concur.

(122 App. Div. 552.)

DONOHUE v. BRAAF.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action against the proprietor of a saloon for the death of a customer who fell down an elevator shaft on the premises, evidence held to show contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 274.]

Laughlin, J., dissenting.

Appeal from Trial Term.

Action by Loretta M. Donohue, as administratrix of the estate of Thomas Donohue, deceased, against Charles Braaf. Appeal by defendant from a judgment in favor of plaintiff, and from an order denying a motion for a new trial. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Carl Schurtz Petrasch, for appellant.

George Gordon Battle, for respondent.

INGRAHAM, J. The plaintiff's intestate died as the result of injuries sustained by falling down an elevator shaft on the premises of defendant in the city of New York. The defendant was the proprietor of a hotel, in which there was a saloon on the ground floor. On Saturday, the 17th of March, 1906, between 11 and 12 o'clock at night, the deceased, with a companion, went to this saloon. After staying there about 15 or 20 minutes, they started to leave by the public entrance by which they had entered, when the barkeeper told them that the saloon was closed, and they would have to go out

through the rear of the building. The barkeeper then led the way towards the rear of the saloon, and opened a door through which the deceased and his companion passed, the barkeeper following them. This door entered into what was to be a dining room, but which was then being repaired. The deceased led the way into this room, followed by his companion and by the barkeeper, who appears to have been about 15 feet behind. Passing through this room, between the scaffolding and partitions in the course of erection, the deceased and his companion came to two doors, the approach to which was up two or three steps, and as to one of which the deceased's companion testified that it had the appearance of being an elevator door. This door was partly constructed of glass, through which a light was shining, while on the left of this door was an ordinary door. The door which had the appearance of being an elevator door opened directly to the north, while the other door opened towards the west. There was an electric light lighted in this room, and the deceased's companion testified that both doors were plainly visible. The deceased approached the door through which a light was shining with his head turned towards his companion, who was following, and talking and laughing with him. As he approached the door and put his hand upon it, the barkeeper shouted: "Don't go out that way." The deceased, however, in some way opened the elevator door, stepped into the elevator shaft, fell to the bottom, and was killed. An examination of this door disclosed that, although there was a hasp so constructed that if the hasp caught the door could be only opened from the inside of the elevator shaft, for some reason the hasp had not caught, and the door could be opened from the outside by pushing it to one side. The court submitted the question as to the defendant's negligence and the freedom of the deceased from contributory negligence to the jury, who found a verdict for the plaintiff.

I do not think there was evidence of the defendant's negligence. The door was not open. There was not such an absence of light that a person walking through this room could not see the situation. There was no invitation by the defendant to open the door and walk into the elevator shaft, and, as the elevator shaft was lighted, as soon as the door had been opened the fact that this was not a means of exit to the street must have been apparent. The defendant could not have anticipated that a person walking through this room would open this elevator door and walk into the elevator shaft, which was lighted and the danger of which was apparent. But, whatever may be said as to the defendant's negligence, it is quite clear that the deceased was guilty of contributory negligence. He approached a door which had the appearance of being the door of an elevator through which there was a light shining, opened the door with his head turned over his shoulder, so that he could not see where he was going, and stepped into a lighted elevator shaft without looking. The slightest attention to the door before he attempted to open it, or looking after he opened the door, and before he stepped in, would have apprised him of the situation and prevented the accident. Certainly nothing in the situation prevented the deceased from seeing where he was

going or distracted his attention in such a way as to excuse him from looking. If the deceased had shown the slightest care in examining the door he was about to enter, either before or after he had opened it, or had waited until he could have heard the warning of the bar-keeper who was following him, the accident would have been avoided. The evidence of the witnesses for the plaintiff and defendant was that there was plenty of light to see the two doors, and certainly, under such circumstances, a person was not justified in opening a door and walking through it without taking the slightest care to see what was on the other side.

The case of *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282, is not at all in point. There the proprietor of a hotel rented a large room in the hotel for a ball, to which anybody paying the price of admission was admitted. On the way to the ballroom there was a door opening out on the top of an awning, which was unguarded. A person attending the ball started to go into the street, mistook this open door for the street door, walked through it, fell off the awning into the street, and was injured. A recovery in that case was sustained, upon the ground that it was negligence to leave a door which persons not familiar with the premises might in the nighttime mistake for the door into the street open. In this case the door was closed, and, for the deceased to go through it, it was necessary that he should open it, and, when he opened it and walked through without looking to see where he was going, when there was plenty of light for him to see, it is quite clear that the accident was the result of his negligence, for which neither he nor his personal representatives could recover.

It follows that the judgment and order appealed from must be reversed and a new trial ordered, with costs to the appellant to abide the event.

PATTERSON, P. J., and CLARKE and SCOTT, JJ., concur.
LAUGHLIN, J., dissents.

STEMMERMAN V. KELLY.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. PLEADING—DIFFERENT DEFENSES—REFERENCE FROM ONE PARAGRAPH TO ANOTHER.

An allegation in separate defenses that defendant "realleges all that he has hereinbefore alleged" incorporates affirmative defenses theretofore alleged in the answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 193.]

2. SALES—PERFORMANCE.

In an action for breach of contract by defendant to purchase asphalt from plaintiff's assignor, it is a good defense that plaintiff's assignor failed to tender delivery of the asphalt, and that plaintiff's assignor had no asphalt meeting the requirements of the contract which it could tender or deliver.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 360.]

3. PLEADING—MOTION TO STRIKE.

The objection that a defense is improperly incorporated in the several separate defenses of an answer should be raised by motion to strike.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 89, Pleading, § 1102.]

Appeal from Special Term, New York County.

Action by William C. Stemmerman against William Kelly. From interlocutory judgment overruling his demurrer to certain defenses of defendant's answer, plaintiff appeals. Affirmed.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAMBERT, LAUGHLIN, and HOUGHTON, JJ.

Henry B. Johnson, for appellant.

George W. Titcomb, for respondent.

HOUGHTON, J. The plaintiff's complaint contains two counts for an alleged breach of contract by defendant to purchase asphalt from his assignor, the Densmore-Stabler Refining Company. The defendant's answer contains specific and general denials sufficient to put the plaintiff to proof of breach of the contract. The second separate defense alleges that, to the knowledge of plaintiff's assignor, the contract which defendant entered into with it was made by defendant as the agent of the asphalt construction company, and that it was intended to be and was treated as a contract of the latter company. The third separate defense purports to set forth that, plaintiff's assignor knowing that defendant was agent and was to receive a benefit from such contract, to the detriment of the asphalt construction company, the same was against public policy and void. The sixth separate defense sets forth that the asphalt to be furnished was to be such as was acceptable to the authorities of the borough of Manhattan for the making of asphalt pavement, and that plaintiff's assignor well knew that the same was to be used for that purpose, and that that furnished was unsuitable therefor after May, 1904. At the beginning of each separate defense, the defendant avers that he "realleges all that he has hereinbefore alleged." The plaintiff has demurred to these second, third, and sixth separate defenses, on the ground that each is insufficient in law upon its face to constitute a defense, and such demurrer has been overruled.

Assuming, as we do, that defendant's general denials of the complaint are not incorporated in his several separate defenses by the use of the expression that he "realleges all that he has hereinbefore alleged," because "allegations" do not strictly embrace "denials," still the language does incorporate affirmative defenses theretofore alleged in the answer. Searching the answer, we find that the defendant affirmatively pleads that plaintiff's assignor failed to tender delivery of the asphalt for failure to accept which damages are claimed, and that plaintiff's assignor had no asphalt meeting the requirements of the contract, which it could tender or deliver. This is affirmative allegation in defense of plaintiff's whole cause of action, which defendant by his language has incorporated into his separate defenses. Plaintiff cannot therefore properly demur to such defenses on the ground that they are insufficient in law. They contain a de-

fense to plaintiff's cause of action. If that defense was improperly incorporated in the several separate defenses, plaintiff should have made a motion to strike it out before demurring. *Uggle v. Brokaw*, 77 App. Div. 310, 79 N. Y. Supp. 244.

It follows, therefore, that the demurrers were properly overruled, and the interlocutory judgment should be affirmed, with costs, with leave to the plaintiff to withdraw his demurrer and plead over upon payment of costs. All concur.

ROSS v. McCALDIN.

(Supreme Court, Appellate Division, Second Department. December 5, 1907.)

1. **DISMISSAL—ACTION ON WRONG CALENDAR.**

A complaint that states any cause of action, legal or equitable, cannot be dismissed on its face or because the cause is on the wrong calendar.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dismissal and Nonsuit, § 111.]

2. **JURY—WAIVER OF RIGHT TO TRIAL BY.**

Under the express provisions of Code Civ. Proc. § 1009, unless a party claim his right to a jury trial before any evidence is received, he waives it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 163½.]

Appeal from Special Term, Kings County.

Action by J. Stewart Ross against James McCaldin. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before JENKS, HOOKER, GAYNOR, RICH, and MILLER, JJ.

James Troy, for appellant.

J. Stewart Ross, pro se.

GAYNOR, J. There was no question made at the trial but that the complaint stated a cause of action. It was only claimed by the defendant's counsel when the case was reached for trial that the complaint did not state an equitable but a common-law cause of action, which seems to be the case. Why he called attention to this is not apparent, for he expressly said the court could not dismiss the complaint for that reason; which was entirely correct, for a complaint that states any cause of action, legal or equitable, cannot be dismissed on its face, or because the cause is on the wrong calendar. If it could not be dismissed it certainly had to be tried, and the only question therefore was whether it should be tried by a judge alone or with a jury. Unless a party claim his right to a jury trial before any evidence is received he waives it (Code Civ. Proc. § 1009; *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659) and that is the case of the defendant here, for the defendant did not claim the right to a jury trial. Inasmuch as a jury trial was waived, it does not matter what was the kind of action pleaded and proved. It could not be dismissed at the close for being a common-law action. The plaintiff had the right to re-

cover on it whether it was in equity or at common law. It therefore does not matter whether it was the one or the other.

The judgment should be affirmed.

Judgment affirmed, with costs. All concur. Rich, J., concurs in separate opinion.

RICH, J. The sole question is whether the Special Term erred in trying the action as one in equity, and is presented by the defendant's exception to the refusal to dismiss the complaint upon the ground that it did not allege or the evidence establish an equitable cause of action; that both the pleading and proofs disclosed that the plaintiff had an adequate remedy at law.

It was too late to raise this question at the trial. Such objection was not taken by the answer. On the contrary, the defendant, after alleging the facts regarded most favorable to himself, demanded affirmative equitable relief, and thus brought himself within the rule declared in *Crisfield v. Murdock*, 127 N. Y. 315, 27 N. E. 1046, and *Gage v. Lippman*, 12 Misc. Rep. 93, 33 N. Y. Supp. 59, in the former of which Judge Parker said:

"On the trial the point was made that the plaintiff ought not to maintain this suit because he had an adequate remedy at law; and it is again urged on this appeal. In the answers of the several defendants, no such objection was made. On the contrary, each defendant, after setting forth the facts deemed the most favorable to his position, demanded equitable relief. The parties having thus submitted to the jurisdiction of the court, it was too late to take the objection on the trial that the plaintiff had a remedy at law. * * * Whether the objection, if seasonably taken, could have been made available, need not therefore be considered."

In the *Gage Case*, Judge Bischoff, writing for the court, says:

"As to the contention that the plaintiffs had an adequate remedy at law, viewed apart from the effect of the findings made, it is only to be said that the defendants not only failed to plead this defense, which was essential (*Ostrander v. Weber*, 114 N. Y. 102, 21 N. E. 112; *Town of Mentz v. Cook*, 108 N. Y. 507, 15 N. E. 541), but actually submitted the case to the equity side of the court for determination, they themselves praying for affirmative equitable relief in the form of a decree against the plaintiffs for specific performance."

In the case at bar the defendant demanded a decree adjudicating that the promissory notes alleged in the complaint were obtained by force and duress and consequently void. The judgment must be affirmed, with costs.

(56 Misc. Rep. 250.)

PEOPLE v. SEWELL.

(Delaware County Court. October, 1907.)

CRIMINAL LAW—LIMITATIONS—ABSENCE FROM STATE.

Code Cr. Proc. § 143, limiting the time for filing indictments, and providing that no time during which defendant is not an inhabitant of the state, or usually resident therein, or in personal attendance on business within the state, is a part of the limitation, applies where defendant was in the state when the crime was committed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 277.]

Hubert S. Sewell was indicted for crime, and moved to dismiss. Motion denied.

Alexander Neish, Dist. Atty., for the People.

W. F. White, for defendant.

GRANT, J. The indictment was found by the grand jury of Delaware county on the 21st day of May, 1906, and recites that the acts constituting the crime charged were committed on or about February 10, 1899. The defendant moved to dismiss the indictment upon the grounds: First, that five years had elapsed after the alleged crime was committed and before the indictment was found; and, second, that improper evidence was received before the grand jury.

To determine the questions involved in this case necessitates a construction of sections 142 and 143 of the Code of Criminal Procedure, which are as follows:

"Sec. 142. Limitation of five years.—An indictment for a felony, other than murder, must be found within five years after its commission, except where a less time is prescribed by statute. And an indictment for a misdemeanor must be found within two years after its commission.

"Sec. 143. Defendant out of state.—If, when the crime is committed, the defendant be out of the state, the indictment may be found within the term herein limited after his coming within the state; and no time during which the defendant is not an inhabitant of, or usually resident within, the state, or usually in personal attendance upon business or employment within the state, is part of the limitation."

The position of the defendant is that the exception contained in section 143, relating to absence from the state, only applies to cases where the defendant is out of the state when the crime is committed, and has no application to cases where the defendant was in the state when the crime was committed. The district attorney, answering the contention of the defendant's attorney, urges that the absence from the state, mentioned in section 143, has a general application to all crimes, not only those mentioned in section 143, but those mentioned in section 142 as well. The question seems to be a new one, and I have been unable to find any case reported which sheds any light, unless it may be the case of *People v. Linderborn*, 23 Misc. Rep. 428, 52 N. Y. Supp. 101, in which Mr. Justice Fursman, in writing the opinion, in effect held that the exceptions contained in section 143 had a general application to all cases; but, as the questions involved in the case under consideration were not in the case decided, I do not consider it controlling, hence it is necessary to examine sections 142 and 143, and, if possible, ascertain their meaning.

Under the criminal statute relating to limitations, as it existed prior to the enactment of the Code of Criminal Procedure in 1881, what are now sections 141, 142, and 143 were embodied in a single section, under which there could be no question but that absence from the state would prevent the statute of limitations from running; and whether, by the codification of this provision, dividing the former section into separate sections, separately numbered and with separate headings, the Legislature intended to establish a different rule, must be determined from an examination of these sections. It will be ob-

served that section 143 commences with the conjunctive words "if, when," showing it to be a dependent sentence, depending upon something that has preceded it to determine its meaning. Another reason why it would seem to be clear that section 143 was not an independent sentence, but dependent upon section 142, is the fact that the limitation period is alone mentioned in section 142, yet in section 143 the words, "within the term herein limited," are used, which must refer to the term mentioned in section 142. From these facts, it would seem to be clear that the codifiers intended that title II of the Code of Criminal Procedure, relating to the time of commencing criminal actions, should be considered the same as a single section, or, in any event, as relating to a single subject-matter; and, if such was their intention, as it would seem to be, it is apparent that the clause, "and no time during which the defendant is not an inhabitant of, or usually resident within, the state, or usually in personal attendance upon business or employment within the state, is a part of the limitation," applies, not only to section 143, but to section 142 also, and in such event the indictment was found in due time.

I have also examined the evidence taken before the grand jury when the case was before it for consideration, and do not find any illegal evidence which would warrant the dismissal of the indictment.

Motion to dismiss the indictment is therefore denied.

Motion denied.

(56 Misc. Rep. 249.)

COOK v. COOK et al.

(Chautauqua County Court. October, 1907.)

JUSTICES OF THE PEACE—JURISDICTION.

Where complaint in an action in a justice court demands judgment for \$300, a judgment for \$100 must be reversed, under Code Civ. Proc. § 2862, limiting the jurisdiction of the justice in action for breach of contract to an amount not exceeding \$200, though the question of jurisdiction was not raised in the court below.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 218.]

Appeal from Justice Court.

Action by Edward Cook against Fred Cook and William Stevens. From a judgment for plaintiff rendered by a justice, defendants appeal. Reversed.

A. F. Jenks, for appellants.

T. W. Schiller, for respondent.

OTTAWAY, J. This action was brought in Justice's Court. The complaint demanded judgment for the sum of \$300. The answer was a general denial. The defendant demanded a jury, and went to trial upon the pleadings. At the close of the plaintiff's case, the defendant moved for a nonsuit upon various grounds suggested by the evidence adduced. Upon the denial of the motion, he rested his case. He brings this appeal, and asks that the judgment be reversed on the ground that the justice had no jurisdiction; the complaint demand-

ing judgment for more than \$200. The plaintiff urges that the contention of the defendant should not prevail for the reason that he waived this right by appearing and taking part in the trial without raising the question of jurisdiction at any stage. He further contends that the appeal should not prevail for the reason that the jury rendered a verdict for only \$100—a sum within the jurisdiction of the justice.

The judgment entered upon the verdict of the jury must be reversed. Section 2861 of the Code of Civil Procedure provides a justice of the peace has such jurisdiction in civil actions as is especially conferred upon him by statute, and no other. Section 2862 of the Code of Civil Procedure provides that a justice of the peace has jurisdiction in an action to recover damages for the breach of a contract where the sum claimed does not exceed \$200. The amount claimed is the test of the jurisdiction of the justice. Parties could not confer jurisdiction upon a justice to try a cause where more than \$200 was claimed; consequently there was no waiver by the defendant, who appeared and took part in the trial. *Ballinger v. Ford*, 14 Barb. 250; *Dennis v. Crittenden*, 42 N. Y. 542.

Judgment is reversed, with costs.

(56 Misc. Rep. 247.)

In re STONE'S ESTATE.

(Surrogate's Court, Oneida County. October, 1907.)

TAXATION—ASSESSMENT OF TRANSFER TAX—NOTICE OF APPEAL.

Under Tax Law, Laws 1896, p. 875, c. 908, § 232, a notice of appeal from an order determining the amount of a transfer tax must state the grounds of appeal.

In the matter of the estate of Britania E. Stone. Motion to dismiss appeal from an order determining the amount of a transfer tax.

George F. Morss, for executors.

David E. Powers, for State Comptroller.

SEXTON, S. In this estate a transfer tax proceeding was instituted April 27, 1897, by an order of the surrogate of Oneida county, which appointed A. J. Dutcher appraiser to fix the fair market value of the property of testator. August 7, 1905, the appraiser filed his report, in which he found upon the evidence of one of the executors, Benjamin D. Stone, that a claim against the estate in favor of Penfield & Stone, for \$37,118.89 was adjusted and allowed by all three executors representing this estate, in the sum of \$13,500, which adjustment was adopted by the appraiser. The evidence was closed August 1, 1905. There were several hearings before the appraiser, and R. S. Johnson, on each hearing, appeared as attorney for the county treasurer, and George F. Morss, on each hearing, appeared as attorney for the executors in the above estate. No objection was made at any time, by or on behalf of this estate, to the adjustment of said account by the appraiser, on the evidence before him, at \$13,500. On September 23, 1905, said executors filed in the surrogate's office a notice of appeal, the material part of which is as follows:

"Take notice, that the executors appeal to the surrogate of Oneida county from the decision of Mr. A. J. Dutcher, the appraiser herein, made and filed on the 7th day of August, 1905."

This appeal was never brought to a hearing. The matter is now before the court on a motion to dismiss the appeal, on the ground that the notice of appeal does not state the grounds of the appeal. The motion is made by D. E. Powers, as attorney for the State Comptroller.

An appeal of this character is perfected by an interested party "filing in the office of the surrogate a written notice of appeal, which shall state the grounds upon which the appeal is taken." Tax Law, Laws 1896, p. 875, c. 908, § 232. "Only the parts of a judgment or decree which are appealed from can be reviewed; and, where a statute requires the grounds of the appeal to be stated, as does the taxable transfer act of 1892 (page 819, c. 399, § 13), in the case of an appeal to the surrogate from the appraisal or assessment and determination of a tax, none except those specified in the notice of appeal can be considered, and the proceedings cannot be interfered with or disturbed in other respects." Matter of Davis, 149 N. Y. 539, 44 N. E. 185. "The purpose of requiring the notice of appeal to the surrogate to state the grounds the appeal is made upon was to limit the questions to be reviewed by him to those only stated in the notice, * * * and neither the Supreme Court nor this court can review any question except that reviewed by the surrogate." Matter of Manning, 169 N. Y. 449, 452, 62 N. E. 565, 566. The notice of appeal in question stated no ground upon which the appeal is taken. It therefore follows that the appeal must be dismissed.

The motion to dismiss the appeal is granted, without costs to either party.

Motion granted, without costs.

(56 Misc. Rep. 232.)

In re DICKINSON'S ESTATE.

(Surrogate's Court, Kings County. October, 1907.)

1. WILLS—DESIGNATION OF BENEFICIARIES.

Where testator bequeathed certain sums to religious societies by names which were not their strict corporate names, but plainly identified the societies the testator had in mind, and there were no other institutions of a similar name, or claiming the legacies, they will be distributed to the societies intended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1112.]

2. SAME—IDENTIFICATION.

Where testator made a bequest to a public library in P., and there were two libraries which might have been intended, the means of knowledge of the testator as to the character of the two libraries, in connection with the names by which they were known, will be considered in determining which was the legatee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1033, 1044.]

In the matter of the estate of Willard W. Dickinson. Proceedings for judicial settlement of the accounts of the executor. Decree rendered.

Otto F. Struse, for Nassau Trust Company, executor.

Edward H. Leggett, for Phelps Union and Classical School.

A. C. Olp, representing the Attorney General.

Wood & Goldsmith, for Mary Swift Stearns, a residuary legatee.

H. L. Thompson, for Methodist Episcopal Church of Phelps, N. Y.

George S. Ingraham, for First M. E. Church, Brooklyn.

Douglass & Minton, for Lettie Stearns Bushnell, a legatee.

Fisher & Voltz, for Industrial School Association.

CHURCH, S. The deceased in his will made four bequests to four separate institutions, and it is contended that these bequests are invalid for various reasons which will now be considered.

There was a bequest to the Methodist Episcopal Church of Phelps, N. Y., of \$5,000, and also to the South Second Street Methodist Episcopal Church of Brooklyn, of \$3,000. It is shown that there is no institution whose corporate name corresponds to these designations, but, on the other hand, it is also shown that in each case there is a church plainly answering the description of the respective institutions which the testator had in mind. No other institution of similar name or character claims either of the legacies, and, as the latter do not conflict in any way with the provisions of statute touching bequests to charitable institutions, they should be sustained.

The testator made a further bequest of \$5,000 to the "Public Library of Phelps, N. Y." It appears that there is no institution incorporated under that title, but that there is a public library of the school district of the village of Phelps, which is commonly referred to as "the library" or "the public library;" that the existence of this library was known to the testator, and that in his boyhood days he attended the district school, and undoubtedly had the use of the library. It is further shown that another library was incorporated several years ago in Phelps, known as the "Crown Library Association." This library for a time was apparently in active existence, circulating books. For a number of years prior to the death of the testator, however, it had not done any business as a library. No proceedings had been taken to dissolve its charter or to dispose of its property, but its books were not circulated, being packed away in storage, and for all practical library purposes it was virtually defunct. It is not disclosed that the decedent ever knew of the existence of this "Crown Library." That association does not claim this bequest. On the contrary, it appears, and waives any claim to the same. The residuary legatees, however, claim that, as the school library was a mere incident of the school, it could not have been the institution that was in the mind of the testator; that the Crown Library was the only one in the village of Phelps that comes within the provisions of the will, and that, if the court adopts this construction, as the Crown Library was incorporated under an amendatory act of the act of 1848, the bequest must fail for the reason that the will was not made within 60 days of the death of the testator. They urge that the knowledge of the invalidity of the gift prompted

the Crown Library to waive any claim to it. It is further claimed on their behalf that, if it cannot be definitely determined that the Crown Library is the institution which was in the testator's mind, then the language of the will is so ambiguous that it is impossible to tell which of the two libraries was to be benefited, and, therefore, the bequest should be declared void for uncertainty.

Hence the main question for determination is as to which institution the testator had in mind in referring to the "Public Library of Phelps." In its consideration, we must recognize the principle that it is the duty of the court to carry out the intention of the deceased, and that the bequest will not be declared void on the ground of uncertainty, unless the conditions are such as to make it impossible to ascertain, with any degree of reasonable certainty, what was his intention. It appears from the evidence that, although the testator was born in Phelps, and always maintained an active interest in the place of his birth, he had not lived there for many years. It is but natural, in consequence, that in making a bequest for the "Public Library" he should have had in view the library which was in existence when he lived in the town, rather than some institution which was incorporated in later years, about which he knew nothing. Again, it is shown that the library attached to the school has not borne any definite or particular name, but has been referred to as "the library," or "the school library," or "the public library," and it is but natural, too, that the testator should believe that the words "public library," even if not the corporate name of the institution, would be sufficiently descriptive to indicate to any person the library which he had in mind. On the other hand, the title of the "Crown Library Association" is such that, while the exact title as contained in the certificate of incorporation might not have been used, yet similar words would have been used which would have left no one in doubt as to the testator's meaning. While the phrasing of the bequest is not so definite as might be desired, yet it seems to be plain that the library of the school was the one which the testator intended to benefit.

The will also contained a bequest to the Eastern District Industrial School Association of the sum of \$3,000. This institution is conceded by the various parties to have been incorporated under one of the amendatory acts of the statute of 1848, and in consequence the bequest is invalid.

Let decree be entered settling the accounts as herein indicated.

(56 Misc. Rep. 96.)

In re PHILLIPS' ESTATE.

(Surrogate's Court, Cattaraugus County. September, 1907.)

1. WILLS—CONSTRUCTION—JURISDICTION.

A surrogate has jurisdiction to construe the provisions of a will relating to both real and personal property when necessary to the judicial settlement of an executor's account and to distribution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1676.]

2. SAME—VESTING OF ESTATE.

Testator devised all the residue of his estate to certain residuary devisees and legatees, his sons and daughters, all adults, their heirs and assigns, subject to the condition that the property should not be divided by them within five years after his decease, but should remain during that time under the control of the executor, and that if any of his sons or daughters should die within the five years, leaving no child or children, his share should belong to his surviving brothers and sisters and their heirs, but that nothing should abridge the rights of his wife previously given unless she forfeited the same by marrying again, in which case certain bequests should cease and the property given should pass to his executor and belong to his sons and daughters subject to the same conditions, the rights and interests of such sons and daughters when apportioned, to be subject to the rights of testator's wife as fixed by the will. *Held*, that the title vested in each of the legatees and devisees named, on the probate of the will, subject to be divested on his or her death, pending the five-year period when such share would go to the surviving brothers and sisters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1485.]

3. SAME—VALIDITY OF PROVISIONS.

A provision in a will that the title of any devisee who might die within five years, during which time the estate was to remain under the control of the executor, should be divested, was not invalid, but in so far as it provided that the estate which vested in a child of a deceased child who might die within the five years should remain in the control of the executor it was invalid as an unlawful suspension of the power of alienation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1515; vol. 39, Perpetuities, § 45.]

4. SAME—INVALID PROVISIONS—EFFECT.

Where a will provided that the estate should remain in the hands of the executor for five years, and that on the death of any legatee during that time his portion should descend to his children subject to the same condition, the latter invalid portion of the will would be eliminated and the valid portion preserved to effectuate the general testamentary scheme.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 992-994.]

5. SAME.

Where a will provided that the residuary estate should be divided among testator's children and remain in the control of the executor for five years, and on the death of any child within that time, leaving no issue, his estate should pass to his surviving brothers and sisters, the interest of a son who died after the probate of the will, and within the five-year period, leaving no issue, passed to such surviving brothers and sisters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1171, 1172.]

6. PERPETUITIES—ACCUMULATIONS.

A will, by its terms, prohibited the division of any portion of the estate for five years, leaving the management in the hands of the executor. *Held*, that without any direction for payments of any annuities during that time that the direction for the accumulation of the income, of the estate during that time was invalid under Real Property Law (Laws 1896, p. 568, c. 547) § 51, and under Personal Property Law (Laws 1897, p. 508, c. 417) § 4.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, § 69.]

7. WILLS—CHARGE ON REALTY.

Where by the terms of a will an annuity to the widow became an express charge on the realty, the share of each devisee in the real estate was subject to the payment of a proportionate part of the annuity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 2117.]

In the matter of the judicial settlement of the estate of Isaac H. Phillips, deceased. Decree rendered.

Frank L. Crane and Richard C. Hall, for executor.

James E. Bixby, for administrators of estate of Verne Phillips, deceased.

DAVIE, S. In the account filed for judicial settlement the executor charges himself with balance remaining on hand as established by decree on intermediate accounting April 11, 1903, and with "increase" to the amount of \$3,768.48, making total charges the sum of \$3,854.90; he credits himself with inventoried effects undisposed of, funeral expenses, annuity to the widow, moneys distributed to legatees, and expenses of managing the estate, amounting in all to \$2,257.11, leaving a balance for distribution, subject to commissions and expenses of this accounting of \$1,597.79. The "increase" with which the executor charges himself consists, largely, of income derived from the real estate. The expenses with which he credits himself were chiefly incurred in the management of the real estate and the production of such income. Construction of certain portions of the will is necessary to determine the rights of the various legatees in the balance remaining for distribution; and no question is raised as to the jurisdiction of the Surrogate's Court to construe, upon this accounting, the provisions of the will, although they relate to both real and personal estate. It is assumed by all the interested parties that construction is absolutely necessary as an incident to judicial settlement and distribution.

The will bears date April 1, 1899, was admitted to probate March 11, 1902, and names Isaac H. Phillips, a son of the testator, as sole executor thereof. Verne Phillips, another son, died intestate August 6, 1904, leaving no issue, and letters of administration upon his estate were thereafter granted to Nellie, his widow, and Frank Phillips, a brother. The contest relates, principally, to the interests of the estate of Verne Phillips, deceased, under the provisions of the residuary clause of the will.

By the first item of his will the testator gives his household effects to his widow, absolutely. By the second item he gives her the use, income and profits of the house and lot, occupied by him as a home, during the term of her natural life, subject, however, to the restrictions hereinafter set forth. The third item is as follows:

"I give and bequeath to my said wife the sum of one hundred dollars per year for and during the term of her natural life, and the same is made a charge and lien upon my real property and estate, and my executor hereinafter named shall from time to time pay the same to her as she may call for and need the same, but this bequest to her and the bequest to her of the use of the land where we now reside shall cease and terminate if she shall again remarry after my decease and the bequests and devises herein made to her are in lieu of dower."

The fourth item of the will is as follows:

"I give and bequeath and devise all the rest, residue and remainder of my property and estate, both real and personal that I may have, hold and own

at my decease including the real property, the use of which is devised to my wife, as follows:

"To my son, Isaac H. Phillips one-seventh part of the same; to my son Emmet Phillips one-seventh part of the same; to my son Verne Phillips one-seventh part of the same; to my daughter, Olive Phillips, one-seventh part of the same; to my daughter, Elizabeth Fuller, one-seventh part of the same and to my daughter-in-law, Lottie Phillips, the wife of my son Frank Phillips, one-seventh part of the same; and the same is given to them and to each of them and their heirs and assigns forever, subject however, to the following terms and conditions:

"That said estate and property shall not be divided in any way by the owners thereof within five years after my decease but shall during that period remain under the control and management of my executor hereinafter named, and if any of my sons or daughters, before named shall be deceased within said five years leaving no child or children, then the share of such one as shall be deceased, shall belong to their surviving brothers and sisters, their heirs and assigns forever.

"Nothing herein contained shall abridge the rights of my said wife, hereinbefore given to her unless she shall forfeit the same by marrying again after my decease, in which case the bequests to her in the second and third items of this will shall cease and be of no effect and the property herein given shall thereafter pass into the hands of my executor and belong to the seven persons, named hereinbefore, subject to the same conditions as the other bequests made to them.

"Their rights and interests in my real estate, shall be when divided and apportioned to them, subject to the rights of my said wife, as herein fixed and defined."

It is not difficult to ascertain the intention of the testator. It is apparent that he designed that the title to his residuary estate should vest in the legatees and devisees named immediately upon his death and probate of the will. Such intention is evidenced by the fact that the disposing clause under consideration contains words of present gift, and in the latter explanatory clause the testator designates such legatees as the owners of the estate. The phraseology is "that said estate and property shall not be divided in any way by the owners thereof within five years after my decease." He further intended that the title of the individual legatees should not be absolute for five years immediately following his death, but, during that time, should remain subject to be divested by the death of such legatee during that period; that if such legatee, so dying, left a child or children, his or her share should pass to such issue; dying without issue, such share should go to the surviving brothers and sisters. Now, is this entire provision valid, and can the intention of the testator be effectuated? Is any portion of it invalid? If so, can the valid portions be preserved and the invalid parts eliminated? It is a fundamental proposition in testamentary construction that:

"If, in any particular contingency, the power of alienation is so suspended that it may possibly exceed the limits prescribed by law, the estate granted on that particular contingency is void; but this defect which would affect the statute only if the contingency occurred can have no effect if the contingency does not occur. Then that unlawful estate is not attempted. Accordingly, the good alternative estate is sustained notwithstanding the defect which would have been in the other, if the course of events had created it." *Chapl. Susp. Allen*, 275.

The limitation upon the vesting of the absolute fee, to the effect that the title of any of the devisees who might die within five years should be divested, creates no invalidity. *Mead v. Maben*, 131 N.

Y. 256, 30 N. E. 98; Vanderpoel v. Loew, 112 N. Y. 167, 19 N. E. 481; Buel v. Southwick, 70 N. Y. 584. The attempted provision on behalf of the child or children of either of the devisees who might die during the five years is invalid, being in contravention of the statute against unlawful suspension of the power of alienation. To illustrate—assume that Verne Phillips, after the probate of the will, had joined with all the other devisees in conveying the real estate; he then dies during the five-year period leaving a child; the title of the grantee is defective because such child has succeeded to his father's interest; so that, under this provision of the will, if effect is to be given to it, the power of alienation is absolutely suspended for a period of five years, because, during that period, it could not be ascertained who would have the right to convey. Such five years might exceed the legal limitation of two lives in being and is therefore void under the statute. *Craig v. Hone*, 2 Edw. Ch. 557. This invalid portion may and should be eliminated in order to effectuate the testator's intention as far as possible. The law is well settled that, when invalid portions of a will may be eliminated so as to save intact the valid portions and still preserve the general testamentary scheme, construction to that effect should be adopted. *Kalish v. Kalish*, 166 N. Y. 368, 59 N. E. 917; *Oxley v. Lane*, 35 N. Y. 340; *Savage v. Burnham*, 17 N. Y. 561, 572; *Kane v. Gott*, 24 Wend. 641, 666, 35 Am. Dec. 641; *Parks v. Parks*, 9 Paige, 107, 117; *De Kay v. Irving*, 5 Denio, 646; *Lang v. Ropke*, 5 Sandf. 363, 371. This, then, leads to the result that in this case the residuary clause of the will must be construed as if no reference whatever had been to the issue of any legatee who might die during the five-year period; that is, each devisee upon the probate of the will became vested with the title to a one-seventh part of the estate, such title, however, subject to be divested in case of his or her death during the period named, and such interest thereupon to go to the surviving brothers and sisters. Had Verne Phillips left a child who was now seeking to secure an interest in the estate, he would be confronted with the illegality of that portion of the will upon which his claim was based; but no such contingency has arisen. He left no issue, and the question of the rights of such issue has not and cannot hereafter arise.

Regarding the second question, that of the alleged unlawful accumulation of the income, the will by its terms prohibits the division of any portion of the estate, real or personal, during a period of five years from testator's death. It assumes to place the management and control of the entire estate during that period in the hands of the executor. The will contains no direction for payment of debts, funeral expenses, annuity, or expenses of administration. The prohibition against distribution seems equally applicable to income as to the corpus of the estate. Such direction for accumulation of income is invalid. Section 51 of the Real Property Law (Laws 1896, p. 568, c. 547), provides that all directions for the accumulation of the rents and profits of real estate, except for the benefit of one or more minors, to terminate at or before the expiration of such minority, are invalid. Section 4 of the Personal Property Law (Laws 1897, p. 508, c. 417), makes a similar provision in regard to the income from personal prop-

erty. In *Kalish v. Kalish*, above cited, the court held that a testamentary direction that upon the death of a life tenant the executor hold the property in trust, with the power to collect the rents, issues, and profits, and after the payment of taxes, charges, and specified annuities, invest the surplus in real estate, and that the estate should not be settled for a period of five years after the death of the life tenant, final settlement to be made as soon thereafter as in the opinion of the executor would be for its best interests, was void as contravening the statute against perpetuities and as violating the statute against unlawful accumulation of rents and income, where the beneficiaries were all of full age.

In the case at bar none of the beneficiaries were minors at the date of the execution of the will. Such prohibition against distribution of income, under the statutes and authority cited, was invalid. Each of the devisees and legatees, they having become invested with title, became entitled to the one-seventh of the income from the death of testator to the date of the death of Verne Phillips, and from that time on each of the brothers and sisters became entitled to $\frac{1}{12}$ of the income, in consequence of their having succeeded to the share of the deceased brother. The share of each devisee in the real estate was subject to the payment of its proportionate part of the widow's annuity as the payment thereof was by the terms of will made an express charge thereon. The payments made by the executor from the income of the real estate to the widow upon her annuity should be sustained and allowed; and, as all the interested parties have acquiesced in the management and control of the estate by the executor, the expenses incurred by him in the management thereof should also be allowed, as well as the payments made by him for funeral expenses and upon the shares of the distributees. The account should be restated in accordance with the foregoing conclusions, and the balance, after payment of commissions and expenses of accounting to be fixed by the decree herein, distributed as follows: One-seventh of the net income from death of testator to August 6, 1904, date of the death of Verne Phillips, to the administrators of his estate, \$500 thereof should be retained by the executor until the further order of the court to await the termination of action now pending in which the executor as such is a party, and the balance divided equally between the six other legatees named in the residuary clause of the will. The terms of the decree will be settled, and such other evidence there taken as may be necessary in order to state the account as indicated at the surrogate's office in Salamanca October 7, 1907, at 11 a. m.

Decreed accordingly.

(56 Misc. Rep. 235.)

In re DURAND et al.

In re MORGAN'S WILL.

(Surrogate's Court, Monroe County. October, 1907.)

1. JUDGMENT—RES JUDICATA.

A judgment establishing the validity of certain testamentary provisions of a will, in an action attacking their validity, brought by one who based his claim on the statute of distribution, and who had no vested interest in the estate, does not estop the representatives of the son and widow, who

were not parties, and in whom the estate would have vested if the will were invalid, from claiming the estate in subsequent proceedings for the settlement of the executor's accounts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 80, Judgment, § 1213.]

2. WILLS—RIGHTS OF LEGATEES—ESTOPPEL—RECEPTION OF BENEFITS.

Legatees are not estopped from attacking certain provisions of a will as invalid because they have received benefits under other provisions concededly valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1717.]

3. SAME—CONSTRUCTION—NATURE OF ESTATE.

Testator, on the happening of certain events, directed his executor to pay over his estate to the trustees of the University of Rochester, with an express desire that it should be used for purposes of female education in the city of Rochester, under the management of the trustees there, in connection with the university, or otherwise, as the trustees might determine; the estate to be held as a perpetual fund, and the income to be used for the purpose named. *Held*, that the gift was to the trustees in their corporate capacity or the university absolutely; it being within the power of the university to devote the same to female education and no trust being thereby created.

4. PERPETUITIES—SUSPENSION OF POWER OF ALIENATION.

Where testator devised his estate to the trustees of a university, and expressed his desire that it should be used for the purposes of female education, the estate to be held by the trustees as a perpetual fund, and the income to be devoted to the object named, there was no suspension of the power of alienation.

5. CHARITIES—PURPOSE OF BEQUEST—CERTAINTY.

A devise to the trustees of a university, to be used for the purposes of female education of a high grade, in the city in which the university was located, was not void for indefiniteness as to the uses of the gift.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Charities, § 55.]

6. WILLS—BEQUESTS—CAPACITY TO TAKE—HOW DETERMINED.

Where a bequest to a university was not to vest until the death of testator's son, on whose death without lawful issue it was contingent, the capacity of the donees to take was to be determined as of the date of the death of such son, and though it could not have taken at the time of the testator's death, because of the general restrictions on the amount of yearly income of the university, where the income was subsequently increased by changes in the law, so as to make the gift within the capacity of the university to take, the legacy was valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 23.]

7. SAME—VALIDITY OF BEQUEST.

A university, being an educational institution, is not affected by Laws 1860, p. 607, c. 360; it not being one of the corporations named in such act.

In the matter of the settlement of the accounts of J. Ewing Durand and Charles R. Morgan, as executors of Lewis H. Morgan, deceased. Decree rendered.

Egerton R. Williams, Jr., for administrator of Lemuel S. Morgan, deceased, et al.

John E. Durand, in pro. per.

Asher P. Whipple, for Harriet A. Smith et al.

Wherry & Morgan, for Harriett S. Porter et al.

Charles M. Williams (Walter S. Hubbell, of counsel), for trustees of University of Rochester.

BRUCE, S. This is a proceeding upon the accounting of the executors of the last will and testament of Lewis H. Morgan, deceased. The testator died at Rochester, N. Y., on the 17th day of December, 1881, a

resident of Monroe county, leaving the last will in question, with a codicil thereto, which will and codicil were probated in the Surrogate's Court of Monroe County on January 13, 1882. The said testator left, him surviving, his widow, Mary E. Morgan, who subsequently died in 1883, and his only son and descendant, Lemuel S. Morgan. Said widow and son during their respective lifetimes enjoyed the use and income of the principal fund of the estate. The son Lemuel was a resident of Monroe county, and died on July 29, 1905, in said county, leaving him surviving, no wife and no child or descendants. The estate left by said testator consists practically entirely of personalty; the only real estate being a small parcel of no particular value. The said personal estate is still in the hands of said executors, and is now of the value of about \$75,000. Said executors at the time of the commencement of this proceeding had not converted the estate entirely into money; about \$20,000 being in mortgages.

Under the provisions of the will, the trustees of the University of Rochester claim that the residuary estate (that is, all that now remains of the estate after the payment of commissions and expenses of the accounting), is the property of the University of Rochester, a corporation granted a charter by the regents of the state of New York. William H. Morgan, as administrator of the estate of Lemuel S. Morgan, deceased, the son of the testator, appears herein and claims that said bequests to the trustees of the university are void, on the following grounds: First, that the residuary provisions of said will suspend the ownership of the testator's property beyond two lives in being at his death; second, that there is no bequest to or for the University of Rochester, but that the bequest is to the gentlemen who were the trustees of said university at the time of Lemuel S. Morgan's death, as a perpetual trust, to use the income in establishing and maintaining a new institution for female education; third, that the trust attempted to be created is void on the ground of the entire indefiniteness and uncertainty of the beneficiaries and the indefiniteness as to the means and mode of its execution; fourth, that the trust attempted to be created is void because of its scheme for an indefinite accumulation of income; fifth, that at least the bequest to the University of Rochester as to one-half of the estate is void, under chapter 360, p. 607, of the Laws of 1860, relative to bequests, which provides that no person having a husband, wife, child, or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious, or missionary society, association, or corporation, in trust or otherwise, more than one-half part of his estate after the payment of his or her debts.

The trustees of the University of Rochester raise the question herein that the said William H. Morgan and others of the heirs at law and next of kin, and the said William H. Morgan, as administrator of Lemuel S. Morgan, and the executor of Mary E. Morgan, deceased, the widow of said testator, are barred from maintaining their position herein because of a judgment of the Supreme Court in an action in which said William H. Morgan was plaintiff, and the said trustees and other defendants, which included some, but not all, of the parties to this proceeding, wherein the question now before us was in controversy, and the complaint of the plaintiff was dismissed.

Their claim is that said judgment is conclusive and *res judicata* against those claiming herein against the University of Rochester, and that the contestants, being legatees or legal representatives of legatees under the will, are estopped from objecting to the validity of any provision in the will, because of having taken benefits under the will. These questions must first be determined before proceeding to the merits of this controversy.

It appears from the evidence herein that William H. Morgan commenced an action in the Supreme Court for the construction of the will in question, and to recover for the next of kin of said Lemuel S. Morgan, deceased, the residuary estate bequeathed to the trustees of the University of Rochester, on the ground that the bequests so made to said University of Rochester were void. This action was tried; and, in an elaborate opinion, Justice Foote dismissed the complaint. The judgment does not state, nor does it appear in the judgment roll, that the complaint was dismissed upon the merits. The following, however, does appear in Justice Foote's opinion, reported at page 537 of 51 Misc. Rep., at page 1011 of 101 N. Y. Supp.:

"It is not necessary now to consider whether any personal representatives of the estate of Lemuel S. Morgan, the son, would be in a position to invoke the protection of the Constitution to prevent the application of this statute to this will. Neither plaintiff nor the defendant Mrs. Porter is entitled to represent in this action the estate or property owned by Lemuel S. Morgan at the time of his decease. If I am correct in holding that the sister and nephews and nieces acquired no interest, vested or contingent, in the personal property of Lewis H. Morgan not effectually disposed of by his will, then the complaint in this action must be dismissed, even if I am wrong in the construction which I have given to this will, and without reference to the other questions which have been so ably presented by counsel. For that reason, I shall not undertake to discuss or express any opinion upon these other questions. It is sufficient to say that the administrator of the estate of Lemuel S. Morgan, he having died intestate, is alone entitled to administer his estate and to recover such interest, if any, as he became entitled to in the funds involved in this action not effectually disposed of by the will of his father. The plaintiff's complaint must therefore be dismissed, with costs against plaintiff and against the defendant Mrs. Porter, and in favor of the defendants the trustees of the University of Rochester."

It appears that, since said judgment was taken, said William H. Morgan has been appointed limited administrator of the estate of Lemuel S. Morgan, deceased, and as such administrator asked leave to intervene and become a party to this proceeding, which privilege was granted to him as such limited administrator. In the action in the Supreme Court the office of administrator was not represented. There was no administrator of the estate of Lemuel S. Morgan then appointed, nor any a party to said suit. Harriett Porter, although a party to the said suit, was not a party as the executrix of Mary E. Morgan, deceased, the widow of said testator. Hence it appears that two estates which were not represented in said Supreme Court action are parties contestant in this proceeding. I am of the opinion that said judgment is not a bar or *res judicata* against the contestant William H. Morgan, as administrator of Lemuel S. Morgan, deceased, nor against Harriett Porter, as executrix of the last will and testament of Mary E. Morgan, deceased. *Genet v. Delaware & Hudson Canal Co.*, 163 N. Y. 173, 57 N. E. 297.

As to the question of estoppel, I see no force in the objection that the legatees cannot raise this question of the construction of the will because they have received their legacies under the will. If this were an attempt to set aside the will, such an objection might prevail; but the will is not attacked. The contention is that a certain provision of the will is in contravention of the statute, and that as to that part of the estate the testator died intestate. The will stands as to the legacies not affected by the residuary gift. Accordingly, I am of the opinion that this matter must be settled upon its merits, and will proceed to the consideration of such merits by quoting the provisions of the will pertinent hereto:

"Second. Upon the determination of said life estates, I give and devise the whole of my real and personal estate, with the exceptions hereinafter named to such child or children of my said son lawfully begotten as he may have born to him share and share alike, and to their heirs forever.

"Third. In case of the death of my said son without child or children or lawful descendants, I direct my said executors, after the death of my said wife, to convert the whole of my estate into money, in time and manner at their discretion except my family tomb at Mt. Hope Cemetery, my library and cases and my collections, and to pay over the same to the trustees of the University of Rochester, for the purposes hereinafter named.

"Fourth. Upon the occurrence of the events before named, the death of my son without children, I desire to use my said estate for the purposes of female education of high grade in the city of Rochester, and under the management of the trustees of said University; the said institution to be made a part of said University if the trustees chose to make it such or to be kept independent, and subject to their management and control. When said trustees shall have signified their acceptance of said devise and bequest, I direct my said executors to pay over the said proceeds of my estate into the hands of the said trustees of the University of Rochester, to be held by them as a perpetual fund, and the income thereof to be devoted to the objects named.

"Fifth. Since 1873, before which this plan was formed, my estate has shrunk, and it will be necessary to accumulate it, or it may be that parties will co-operate in the work of founding a female college in Rochester, I would much prefer that the fund herein provided be used in connection with other funds contributed for the same object that an institution might be created commensurate with the position and wants of Rochester.

"Sixth. I give to my son the use of my library, collections and cases for and during his natural life, and after his decease I give the same to the institution named herein should the trustees of the University accept the trust hereby created."

The first question to dispose of is whether or not, under the terms of this will, the University of Rochester is the beneficiary of the residuary estate mentioned in said will, or whether a trust has been created. If a trust has been created, we must consider the matter under the question of a trust. If no trust has been created, then we must consider the appropriate questions relative to the right of the University of Rochester to take said property.

It seems to me that the intent of the testator was to found a department, in the University of Rochester and under the direction of the University of Rochester, for female education of a high grade. The testator was a scholarly man, a man of learning and ability, and is presumed to have known that the University of Rochester was a corporation endowed with the privilege of educating the youth. Although, at the time of the making of the will and the death of the testator, the University of Rochester was not conducting a department for the education of females, nevertheless, under its charter it

was entitled at any time to undertake such work. The charter provided that:

"The regents do grant and declare that an institution for the instruction of youth in the learned languages and in the liberal and useful arts and sciences shall be, and hereby is, founded and established at or near the city of Rochester, in the county of Monroe, * * * by the name of the University of Rochester, and said corporation is by these presents invested with all the privileges and powers conceded to any college in this state."

There is no limiting of its powers as to which sex of youth it shall undertake to instruct, and it was the purpose of the testator to turn over his residuary estate to said university, the corporation, for the purpose of enabling it to educate females, either in connection with the department it already had, or, if it saw fit, a new department. The word "trust" used in said will I do not regard as intended by the testator to be used in its technical sense, but in the sense that the University of Rochester, upon receiving this property, had a responsibility to carry out, subject to the desires of the testator as set forth in his will. The context of the will clearly shows that the creation of a separate corporation was not contemplated by the will, for the institution was to be made a part of the University of Rochester, or to be kept independent. The trustees of the University of Rochester could not form another corporation, but they could carry on a department for women in a separate institution or building, or they could make it a part of the institution already formed. The trustees of the University of Rochester are a body corporate, and it is settled by authority that a gift or grant to the trustees of a corporation for a corporate purpose is a gift or grant to the corporation. *New York Institution for the Blind v. How*, 10 N. Y. 84.

The provision of the will suggesting that the trustees accumulate the fund until it is large enough to be of sufficient consequence to accomplish the result, and the intimation that others might join and increase the fund, further show the intention of the testator. He realized naturally that other people might be willing to add to this fund, by making subscriptions or contributions to the university to institute a woman's department, whether separate or in connection with the men's department in the college, and by a gift absolute he left it to the judgment of the university trustees in their corporate capacity to hold as an absolute gift, accumulate the income, and when the absolute gift and its increments of income, with or without other gifts, became sufficient to institute, under the university's corporate rights and privileges, provision for the education of women, it could do so. Taking any other view of the case would impute ignorance to the testator in the preparation of a provision in his will which was not lawful.

We therefore arrive at the conclusion that the University of Rochester, a body corporate, was intended by the said testator in his will to take said property as an absolute gift, for the purpose mentioned therein, the gift being subject to the life use thereof of the widow and son of the testator, and that it was also provided, if the said son died without lawful issue, the gift should not vest until the death of the son, when the contingency as to whether or not the son died with or without lawful issue was determined. Had the son left law-

ful issue, the property would have vested in such issue, and the bequest to the university would have failed; but, there being no issue of the son at the time of his decease, the vesting was immediate to the University of Rochester at Lemuel's death. *McGillis v. McGillis*, 154 N. Y. 539, 4 N. E. 145; *Matter of Crane*, 164 N. Y. 71, 58 N. E. 47; *Richards v. Hartshorne*, 110 App. Div. 650, 97 N. Y. Supp. 754.

In *Shipman v. Rollins*, 98 N. Y. 311, it was held that the capacity of the donee to take was determined as of the date when the contingency happened. Accordingly, it appears that the University of Rochester was capable of receiving this gift upon the death of Lemuel S. Morgan, and the same became vested in them immediately upon his death; and therefore the statutes in force at the time of the death of Lemuel S. Morgan determined the capacity of the university to take.

At the time of the death of the testator, December 17, 1881, the yearly income of a college, except by special charter, could not exceed \$25,000. The yearly income of the University of Rochester at that date was \$18,199.83; but in 1889 the Legislature amended the statute and thereby increased the permissible income to not to exceed \$250,000 yearly, and in the revision of the statutes, by what is known as the University Law (chapter 378, p. 774, of the Laws of 1892), no limitation appears, but the regents may authorize property holding beyond such as shall be authorized by charter or by special or general statute. By chapter 687, p. 1805, of the Laws of 1892 (section 12 of the General Corporation Law), it is provided that, if any general or special law heretofore passed, or any certificate of incorporation, shall limit the amount of property a corporation other than a stock corporation may take or hold, such corporation may take and hold property of the value of \$3,000,000 or less, or the yearly income derived from which shall be \$500,000 or less, notwithstanding any such limitations. These changes in the law having taken effect before the title to the residuary estate vested, as we have already held, said statutes determine the limit to which the university may take; and the act of the Legislature in changing such limitations does not affect vested rights or make a void legacy valid. The removal or expansion of the yearly income of a college did not make a new will or affect void bequests. There is a distinction between the Legislature's attempting to make a vested void trust or bequest valid, and the Legislature's increasing the limitation capacity to take before the bequest vests, or before the probable contingency which vests it may arise. The Legislature can enlarge the capacity of a corporation to take, and as to the powers of the corporation to take the limitation must be tested at the time, and not before, the corporation is called upon or in a position to take it.

By its charter the University of Rochester was invested with all the privileges and powers conceded to any college in the state; and, accordingly, the university is entitled to hold property to the amount of \$3,000,000 or less, and to have an income of \$500,000 or less. It appears from the evidence that, at the time of the death of the said Lemuel S. Morgan, the productive assets of the University of Rochester amounted to \$762,221.73; that the unproductive assets amounted to \$633,665.16; and that the income produced by the productive assets amounted to \$36,272.69. Therefore it appears that the University of

Rochester was far within the limit of the amount of its assets or its income which it was capable of holding and receiving at the time of the death of the said Lemuel S. Morgan, and that the gift or bequest under the will of the testator herein, being about \$75,000, is not sufficiently large to make the holdings of the University of Rochester, or the income from its holdings, at the time of the death of the said Lemuel S. Morgan, in excess of its rights and privileges.

Another objection raised to the University of Rochester receiving this bequest, to the extent of at least one-half thereof, is the provision of chapter 360, p. 607, of the Laws of 1860. It does not seem to us that this act applies to the University of Rochester. The University of Rochester is an educational institution incorporated by the regents, and is not one of the corporations named in said act. *Amherst College v. Ritch*, 151 N. Y. 283, 45 N. E. 876, 37 L. R. A. 305; *Allen v. Stevens*, 161 N. Y. 123, 55 N. E. 568; *Pritchard v. Kirsch*, 58 App. Div. 334, 68 N. Y. Supp. 1049; *Matter of Norton*, 39 App. Div. 369, 57 N. Y. Supp. 407, affirmed 160 N. Y. 684, 55 N. E. 1098; *Hollis v. Drew Theological Seminary*, 95 N. Y. 166.

Having determined that the university takes this bequest as an absolute gift, and that the vesting thereof took place upon the death of Lemuel S. Morgan, the authorities relative to trusts and perpetuities cited so ably in contestant's brief do not apply, if our construction of the will of the testator is correct.

By parity of reasoning we hold that the gift of the library cases and collections under the sixth provision of the will is valid, and they likewise go to the University of Rochester as an absolute gift; the institution referred to in said clause being the University of Rochester.

In recapitulation, I find: That the testator intended his residuary bequest, including his art collection, etc., in the event of the death of his son without lawful issue, as an absolute gift to the University of Rochester, to be used by said university for the maintenance of female education; that said gift vested upon the death of the said Lemuel S. Morgan; that the said university was at that time capable of receiving the same, and the purposes for which the gift was given were within the charter and the corporate powers of the university; that the law against perpetuities does not apply to this gift to the University of Rochester; that the purpose for which the gift was given is not void because of indefiniteness as to the uses and purposes for which the gift is to be used; that the statute (chapter 360, p. 607, Laws 1860) does not apply to gifts to the University of Rochester; that the objections of the contestants should be dismissed; that the executors be directed, after payment of commissions of the executors and expenses of this accounting, to pay the balance of the estate of the said Lewis H. Morgan, deceased, now on hand, and turn over the collection, etc., now on hand, to the trustees of the University of Rochester.

The executors are allowed, in addition to their commissions, the costs of this accounting, to be taxed as a contest. The trustees of the University of Rochester are allowed costs as of a contest, to be paid out of the estate of deceased. Otherwise no costs are allowed. Let findings be drawn in accordance with the terms of this decision, and a decree entered thereupon, upon three days' notice.

Decreed accordingly.

(122 App. Div. 564.)

LONG v. UNION RY. CO. OF NEW YORK CITY.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. STREET RAILROADS—PERSONS ON TRACK—INJURIES—EVIDENCE.

In an action against a street railroad for the death of one struck by a car while attempting to pass in front of it, evidence *held* to show contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 249.]

2. SAME.

It is contributory negligence for a pedestrian to attempt to pass in front of a moving street car six or seven feet away, irrespective of the speed of the car.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 249.]

3. DEATH—EXCESSIVE DAMAGES—PERSONAL INJURIES.

In an action for the death of a woman 58 years of age, who left surviving a husband and sons aged 30, 28, and 24 years, respectively, and who was the housekeeper of the family, a verdict for \$3,000 was excessive, under Code Civ. Proc. § 1804, providing that the damages shall be a fair and just compensation for the pecuniary injuries resulting to the persons for whose benefit the action was brought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 125-130.]

Appeal from Trial Term.

Action by Leonard Long, as administrator of the estate of Katherine Schmidt, deceased, against the Union Railway Company of New York City. Appeal by defendant from a judgment in favor of plaintiff, and from an order denying a motion for a new trial. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Charles F. Brown (Bayard H. Ames, on the brief), for appellant.

Frank F. Davis (Wm. M. Sullivan, on the brief) and John J. Hynes, for respondent.

CLARKE, J. This is an appeal from a judgment entered upon a verdict for \$3,000 in an administrator's action to recover damages for the death of one Katherine Schmidt, alleged to have been caused by the defendant's negligence. The accident occurred at 166th street and the Boston Post Road on July 2, 1904, about 8:30 in the evening, while it was still light. The plaintiff's testimony in regard to the accident is given by a niece of the decedent, one Mrs. Chapman. The witness and the decedent went to the northeast corner of 166th street on the Boston Post Road; Mrs. Schmidt intending to take a south-bound car. To take said car it was necessary to cross the Post Road; the downtown track being on the westerly side of the street. It was agreed on the record that it is about 400 feet from 166th to 167th street, that the width of Boston Road from curb to curb is 52½ feet, and that the distance from the easterly curb to the westerly rail of the downtown track is 31⅞ feet, and from the easterly curb to the easterly rail of the downtown track is 27 feet 6 inches. Although Mrs. Chapman was somewhat uncertain as to distances, testifying at one time that when Mrs. Schmidt stepped on the track the car was a block away, and at another time half a block,

reading her evidence in the most favorable light to plaintiff, she testified, in substance: That, when the decedent started directly across the road, the car was just about at 167th street—that is, 400 feet away—in plain sight, with no vehicles or obstructions of any kind in the way, and running fast. The decedent was strong, well and hearty, and possessed of good eyesight and hearing. Neither she nor Mrs. Chapman made any signal to the approaching motorman, or indicated in any way that she desired to board the car. The car did not change its speed from the first time she saw it until it struck the decedent. She said:

"I watched the car, saw the car coming, and then I watched my aunt, to see her cross, because I wanted to see that my aunt got the car. * * * I did not see her do anything at all. She just went right across."

When decedent stepped on the first rail of the south-bound track, the car was about half a block away. As the car struck her, she was just stepping off the track. She lay to the west of the track, maybe three feet or two. So that the evidence for the plaintiff, in effect, is that decedent stepped upon the south-bound track in front of a rapidly approaching car, in plain sight, in daylight, when the car was 200 feet away, and, walking directly across, before she could cross the track, a distance of four feet and eight inches, the car, without slackening its speed, ran 200 feet and hit her just as she was stepping off the last rail. This account of the accident is not credible.

For the defense, four witnesses testified that decedent stepped on the track from five to seven feet in front of the car. There was testimony that the motorman rang his bell, threw off his power, and put on his brake, and that when the car was brought to a standstill decedent was lying about even with the middle of the car. This judgment cannot be sustained, for these reasons:

First. The verdict was clearly against the weight of the evidence. The plaintiff failed to show that decedent was free from contributory negligence.

In *Greene v. Metropolitan St. Ry. Co.*, 100 App. Div. 303, 91 N. Y. Supp. 426, approved in *Lofsten v. Bklyn. Hts. R. Co.*, 184 N. Y. 148, 76 N. E. 1035, Mr. Justice Ingraham said:

"There was no evidence to justify a finding that the defendant was negligent, or that the plaintiff was free from negligence. The plaintiff and his companions walked in front of an approaching car which was coming at a rapid rate of speed. There was nothing to indicate to the motorman that they intended to cross in front of the car; nothing to require the motorman to stop the car to let them cross. But whatever may be said of the negligence of the defendant, it is entirely clear that the accident was caused by the negligent act of the plaintiff in stepping in front of this rapidly approaching car when it was at such a distance from him that no act of the motorman could have prevented the accident. While I do not think that as a matter of law it is contributory negligence for a person to attempt to cross the track of a street railroad, because a car is in sight, it is certainly reckless conduct to step in front of a rapidly approaching car when the car is only 10 feet away. I think it immaterial whether or not the plaintiff looked after leaving the sidewalk. If he looked, he must have seen that an attempt to cross in front of the car would necessarily result in a collision. If he saw a rapidly approaching car when he stepped off the sidewalk, and he walked on without looking, and because of his failure to look he placed himself in a position of danger, he was guilty of negligence which precludes recovery."

In the Lofsten Case, *supra*, the court said:

"We think that the evidence showed that he was guilty of contributory negligence as a matter of law, and that the judgment in his favor should be reversed. This car was proceeding at a rate of five or six miles an hour. It was in the neighborhood of fourteen feet from this curb from which plaintiff saw the car to the nearest rail of the track upon which he was struck. According to his version, there was nothing whatever to obstruct his view of the approaching car. He was struck by the nearest forward corner of the car. If he had exercised the slightest heed by either looking or listening, he would have detected its presence in such close proximity as to disclose at once the foolhardiness of stepping upon the track in front of it. Nothing but utter oblivion of his surroundings and of his obligations could mislead a traveler into the conduct displayed by plaintiff. It is true that the defendant's employes were under the obligation to manage the car with care, but this obligation of care was not confined to them. It also rested upon the plaintiff, and their negligence did not relieve him from the consequences of his own fault."

Second. The defendant asked the court to charge:

"If the jury believes the testimony of defendant's witnesses, or some of them, that the car was not more than six or seven feet away from Mrs. Schmidt at the time she stepped upon the track, their verdict must be for the defendant, whatever may have been the speed of the car."

The court refused so to charge, and the defendant excepted. This refusal constitutes reversible error. In *Bambace v. Interurban R. Co.*, 188 N. Y. 288, 80 N. E. 913, the court below refused to charge:

"If you believe that the deceased ran or stepped on the track when the horses attached to the defendant's car were not more than five or six feet from him, as testified to by several of plaintiff's witnesses, then your verdict must be for the defendant."

The Court of Appeals held that the defendant was entitled to the instruction asked for, and that, if the jury so found, it would follow as matter of law that the decedent was guilty of contributory negligence, and for this refusal reversed the judgment.

Third. The verdict was excessive. The decedent was a woman of 58, and left surviving a husband and three sons, 30, 28, and 24 years of age, respectively. She was the housekeeper of the family. The damages are limited to the fair and just compensation for the pecuniary injuries resulting from the decedent's death to the person or persons for whose benefit the action is brought. Section 1904, Code Civ. Proc. There was no support in the evidence for the amount of damages found.

The judgment and order should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

HARRINGTON V. GREEN.

(Supreme Court, Appellate Term. November 29, 1907.)

MONEY RECEIVED—GROUNDS.

Where defendant received a check, knowing that part of the amount was intended for plaintiff, but failed to pay it over, it may be recovered in an action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Money Received, § 31.]

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

Action by John P. Harrington against John K. Green. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Hippolyte A. Geney, for appellant.

Morgan & Mitchell (Arthur L. Marvin, of counsel), for respondent.

PER CURIAM. The defendant knew, when he received the check for \$372 from the Bromonia Company, that \$82.44 thereof was intended for the plaintiff. He neglected to pay it over, and he should be required in this action, brought to recover that sum, to respond accordingly.

Judgment reversed, and new trial ordered, with costs to appellant to abide event.

FRANK v. MANHATTAN MATERNITY & DISPENSARY.

(Supreme Court, Appellate Term. November 29, 1907.)

1. MASTER AND SERVANT—INDEFINITE TERM—DAMAGES FOR DISCHARGE.

A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at a rate fixed for whatever time the party may serve; and so, where one was hired at \$50 a month, nothing being said about the period of service, the master had the right to discharge him at any time, and incurred no obligation beyond the wages due at the time of such discharge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Master and Servant, § 19.]

2. SAME—ACTIONS FOR WRONGFUL DISCHARGE—BURDEN OF PROOF.

Where a contract of hiring is general or indefinite in its terms, it is prima facie a hiring at will, and the burden rests upon the servant to prove that the hiring is for a definite term.

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Alexander Frank against the Manhattan Maternity & Dispensary. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Strong & Cadwalader, for appellant.

Greenenthal & Greenenthal, for respondent.

LEVENTRITT, J. The plaintiff had a recovery of \$50 below in an action for unlawful discharge. The judgment cannot stand, as there was a failure to prove a hiring for any definite term. On direct examination the plaintiff testified that he saw the superintendent of the defendant, Miss Mewhort, "in the middle of March, 1907, and Miss Mewhort accepted me at \$50 a month." Not a word was said as to the term of hiring. He went to work on March 16th, received \$25 on April 1st, and on the 10th was told to leave on the following day. This action is brought to recover wages up to the 11th and

damages from that day to the 1st of May—in all, \$50. On cross-examination the plaintiff testified:

"Q. How many months did she tell you she would engage you for? A. That was not spoken about at all. Q. Did she say that she would engage you for one month? A. She did not say anything about it at all."

It is too well settled in this state to require extended citation that "a hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve." *Martin v. Insurance Co.*, 148 N. Y. 117, 121, 42 N. E. 416; *Wood, Master and Servant*, § 136; *Baker v. Appleton & Co.*, 107 App. Div. 362, 95 N. Y. Supp. 125; *Outerbridge v. Campbell*, 87 App. Div. 597, 84 N. Y. Supp. 537; *Fischer v. Sanchez & Haya Co.*, 44 App. Div. 629, 60 N. Y. Supp. 1138. Where a contract of hiring is general or indefinite in its terms, it is *prima facie* a hiring at will, and the burden rests upon the servant to prove that the hiring is for a definite term. *Hotchkiss v. Godkin*, 63 App. Div. 469, 71 N. Y. Supp. 629.

Not only has the plaintiff failed to carry the burden, but his cross-examination affirmatively shows that no definite period of service was in the contemplation of either party. The defendant, therefore, incurred no obligation beyond the wages earned from the 1st of the month to the 11th and was within its legal rights in dispensing with plaintiff's services thereafter.

Judgment reversed, and new trial ordered, with costs to appellant to abide event. All concur.

(56 Misc. Rep. 434.)

POLLACK v. WIENER et al.

(Supreme Court, Appellate Term. November 29, 1907.)

PLEADING—BILL OF PARTICULARS—COUNTERCLAIM.

Pursuant to an order to file a bill of particulars of a counterclaim, providing that in case of default the defendants would be precluded from giving evidence in support of the counterclaim, defendants filed a bill claimed to be in compliance with the order, and no further steps were taken by plaintiff with reference to the bill until the case came on for trial. *Held*, that plaintiff, having failed to move before trial for a further bill of particulars, could not object to receiving evidence of the counterclaim.

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Jacob Pollack against Louis Wiener and others. From a judgment for plaintiff, defendants appeal. Reversed.

Argued before GILDERSLEEVE, P. J., and LEVENTRITT and ERLANGER, JJ.

Rudolph Cherurg, for appellants.

Laurence J. Bershad, for respondent.

LEVENTRITT, J. The plaintiff sued to recover an unpaid balance for carpenter work performed under a contract with the de-

defendants, who pleaded a general denial and set up a counterclaim for damages resulting from a breach of the contract. Upon the defendants' failure to comply with a demand made for the particulars of the counterclaim, the plaintiff moved for a bill, and the motion was, on the 14th of January, 1907, granted by default, and thereafter an order was entered reciting the particulars which the defendants should furnish within three days, and providing that upon failure to comply the defendants would be precluded from offering on the trial proof in support of their counterclaim. Within the specified time the defendants filed a bill which they claimed was a compliance with the order. No further steps were taken by the plaintiff with reference to the bill. The cause came to trial before a jury on the 16th of April, 1907, and when the defendants tendered evidence to sustain their counterclaim the plaintiff objected that the bill filed was not in compliance with the order, and invoked the provision which precluded the evidence. The defendants insisted that the order had been obeyed; but the learned trial justice held to the contrary, rejected the testimony, and the defendants excepted to the ruling. From a judgment entered upon a verdict in favor of the plaintiff, the defendants appealed, assigning as error the rejection of the evidence offered.

It was error to exclude evidence of the counterclaim. The defendants, having served a bill which they deemed a compliance with the order, were not in default. If the plaintiff claimed the bill defective or insufficient, he should have moved for a further bill. He cannot wait until the trial, without intimating that the bill does not meet the requirements of the order, and then for the first time advance his objection and invoke the drastic provision precluding the giving of testimony. *Faller v. Ranger*, 99 App. Div. 374, 91 N. Y. Supp. 205; *Reader v. Haggin*, 114 App. Div. 112, 99 N. Y. Supp. 681.

Judgment reversed, and new trial ordered, with costs to appellant to abide event. All concur.

(56 Misc. Rep. 160.)

PEOPLE v. BENNETT.

(Supreme Court, Special Term, Fulton County. October, 1907.)

1. PUBLIC LANDS—CUTTING TIMBER—DAMAGES.

Code Civ. Proc. §§ 1667, 1668, providing for treble damages for the cutting of trees, do not relate to damages to trees on lands of the state; but a complaint demanding such damages, otherwise sufficient, is not therefore liable to demurrer.

2. SAME.

Laws 1900, p. 63, c. 20, § 222, authorizing the recovery of penalties for cutting trees on state lands, in an action for trespass or in a separate action, was not repealed by amendment to Code Civ. Proc. § 488, taking effect April 23, 1900.

Action by the people against Charles H. Bennett. Demurrer to complaint overruled.

John K. Ward, for plaintiff.

Countryman, Nellis & Du Bois, for defendant.

SPENCER, J. The complaint sets up two separate causes of action; one for trespass in cutting and destroying trees with treble damages, and the other to recover penalties under the forest, fish, and game law. The defendant demurs: First, that the facts set up in each cause of action are insufficient to constitute a cause of action; and, second, a misjoinder of causes of action.

It is alleged, in the first cause of action, that the plaintiff is the owner of the tract of land known as the forest preserve; that defendant has cut and carried away 69 trees therefrom and has therefore become liable to the plaintiff for treble the sum of the damages caused thereby. I have not been referred to any statute or decision as authority for demanding treble damages, except sections 1667 and 1668 of the Code of Civil Procedure. I know of no other. But these sections do not authorize treble damages for cutting trees on the lands of the state. They long formed a part of the Revised Statutes (Banks & Bros. [6th Ed.] pt. 3, c. 5, tit. 6, § 1), and were incorporated into the Code of Civil Procedure. In transition, there was a slight change of terms, chiefly for tautological reasons, but no change in respect to the persons and corporate bodies to which they had application. The operation of the statute is limited to the lands of persons and of cities, villages, and towns, and does not extend to lands of the state. The state is a political corporate body. If treble damages had been intended as to the cutting of trees on its land, it would have been named. It is not a "person," within the meaning of the word as there employed. The statute itself recognizes the distinction. Not being within the list of corporate bodies therein mentioned, the state may not be regarded as included within its provisions. It is not difficult to perceive the reason for this exclusion. When first enacted, the cutting of trees on state lands was not regarded as a serious offense. Indeed, the man who cleared the forests was regarded in the light of a public benefactor, as he rendered the most laborious service in the process of converting the wilderness into fruitful fields. But the situation changed, and now we rightfully regard him who despoils the uplands as a criminal. Therefore the Legislature has imposed penalties for such despoliations, but the law in respect to treble damages remains the same. Without a clear expression of legislative intent, it will not be presumed to have been extended to the cutting of trees upon lands of the state.

If this be so, then the first cause of action must fall before the demurrer, unless the facts alleged are sufficient to sustain an action for simple trespass. Mindful of the leniency with which pleadings are now regarded, I am inclined to that opinion. Under the statute, as it stood in the Revised Statutes, it was doubtful whether the plaintiff or the defendant was required to produce evidence in exculpation; but, on being carried into the Code of Civil Procedure, a change was made, imposing the burden of such proof upon the defendant. 'Throops' Code of Civ. Proc. 1885, §§ 1667, 1668; *Humes v. Proctor*, 73 Hun, 265, 26 N. Y. Supp. 315. Hence the awarding of treble damages must be regarded as incident to the action, and the demand therefore finds appropriate place in the prayer for relief. By demanding treble damages, the plaintiff has prayed for too much; but that does not make the pleading demurrable. It may be stricken out or treated as surplusage.

As the first cause of action contains facts sufficient to constitute a cause of action for trespass, and the second cause of action is also sufficient, the first ground of demurrer must be overruled.

We now come to the second ground of demurrer. It must be conceded that under the Code (section 484) an action for trespass to real property may not be joined with a cause of action for penalties under the forest, fish, and game law. *People v. Wells*, 52 App. Div. 583, 65 N. Y. Supp. 319. This decision, although by a divided court, is conclusive here. The misplacement of subdivision 10 in section 484 of the Code, whether accidental or intentional, was the occasion of its failure to authorize the joinder. But in section 222 of the forest, fish, and game law (Laws 1900, p. 63, c. 20), we find an express permission to recover the penalties thereby imposed, either in the action for trespass or in a separate action. This provision went into effect February 10, 1900, and the aforesaid addition of subdivision 10, April 23, 1900. It is earnestly contended by defendant that the latter accomplished the repeal of the former. But the former is an express enactment, having special reference to a particular subject, while the operation of the latter comes, not from any express intention, but from its position as related to other subdivisions of the same section. Its language is not prohibitory, but permissive and regulative, and should yield to an express permission, such as is found in the other enactment. It is true that the Legislature has since added subdivisions 11 (Laws 1906, p. 50, c. 29) and 12 (Laws 1907, p. 37, c. 26), in respect to penalties under the agricultural and health laws, and placed them in the same relation as subdivision 10; but the statutes in respect to those subjects contain no provision as to the manner of enforcing penalties. Nor are they related to land, as in the case of trees. It is difficult to perceive any reason why trespass to real estate and the penalties for cutting trees thereon should not be joined in one action, if they relate to the same transaction. This, it seems to me, is the intention of the provision in the forest, fish, and game law, which evidently has reference to the action to recover damages for the trespass, thereby permitting a recovery for both damages and the penalties in one action. The general policy of the law is to limit the number of actions as much as practicable; and, inasmuch as no harm may result to the defendant from uniting the two, it would seem that the permission so to do has not been abrogated. The case of *People v. Wells*, supra, is not applicable. That action was brought under the forest, fish, and game law before its revision, and did not contain the provision now under consideration. That court in none of its various opinions referred to the present law and may not be regarded as having adjudicated thereon.

It follows that the demurrer must be overruled, with costs. The defendant may plead over on the usual terms.

Ordered accordingly.

STATE BOARD OF PHARMACY v. GASAU.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. ADULTERATION—CREAM OF TARTAR—"DRUG."

Cream of tartar is a drug within the statutory definition of the words "food" and "drug" in Public Health Law, Laws 1893, p. 1510, c. 661, art. 3, §§ 40, 41.

2. SAME—STATUTORY REGULATIONS—ILLEGAL SALES BY MERCHANTS—PENALTY.

Public Health Law, Laws 1893, p. 1554, c. 661, art. 11, § 187, as amended by Laws 1897, p. 173, c. 297, confers authority on the state board of pharmacy to license pharmacists, prohibits any person from practicing as a pharmacist without a license, and exempts from the operation of the provision sales by retail dealers or merchants of cream of tartar, etc. Laws 1900, p. 1471, c. 667, art. 11, § 197, provides that all pharmaceutical preparations sold in a pharmacy, store, etc., shall be of the standard quality and purity established by the United States Pharmacopoeia, and that every proprietor shall be responsible for the quality of such commodities. Section 199 provides that the provision shall not apply to the sale by merchants of cream of tartar, "except as herein provided." *Held*, that section 197 is applicable to merchants selling cream of tartar, and the board of pharmacy may prosecute for the penalty prescribed for a violation thereof, the statute as amended indicating a legislative intent to continue to permit the sale of cream of tartar by merchants without procuring a pharmaceutical license, and to devolve on the state board of pharmacy the duty of enforcing the law, and the right to collect the penalties for selling drugs not of the standard of purity.

Houghton, J., and Patterson, P. J., dissenting.

Appeal from Appellate Term.

Action by the state board of pharmacy against Fred Gasau for the penalty for a violation of Public Health Law, Laws 1893, p. 1554, c. 661, art. 11, § 187, as amended by Laws 1897, p. 173, c. 297. From a determination of the Appellate Term (52 Misc. Rep. 490, 102 N. Y. Supp. 539), affirming a judgment of the Municipal Court in favor of plaintiff, defendant appeals. Affirmed.

Argued before PATTERSON, P. J., and LAUGHLIN, HOUGHTON, SCOTT, and LAMBERT, JJ.

Charles M. Stafford, for appellant.

Hieronimus A. Herold, for respondent.

LAUGHLIN, J. The defendant has been convicted for selling cream of tartar not of the standard of strength, quality or purity prescribed in the United States Pharmacopoeia.

Section 40 of article 3 of the public health law (Laws 1893, p. 1510, c. 661) has not been amended since its original enactment. It defines the terms "food" and "drug" as follows:

"The term 'food,' when used herein, shall include every article of food and every beverage used by man and all confectionery; the term 'drug,' when so used, shall include all medicines for external and internal use."

Section 41 of the same article of the public health law, entitled "Adulterations," provides, among other things, as follows:

"No person shall, within the state, manufacture, produce, compound, brew, distill, have, sell or offer for sale any adulterated food or drug. An article

shall be deemed to be adulterated within the meaning of this act: A. In case of drugs: (1) If when sold under or by a name recognized in the United States pharmacopœia, it differs from the standard of strength, quality or purity laid down therein. (2) If, when sold under or by a name not recognized in the United States pharmacopœia, but which is found in some other pharmacopœia or other standard work on materia medica, it differs materially from the standard of strength, quality or purity laid down in such work."

This part of section 41 has not been amended. Subdivision "d" of said section provides that every person violating any provision of the section shall forfeit to the people of the state the sum of \$100 for every such violation. Cream of tartar is a drug within the statutory definition already quoted. Article 11 of the public health law, as originally enacted, contains no provision defining the adulteration of drugs, or imposing a penalty therefor. It conferred authority upon the state board of pharmacy to license pharmacists and assistant pharmacists, and in section 186 it prohibited any person from practicing as a pharmacist without such license. By section 187, defining the application of article 11, it excluded from its operation, among other articles, "the sale of the usual domestic remedies by retail dealers in the rural districts." This section was amended by chapter 297, p. 173, of the Laws of 1897, and sales by retail dealers or merchants of cream of tartar, among other things, was exempted from the operation of the provisions of that article. At this time it is quite clear that the purpose of the Legislature in exempting the sale of cream of tartar from the operation of the provisions of article 11 was to render it unnecessary for the seller to procure a license as pharmacist or assistant pharmacist, or to employ a licensed pharmacist or assistant pharmacist in the sale thereof; and the sale of adulterated drugs was left subject to the operation of the provisions of article 3. The Legislature also prescribed in article 11, which originally related wholly, if not principally, to sales without a license, a penalty for a violation thereof (section 190), and authorizes an action by the state board of pharmacy to recover the same. In 1900 the Legislature, by chapter 667, p. 1471, materially amended the provisions of article 11 of the public health law, and added, among other provisions, section 197, which provides as follows:

"Adulteration or Substitution of Drugs, Chemicals and Medicines.

"Subdivision 1. Unless otherwise prescribed for, or specified by the customer, all pharmaceutical preparations, sold or dispensed in a pharmacy, dispensary, store or place, shall be of the standard strength, quality and purity, established by the latest edition of the United States Pharmacopœia.

"Subdiv. 2. Every proprietor of a wholesale or retail drug store, pharmacy, or other place where drugs, medicines or chemicals are sold, shall be held responsible for the quality and strength of all drugs, chemicals or medicines sold or dispensed by him except those sold in original packages of the manufacturer, and those articles or preparations known as patent or proprietary medicines.

"Subdiv. 3. Any person who shall knowingly, wilfully or fraudulently, falsify or adulterate any drug, medical substance or preparation, authorized or recognized in the said Pharmacopœia, or used or intended to be used in medical practice or shall knowingly, wilfully or fraudulently offer for sale, sell or cause the same to be sold, shall be guilty of a misdemeanor; all drugs, medical substances, or preparations so falsified or adulterated shall be forfeited to the board and by the board destroyed."

The application of the article which had previously been defined by section 187 was by the amendment defined in section 199, as follows:

"Sec. 199. Application of Article Limited. This article shall not apply to the practice of a practitioner of medicine, who is not the proprietor of a store for the dispensing or retailing of drugs, medicines and poisons, or who is not in the employ of such a proprietor, and shall not prevent practitioners of medicine from supplying their patients with such articles as they may deem proper, and except as to the labeling of poisons it shall not apply to the sale of medicines or poisons at wholesale when not for the use or consumption of the purchaser, or to the sale of paris green, white hellebore and other poisons for destroying insects, or any substance for use in the arts, or to the manufacture and sale of proprietary medicines, or to the sale by merchants of ammonia, bicarbonate of soda, borax, camphor, castor oil, cream of tartar, dye stuffs, essence ginger, essence peppermint, essence wintergreen, nonpoisonous flavoring essence or extracts, glycerine, licorice, olive oil, sal ammoniac, salt-petre, sal soda and sulphur, except as herein provided. Provided, however, that in the several towns of this state outside of incorporated villages, physicians may compound medicines, fill prescriptions, and sell poisons, duly labeling the same as required by this act, and merchants, and retail dealers may sell the ordinary non-poisonous domestic remedies."

The contention of the learned counsel for the appellant is that his client in selling cream of tartar was subject to the operation of the provisions of sections 40 and 41 of article 3 of the public health law, the material parts of which, so far as applicable, have been stated, and that he was exempt from the operation of the provisions of article 11 and from the penalty now prescribed in section 201 for a violation of said article. It is to be observed that, by the provisions of the public health law as they existed prior to the amendment of 1900, the sale by merchants of cream of tartar was wholly excluded from the operation of the provisions of article 11, but that by the provisions of section 199, added by said amendment, this exemption was modified by the following clause: "Except as herein provided." It is manifest, therefore, that the Legislature intended that some part of article 11, as amended in 1900, should be applicable to merchants selling cream of tartar. An examination of the provisions of the original statute, as amended, indicates that the Legislature intended to continue to permit the sale of cream of tartar, among other things, by merchants without procuring a license or employing a licensed pharmacist or assistant pharmacist. It is also evident, I think, that, with respect to violation of the law by selling adulterated drugs, the Legislature deemed it advisable to devolve upon the state board of pharmacy the duty of enforcing the law and to confer upon it the right to collect the penalties, and to that end section 197 was enacted, defining, so far as applicable to the question now under review, the standard of purity of drugs substantially the same as defined in section 41 of article 3. I am of opinion, therefore, that the clause "except as herein provided," in section 199, leaves the provisions of section 197 applicable to merchants selling cream of tartar, and that they may be prosecuted by the state board of pharmacy for the penalty prescribed in section 201. It may be more pointedly observed, as already indicated, although the question is not presented for decision, that the effect of the amendment is to relieve those selling adulterated drugs from the application of the provisions of sections 40 and 41 of ar-

ticle 3, and to subject them only to the penalty prescribed in section 201 for a violation of the provisions of article 11, for it is not likely that the Legislature would prescribe, assuming that it has the power, two penalties for such an offense, to be prosecuted and recovered in separate actions by different parties. See *Excelsior Petroleum Co. v. Lacey et al.*, 63 N. Y. 422.

It follows that the determination should be affirmed, with costs.

SCOTT and LAMBERT, JJ., concur. PATTERSON, P. J., and HOUGHTON, J., dissent.

HOUGHTON, J. (dissenting). If there be any cause of action against this defendant, I think it is in favor of the people to recover the penalty of \$100 provided by the general health law for the sale of an adulterated food or drug, and that no cause of action exists in favor of this plaintiff to recover the \$25 penalty prescribed by the Pharmacy Act.

General merchants who sell "cream of tartar," "olive oil," "castor oil," "ammonia," and the other articles enumerated, to my mind, are plainly excepted by section 199 from the provisions of the pharmacy law. The primary object of article 11, of the health law, which is entitled "Pharmacy," is to regulate druggists and the preparation and sale of medicines. The article does not in express terms prohibit the sale of impure drugs. Subdivision 1 of section 197 prescribed that "pharmaceutical preparations" must be of the purity and strength established by the United States Pharmacopoeia. In order that the plaintiff may recover the penalty imposed by subdivision 4 of section 201, "cream of tartar," "olive oil," "castor oil," and the like must be deemed "preparations" of that character. A "pharmaceutical preparation" is primarily a combination of drugs compounded for medicinal uses.

Recognizing this strict meaning, but realizing, also, that many harmless drugs and chemical preparations need not be sold under the supervision of expert pharmacists, the Legislature, by section 187 of the act of 1893 (page 1554, c. 661), excepted from the provisions of the pharmacy article the "usual domestic remedies" when sold by dealers in rural districts, and specified what was deemed such remedies. This exemption section was remodeled by chapter 297, p. 173, Laws 1897. By such amendment, retail dealers and merchants, wherever trading, were permitted to sell various specified articles, including "cream of tartar," and were excepted from the operation of the pharmacy law. Retail dealers in the rural districts were still permitted to sell the "usual domestic remedies," but the articles which they could sell were reclassified. For example, they were still permitted to sell "aloes," "myrrh," "arnica," and like remedies, but "borax," "camphor," "sulphur," and other articles which were enumerated in the law of 1893 as properly sold by rural dealers were shifted to the list of articles which general merchants, wherever located, might sell. The amendment of 1897 clearly shows that the Legislature intended to allow general retail merchants to sell the articles specified, and not to confine their sale to drug stores in charge of licensed pharmacists.

Such merchants must sell pure drugs, as provided by section 41 of the general health law, and were subject to the penalty of \$100 in an action brought by the people if they did not, but the provisions of the pharmacy act did not apply to them at all, for they were expressly exempted from its provisions.

I do not think the words "except as herein provided," in section 199 (Laws 1900, p. 1481, c. 667), had the effect of bringing merchants within the provisions of the pharmacy law or under the jurisdiction of the state board of pharmacy. There is found in the section itself sufficient to which these words can relate, without construing them to apply to the broad provisions of the pharmacy act, the principal object of which is to regulate the sale of medicinal, "pharmaceutical preparations." There is no punctuation, aside from a comma, from the beginning of the section to the end of the words. Several exemptions are provided. "Paris green" may be sold only for destroying insects, but "any substance for use in the arts" and "dye stuffs," whether poisonous or not, may be sold. Many substances used in the arts and in paints and dye stuffs are poisonous, and, if so, they are required to be labeled when sold. The words "except as herein provided" do not relate exclusively to the exemption of merchants selling the specified articles, but they relate to all the exemptions of the section, and find ample scope for their application. "Cream of tartar" and "olive oil" and "licorice" and "essence of peppermint" are not in any proper sense "pharmaceutical preparations," and the prescribed standard of purity for such preparations does not apply to them, and there is no reason why it should.

If the defendant has violated the health law by selling an impure food or drug, he can be prosecuted by the people for such act; but I do not think this plaintiff has any cause of action against him. Any other construction tends to drive the sale of essences and ordinary articles used in cooking and in the household into drug stores, instead of permitting their sale by merchants of various kinds. The Legislature could not have intended any such thing.

I think the judgment should be reversed.

PATTERSON, P. J., concurs.

FELDHEIM v. BROOKLYN, Q. C. & S. R. CO.

(Supreme Court, Appellate Division, Second Department. December 5, 1907.)

1. CARRIERS—STREET CARS—INJURY TO PASSENGER—DANGEROUS PLACE.

Where plaintiff was injured while riding on the rear bumper of a crowded car, he assumed the risk incident to that position, although his fare was accepted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1375-1382.]

2. SAME—NEGLIGENCE—PROOF.

Where a passenger on a crowded street car was injured by the trolley pole slipping from the wire, negligence could not be inferred from such occurrence, and no recovery could be had in the absence of some additional

proof that the slipping of the pole from the wire was due to some negligent act of the carrier.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1283.]

Appeal from Municipal Court, Borough of Brooklyn, Second District.

Action by Lionel Feldheim, by Louis Feldheim, his guardian ad litem, against the Brooklyn, Queens County & Suburban Railroad Company. From a Municipal Court judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before WOODWARD, JENKS, HOOKER, RICH and MILLER, JJ.

Francis R. Stoddard, Jr., for appellant.

Morris W. Hart, for respondent.

MILLER, J. The plaintiff, with three other persons, was riding on the rear bumper of a crowded car. The trolley pole slipped off the wire, and the rope attached to it caught the plaintiff about the shoulder, and cast his head against the vestibule window, breaking the glass and inflicting slight injuries, for which he has recovered the judgment appealed from. He had often seen trolley poles come off the wire, and knew that, when that occurred, the rope went up with the pole. He describes the car as traveling very fast, with a rocking and swaying motion. The only witness who testifies as to the speed of the car says that it was going 12 miles an hour. The conductor had collected plaintiff's fare.

It has frequently been held that it is not negligence per se to ride upon the platform or running board of a crowded car, but even in such case the passenger assumes the usual risks incident to the position. *Kiefer v. Brooklyn Heights R. R. Co.*, 111 App. Div. 404, 97 N. Y. Supp. 841. But I do not think there is any assurance from the company that a passenger can ride on a bumper with safety, even though his fare is accepted, because the position is so obviously dangerous that the law will not create an implied assurance of what the party must have known was not the fact. Rather than wait for another car, the plaintiff preferred to take the risk of riding in a perilous situation. By accepting his fare the defendant consented that he do that, and probably agreed that it would not by any affirmative act increase his peril, but it incurred no obligation to protect him from the obvious perils of the situation. The plaintiff should have known that he was likely to be caught by the rope in case the pole slipped off the wire. He voluntarily put himself in the way of that danger, and, as nothing occurred but what any man of ordinary prudence should have apprehended, he was guilty of contributory negligence as matter of law.

Moreover, the plaintiff failed to prove that the defendant was guilty of any negligence causing the injury. No unusual movement of the car is disclosed, and nothing is shown to have occurred other than the ordinary and usual occurrences incident to the running of trolley cars. The trolley pole slipped off the wire, but negligence cannot be inferred from so common an occurrence, and there is nothing in the record to disclose what caused the pole to slip off. The plaintiff argues that it

was the speed of the car and the rocking and swaying motion, but it is just as probable (and to my mind more probable) that the plaintiff or some of his companions on the bumper caused the occurrence. In any view of the case, the plaintiff cannot recover, and the judgment should be reversed.

Judgment of the Municipal Court reversed, and new trial ordered; costs to abide the event. All concur.

PEOPLE ex rel. JACQUES v. FLAHERTY, Sheriff.

(Supreme Court, Appellate Division, Second Department. December 5, 1907.)

THEATERS AND SHOWS—OFFENSES BY MANAGERS—CONSTRUCTION OF STATUTE.

A ticket taker at a theater is not a person who manages the theater in part within Pen. Code, § 290, declaring a person who permits to remain in any theater owned, kept, or managed by him in whole or in part any child under the age of 16 years, unless accompanied by its parent, guilty of a misdemeanor.

Appeal from Special Term, Kings County.

Writs of habeas corpus and certiorari by the people, on the relation of John Jacques, against Michael J. Flaherty, sheriff. From an order discharging relator (105 N. Y. Supp. 387), the sheriff appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, HOOKER, RICH, and GAYNOR, JJ.

Peter P. Smith, for appellant.

Meier Steinbrink, for respondent.

RICH, J. This is an appeal from an order of the Special Term made upon the return of writs of habeas corpus and certiorari declaring the relator unlawfully restrained of his liberty and ordering his discharge. Relator was a taker of tickets at the main door of the Imperial Theater in Brooklyn. On the evening of March 22, 1907, he received tickets from two boys, aged 14 and 15 years, respectively, not accompanied by parent or guardian, and admitted them to the theater. For this act he was arrested, and upon examination before a magistrate held for the action of the Court of Special Sessions pursuant to the provisions of section 208 of the Code of Criminal Procedure. Writs of certiorari and habeas corpus were subsequently issued, upon the return of which he was discharged.

The said section 290 of the Penal Code, under which the prosecution was had, provides:

"A person who permits or allows to remain in any * * * theater * * * owned, kept or managed by him in whole or in part, any child actually or apparently under the age of sixteen years, unless accompanied by its parent or guardian * * * is guilty of a misdemeanor."

The serious question presented for our determination is whether the relator was "a person" who "managed" that theater "in part" within the meaning of the statute. We are unable to concur in the argument

that it was the intention of the Legislature to include within the provisions of the act all employes of a theater who were called upon for the exercise of any discretion. The duty of the ticket taker is to admit those persons presenting tickets, and presumably to see to it that none enters without a ticket. The person in the box office passes upon the right of the individual to admission, and the mere ticket taker cannot be held liable criminally for the admission to the theater of a holder of a ticket as manager. He is no more the manager of a theater than is the boy who draws kerosene oil the manager of a department store. Relator contends that one of the boys was preceded by an adult who informed him that they were with him; but that is immaterial in the view we take of the statute. The Legislature might require the ticket taker to pass upon the right of persons to enter the theater, but it has not done so.

The order discharging the relator must be affirmed, with \$50 costs and disbursements to the respondent. All concur.

RIDGWAY et al. v. HAWKINS.

(Supreme Court, Appellate Division, Second Department. December 5, 1907.)

TRESPASS—TRESPASS TO REALTY—TITLE TO SUPPORT ACTION.

Where, in trespass on unoccupied land, it was admitted that the entry was on the land described by the complaint, and the only question was whether plaintiff or defendant's licensor owned the land, and plaintiff proved an unbroken chain of title back to 1745, and defendant showed a chain of title in his licensor from 1828, plaintiff was entitled to recover; Code Civ. Proc. § 960, providing that, in trespass on unoccupied lands, plaintiff on showing an unbroken chain of title for 80 years is presumptively the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, §§ 18-31.]

Rich, J., dissenting.

Appeal from Trial Term, Suffolk County.

Action by Sarah G. Ridgway and others against Alexander Hawkins. From a judgment for plaintiffs, defendant appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, RICH, MILLER, and GAYNOR, JJ.

Ackerly & Miles, for appellant.

Livingston Smith, for respondents.

GAYNOR, J. This is an action for damages for trespass on unoccupied lands in Suffolk county by cutting timber thereon. The court directed a verdict for the plaintiff. The complaint describes the lands particularly, and also as being lot 29 in the West Meadow Division of the township of Brookhaven, alleges title thereto in the plaintiffs and the trespass by the defendant on specified dates. The answer admits that the defendant on the said dates "entered upon the lands and premises described in the complaint and cut down some standing trees and timber thereon," but alleges as a defence that the said lands were then and are the lands of one Hawkins, and that such entry of the defendant was by her consent and authority.

There was therefore no dispute in respect of the locus in quo, it being admitted by the answer that the entry was made upon the lot described in the complaint. The only question therefore was whether the plaintiffs or the defendant's licensor owned it. By section 960 of the Code of Civil Procedure proof in an action for trespass upon unoccupied lands of an unbroken chain of title in the plaintiff for thirty years next preceding the trespass is presumptive evidence of his ownership. The alleged trespass was in 1906, and the plaintiffs proved an unbroken chain of title to the said lot 29 from thence back to 1745, having first put in evidence the town record of a written instrument made by a committee of the trustees of the common lands of the town of Brookhaven in 1738 of the division of the West Meadow lands into 46 lots and giving the boundaries of each. The course of the trial, including the failure of the defendant to move to dismiss, shows that there was no question that each conveyance in the plaintiffs' chain conveyed the land described in the complaint, and the brief for the defendant on this appeal expressly admits that to be the fact in these words:

"The plaintiffs trace a record title of a certain lot number 29 in that division down and into themselves."

And then follows a statement of the defendant's theory of the plaintiff's case.

The defendant put in evidence a chain of conveyances beginning in 1828 and terminating in his licensor. If it should be conceded that the land thereby conveyed was the locus in quo, i. e., lot 29 (which does not seem to have been either proved or claimed), it would not help the defendant, for the title proved by the plaintiffs, and which is presumptively good, runs back 83 years further than the chain of conveyances proved by the defendant.

The learned counsel for the plaintiff called a surveyor to prove a map which he had made to show the boundaries and location of lot 29, and it may be he failed to do so. But there was no need of such a map, and the mind of the learned trial judge was not misled by the potter about it.

The judgment should be affirmed.

Judgment affirmed, with costs.

WOODWARD and MILLER, JJ., concur. HIRSCHBERG, P. J., not voting.

RICH, J. (dissenting). I am unable to agree with my associates in this case. Defendant admits going upon the premises described in the complaint; but alleges that they were owned by Myra B. Hawkins, who had given him permission to go upon them, and the only question in dispute was the location of this line. Plaintiffs have shown a paper title from the year 1738 and defendant from about 1829. Upon the trial the plaintiffs called a surveyor who, after testifying to the line, admitted upon his cross-examination that there were no visible monuments of any kind; that he started from the "old field gate,"

and ran the lots out according to the record. He did not know the location of the "old field gate" of his own knowledge, and relied upon information obtained from people living in the neighborhood. This he was compelled to do because there was no visible trace of this starting point. Neither party has ever occupied the land in dispute, and it was necessary for plaintiffs to show that the conveyances constituting their chain of title covered the locus in quo. In order to meet this requirement they called the surveyor, who relied entirely upon hearsay evidence in locating his starting point. Defendant did not concede the accuracy of this survey. On the contrary, he called a surveyor, who denied its correctness. At the close of the evidence, the learned trial justice directed a verdict for the plaintiff. In this we think he was in error. No one was called to give any information as to where the "old field gate" was located, and no evidence was offered upon the subject, except the hearsay evidence of plaintiffs' surveyor. He may have been correct, but the defendant was entitled to have the jury pass upon that question; and I must vote for a reversal of the judgment.

FINCH v. GILLESPIE

(Supreme Court, Appellate Division, Second Department. December 5, 1907.)

PRINCIPAL AND AGENT—ACTS OF AGENT—RATIFICATION—ACCEPTANCE OF BENEFITS.

A power of attorney authorized the agent to sell real estate of the principal and to execute conveyances, and also to mortgage real estate of which the principal was then seized or might thereafter be seized. The agent, acting for the principal, purchased premises which were conveyed to the principal and the deed recorded, and nearly two years thereafter the agent executed and delivered a deed of the premises to another. It did not appear that the principal during the 10 years that elapsed after the sale ever questioned the power of the agent to sell. *Held*, that the title of the one to whom conveyance was made was valid as against the objection that the power of attorney, while authorizing mortgages on after-acquired property, did not relate to a sale of after-acquired property; it being presumed after lapse of such time that she had received the benefits of the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 647.]

Submission of controversy between Edward C. J. Finch and Earl A. Gillespie on agreed statement of facts under Code Civ. Proc. § 1279. Judgment for defendant.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and MILLER, JJ.

Ed. J. Fandrey, for plaintiff.

George F. Alexander, for defendant.

WOODWARD, J. On the 29th day of December, 1891, one Harriet E. Roberts executed and delivered a power of attorney to Wilbur H. Whitlock, in which the said Wilbur H. Whitlock was authorized, "for me and in my name, place and stead and to my use, to grant, bargain, sell and convey any and all my real estate situate, lying and

being in the counties of Kings, Queens and Suffolk, in the state of New York, for such prices and on such terms as to him shall seem best and proper, and for me and in my name to make, execute, acknowledge and deliver good and sufficient deeds and conveyances for the same, either with or without covenants of warranty; and also to borrow upon bond and mortgage upon any and all of my real estate which I am now seized or possessed of or which I may hereafter be seized or possessed of, such sum or sums of money as to him may seem proper and best and to sign, seal and deliver bond or bonds for the payment of sums of money upon such terms as to him may seem proper," etc. There was no limitation as to time in the instrument, and it is evident from the language that Harriet E. Roberts intended by this power of attorney to invest Mr. Whitlock with general powers to deal with her real estate within the territory mentioned until she should revoke the power. This is evident from the fact that so late as August 28, 1895, Mr. Whitlock, acting for her, purchased the premises involved in this controversy, which were duly conveyed to her; the deed being duly recorded in the clerk's office of Queens county. There is no suggestion that the said Harriet E. Roberts did not get a perfectly valid title by this transaction. There is no suggestion that she ever questioned Mr. Whitlock's power to act as her agent in the purchase of these premises, or that she ever did any act to indicate an intention of revoking the power of attorney made and delivered in 1891, and which was duly entered of record in the said clerk's office. On the 1st day of June, 1897, acting under the authority of this recorded and unrevoked power of attorney, Mr. Whitlock executed and delivered a deed of the said premises purchased in 1895 to Earl E. Gillespie, the defendant in this action; and the only question presented is whether the defendant can convey a good and marketable title to the premises. The plaintiff urges that the power of attorney did not relate to after-acquired property, and that the deed to the defendant is not therefore clear as to title.

While it is true that, considered abstractly, the fact that the power of attorney specifically authorizes mortgages upon after-acquired property, while failing to give authority for selling after-acquired property might be construed to negative such a power, when the conceded facts are all kept in mind, and we seek to arrive at the intention of the parties, it must be clear that the power of attorney, duly recorded for the purpose of enabling Mr. Whitlock to deal generally with Mrs. Roberts' real estate, was a continuing power, and authorized Mr. Whitlock to convey any or all of her property within the territory mentioned. She permitted Mr. Whitlock to purchase the premises for her. The deed conveying the same to her had been recorded for nearly two years; thus showing at least a ratification of a very general agency outside of the authority conveyed in the power of attorney, and with this property in her possession she permitted this continuing power of attorney to stand recorded, thus evidencing a purpose to continue the power. There is no suggestion in the record before us that Mrs. Roberts during the period of practically 10 years that has elapsed since the sale of the premises to the defendant has ever questioned the power of Mr. Whitlock, that she has ever questioned the possession or own-

ership of Mr. Gillespie under the deed from Mr. Whitlock, or that the power of attorney has ever been modified or revoked in any particular. It must be presumed that she has, long ere this, received the benefits of the sale of the lands involved; and we thus not only have the practical construction of the parties to the power, but we have a state of facts which would estop Mrs. Roberts from questioning the authority of the man whom she has held out by her acts, as well as her written power of attorney, as her agent in dealing with her real estate in the counties mentioned. *Hyatt v. Clark*, 118 N. Y. 563, 568, 23 N. E. 891.

We are of the opinion that Mr. Gillespie's title, in so far as it is questioned here, is perfectly valid, and that judgment should be entered for the defendant.

Judgment for the defendant on submission of controversy, without costs. All concur.

GHERKY v. STATE LINE TELEPHONE CO.

(Supreme Court, Appellate Division, Second Department. December 5, 1907.)

1. EVIDENCE—SELF-SERVING ACTS.

On an issue as to whether a contract for the building of a conduit system had been modified because of an alleged material mistake of fact as to the character of paving necessary to be taken up and relaid, plaintiff claiming that the original contract contemplated the removing and relaying of brick pavements laid in sand, and that the contract was modified because it was found that the pavement was grouted, which required different tools, evidence of plaintiff's superintendent that, when he went to do the work, he took with him only such tools as were available to remove a sand pavement, was inadmissible as self-serving.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1068-1074.]

2. APPEAL—EVIDENCE—ADMISSION—PREJUDICIAL ERROR.

Where a referee erroneously regarded inadmissible evidence as material, and must have given weight thereto in plaintiff's favor in determining the crucial fact in the case, the admission was reversible error under the rule that the reception of illegal evidence is presumptively injurious to the party objecting, except where the presumption is repelled, and it clearly appears beyond possibility of rational doubt that the result would have been the same if the evidence had been rejected.

Appeal from Special Term, Westchester County.

Action by William D. Gherky against the State Line Telephone Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Argued before HIRSCHBERG, P. J., and WOODWARD, GAYNOR, RICH, and MILLER, JJ.

Frank B. Vermilya, for appellant.

Nathan P. Bushnell, for respondent.

RICH, J. This is an appeal from a judgment entered upon the report of a referee. The action was brought to recover a balance alleged to be due on a contract for the building of a conduit system by plaintiff for defendant in the village of Peekskill. Included in the items which the plaintiff sought to recover was \$696.94 for extra work in taking up and relaying a brick pavement. Defendant denied

any liability and alleged an offset of \$808.45 for brick furnished plaintiff in relaying such pavement. As the conclusion we have reached rests upon these items and the evidence given in connection therewith, we do not regard it necessary to consider the other questions presented by the record. Upon the trial the parties stipulated regarding these items as follows: By the defendant:

"It is agreed on behalf of the defendant that if it be found by the referee that the contract of May 12, 1905, was entered into under a mutual mistake of fact concerning a material part of the work to be done, and that the said agreement of May 12, 1905, was superceded by a new agreement of June 2, 1905, whereby the defendant agreed to furnish and pay for the brick and the extra cost of laying it, then and in that event the plaintiff is entitled to recover the sum of \$696.94, the reasonable value of taking up and relaying the brick pavement as shown by the following statement."

By the plaintiff:

"The plaintiff likewise admits that the defendant expended the sum of \$808.45 in the purchase of paving brick, freight, and cartage thereon, which were used by plaintiff to repave the streets of the village of Peekskill; plaintiff not admitting liability therefor, but admitting that the said sum is a proper set-off against the claim of the plaintiff, if it be held by the referee that no mutual mistake of fact existed at the time the contract of May 12, 1905, was entered into concerning a material part of the work to be done, and if it be held that the original contract of May 12, 1905, was not superceded by a new agreement of June 2, 1905, whereby defendant agreed to furnish and pay for the brick and the extra cost of laying it."

The crucial question in the case therefore rested upon the issue of whether or not, when the contract of May 12, 1905, was entered into, there was a mutual mistake of fact concerning a material part of the work to be done, upon discovery of which the plaintiff notified the defendant that he elected to rescind the contract and was directed by the defendant to proceed with the work, and it would pay for the extra work and brick made necessary by the fact that the brick composing the pavement to be relaid was laid with grout between the interstices of the brick, instead of being laid in sand on a concrete base, with sand, instead of grout between the bricks. This question of fact was sharply contested, and the plaintiff called as a witness one James McHale, who went to Peekskill as plaintiff's superintendent of the work to be done under the contract, who, after testifying that a different kind of tools was necessary and required to take up a grouted brick pavement than were used in taking up one having sand joints, was asked the following question:

"Which character of tool did you bring with you when you come here around Memorial Day, 1905; the tools that were necessary to take up the sand brick pavement, or the tools necessary to take up the grouted pavement?"

This was objected to as incompetent, irrelevant, calling for the mental operation of the plaintiff or his agent, and as attempting to prove a self-serving act or declaration. The objection was overruled, the defendant excepted, and the witness answered:

"Just the ordinary pick and shovels. Q. For taking up which kind of pavement? A. For taking up the sand jointed pavement."

This evidence had no relevancy to the question in issue, unless it be assumed that the plaintiff had directed his foreman to take that

class of tools because of his understanding that the pavement to be taken up had no grout between the bricks. Regarded in this light it was clearly incompetent as a self-serving act or declaration of the plaintiff. 1 Enc. of Evidence, p. 273; *Mowbray v. Gould*, 83 App. Div. 255, 82 N. Y. Supp. 102; *Griffin v. Train*, 90 App. Div. 16, 21, 85 N. Y. Supp. 686; *Healy v. Malcolm*, 77 App. Div. 69, 78 N. Y. Supp. 1043; *Grant v. Pratt & Lambert*, 87 App. Div. 490, 84 N. Y. Supp. 983. It and its effect is the same as if the plaintiff had been permitted to testify that he told McHale to take the class of tools that he did take because the pavement to be taken up was a sand joint pavement and had no grout between the joints, and the plaintiff cannot be permitted to establish his cause of action by his own declarations made to a third party, not in the presence of defendant's officers.

This evidence was incompetent, and the judgment must be reversed, unless it clearly appears from the record that the result would have been the same if the evidence objected to had not been received. The rule governing the determination of this question is stated in many well-considered cases to be:

"The reception of illegal evidence is presumptively injurious to the party objecting to its admission; but where the presumption is repelled, and it clearly appears, on examination of the whole record, beyond the possibility of rational doubt, that the result would have been the same if the objectionable proof had been rejected, the error furnishes no ground for reversal." *People v. Gonzales*, 85 N. Y. 59, cited in *McGean v. Manhattan Railway Co.*, 117 N. Y. 219-224, 22 N. E. 954; *Havens v. Gilmour*, 83 App. Div. 84, 82 N. Y. Supp. 511; *Ward v. Hoag*, 78 App. Div. 510-512, 79 N. Y. Supp. 708.

The presumption of injury is strengthened in the case at bar by the fact that the learned referee regarded the evidence as material, which naturally and logically leads to the conclusion that he gave weight to it in determining the crucial question of fact in plaintiff's favor, and we can only speculate upon what would have been the result if the incompetent evidence had been excluded. Under such circumstances, it is not within the province of this court to say that the defendant has had a fair trial upon the merits, or that its rights may not have been prejudiced, as we held in *Ward v. Hoag*, supra.

The judgment must be reversed, and a new trial granted; costs to abide the event. All concur, except HIRSCHBERG, P. J., not voting.

QUINTO v. ALEXANDER.

(Supreme Court, Appellate Division, Second Department. December 5, 1907.)

FRAUDS, STATUTE OF—SALE OF LAND—PARTY ENTITLED TO RAISE OBJECTION.

Vendee in a contract for the sale of land cannot raise the question that the contract is not sufficiently expressed in writing to satisfy the statute of frauds (*Real Property Law*, Laws 1896, p. 602, c. 547, § 224); but vendor alone can raise that question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, *Frauds, Statute of*, § 245.]

Appeal from Municipal Court of New York.

Action by Anthony Quinto against Arthur Alexander. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered. Argued before WOODWARD, JENKS, HOOKER, GAYNOR, and RICH, JJ.

Meyer Greenberg, for appellant.

James E. Smyth, for respondent.

GAYNOR, J. This action is to recover back \$50 paid by the plaintiff to the defendant as a deposit on a contract for the purchase by the former of the latter of a lot of land. The defendant did not refuse performance, but the plaintiff claims the right to recover on the ground that the contract was not sufficiently expressed in writing to satisfy the statute of frauds. But this is wholly irrelevant. It is only the vendor who can raise that question. Even if the contract be oral, the vendee has to carry it out or forfeit the amount which he has paid, on a tender of performance by the vendor. The statute only requires that the contract of sale be reduced to writing and signed by the vendor; the vendee does not need to sign it. Real Property Law, Laws 1896, p. 602, c. 547, § 224; *Collier v. Coates*, 17 Barb. 471; *Pelletreau v. Brennan*, 113 App. Div. 806, 99 N. Y. Supp. 955. The judgment should be reversed.

Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event. All concur.

KAPLAN v. BERGMANN et al.

(Supreme Court, Appellate Division, Second Department. December 5, 1907.)

VENDOR AND PURCHASER—RESCISSION BY PURCHASER—DEFECT IN QUANTITY.

Under a contract to convey premises described as being 81 feet 9 inches in front and rear, and 75 feet in depth on each side, where a survey showed an encroachment of a building of 5½ inches at the northeast corner, extending easterly, constantly growing less until it ran out at a point 19 feet and 11 inches from the corner, it was a substantial objection to the title tendered that vendors had no title to the portion included in the gore.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 255-258.]

Appeal from Kings County Court.

Action by Joseph Kaplan against Morris Bergmann and another. Judgment for defendants, and plaintiff appeals. Reversed, and new trial ordered.

Argued before JENKS, HOOKER, GAYNOR, RICH, and MILLER, JJ.

Robert H. Roy, for appellant.

Henry Hetkin, for respondents.

RICH, J. This is an action brought to recover money paid as a deposit pending passing of title and expenses incurred in an examina-

tion of the vendors' title. The learned trial court found the facts in accordance with plaintiff's contention, but found as matter of law that the objections raised by plaintiff to defendants' title were insufficient in law to entitle him to refuse performance of the contract, and that the defendants were able to convey the title to the premises mentioned therein according to the terms thereof.

In this conclusion the trial court was in error. By the terms of the contract, the defendants undertook and agreed to convey to plaintiff the absolute fee of "premises known as 897-9 Myrtle avenue, dimensions of land being thirty-one (31) feet nine (9) inches in front and rear and seventy-five (75) feet in depth on each side, subject to state of facts shown on survey of Fred Thomas, dated Feb. 2/04." The survey referred to disclosed that a building on adjoining property encroached on the rear easterly side of the land described in the contract 5½ inches at the northeast corner, extending easterly, constantly growing less until it run out at a point 19 feet and 11 inches from such corner. The defendants had no title to the land included in this gore, and could not give absolute title to it, subject to the encroachment of the building, as they had contracted to do. The rule is well settled that an encroachment to an extent less than the reduction of the area on the lot in the case at bar constitutes a valid reason for rejecting a tendered title. *Klim v. Sachs*, 102 App. Div. 44, 92 N. Y. Supp. 107; *Snow v. Monk*, 81 App. Div. 206, 80 N. Y. Supp. 719; *Place v. Dudley*, 41 App. Div. 540, 58 N. Y. Supp. 671; *Wilhelm v. Federgreen*, 2 App. Div. 483, 38 N. Y. Supp. 8, affirmed without opinion 157 N. Y. 713, 53 N. E. 1133. The reasoning of the court in these cases applies with greater force to the case under consideration, where the only title the defendants could give deprived the plaintiff of the right of ownership, as well as of possession, of the land included in the gore. The defendants' inability to convey to the plaintiff, as they had contracted to do, an absolute fee of the land described in the contract, subject to the encroachment shown by the survey, constituted a substantial objection to the title, which plaintiff had the right to avail himself of by refusing to accept the title tendered.

The judgment must be reversed, and a new trial ordered; costs to abide the event. All concur.

(122 App. Div. 543.)

BERNZOTT v. BERNZOTT.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

MARRIAGE—ANNULMENT—FINAL JUDGMENT—RIGHT TO ENTRY.

Under Code Civ. Proc. § 1774, as amended by Laws 1902, p. 951, c. 364, as amended by Laws 1905, p. 1205, c. 537, postponing the right to final judgment in an action to annul a marriage, or for divorce until 3 months from the filing of the decision, but providing that after that period, and within 30 days thereafter, final judgment shall be entered as of course, unless the court shall have otherwise ordered, where, after entry of an interlocutory judgment for plaintiff in an action to annul marriage, defendant's default was opened on condition that within 10 days he pay all taxable costs, the court was without authority to refuse to enter final judgment on defendant's failure to pay as directed, on affidavit by him that

costs had not been paid because he was unable to do so; but, the 3 months having expired, plaintiff was entitled to judgment as of course.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, § 139.]

Appeal from Special Term.

Action by Matilda Bernzott against George Frederick Bernzott. There was an interlocutory judgment for plaintiff, and, from an order denying her motion for final judgment, she appeals. Order reversed, and judgment ordered for plaintiff.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Alfred Beekman, for appellant.

Andrew J. Smith, for respondent.

INGRAHAM, J. This action, which was brought to annul the marriage between plaintiff and defendant, was at issue and came on for trial at Special Term, when the defendant failed to appear, whereupon the court took the evidence offered by the plaintiff, filed a decision finding the facts as alleged by the plaintiff and directing the entry of a judgment declaring the marriage contract between plaintiff and defendant void and annulling it. Upon that decision an interlocutory judgment was entered on the 24th day of June, 1907, which adjudged that the plaintiff was entitled to a judgment that the marriage contract made and entered into between the plaintiff and the defendant be declared void, and the said marriage annulled, and that after the expiration of three months final judgment be entered granting the relief mentioned, unless otherwise ordered by the court. After the entry of this interlocutory judgment, the defendant made a motion to open the default and to be allowed to come in and defend. That motion resulted in an order entered on the 23d day of September, 1907, allowing the defendant to appear and defend the action upon condition that, within 10 days after the entry of the order and service of a copy thereof upon his attorneys, he pay all the taxable costs and disbursements in the action, and that, in the event of the failure of the defendant to pay such costs and disbursements imposed as a condition for the opening of the default within the time limited, the motion to open the default be denied. A copy of that order was served, but the defendant failed to comply with the conditions imposed, and on the 10th day of October, 1907, the plaintiff served a notice of motion for final judgment with a copy of a proposed judgment. This application was based upon an affidavit from which the foregoing facts appeared: That on the 24th day of September, 1907, a copy of that order was served upon the attorney for the defendant, and on the same day a bill of costs, together with notice of adjustment for September 25, 1907, was likewise served, and on the 25th day of September, 1907, costs were adjusted at the sum of \$118.55; that 10 days had elapsed since the service of such order, with notice of entry, and since the adjustment of such costs; and that the defendant had failed and neglected to pay the amount of costs directed to be paid by him to the attorneys for the plaintiff, or any part thereof. In answer to that application, the defendant submitted an af-

fidavit in which he said that he was unable to pay the costs, and therefore had not paid them, and on that affidavit the Special Term denied the motion for final judgment.

But for the amendment of section 1774 of the Code of Civil Procedure, by chapter 364, p. 951, of the Laws of 1902, as amended by chapter 537, p. 1205, of the Laws of 1905, the plaintiff would have been entitled to final judgment upon filing of the decision. By that section, however, there was a postponement of the right to final judgment until the expiration of three months from the filing of the decision; but after the expiration of that period of three months, and within 30 days thereafter, final judgment was to be entered as of course upon such decision, unless for sufficient cause the court in the meantime should have otherwise ordered. By this provision the entry of final judgment is postponed for three months after the filing of the decision to allow an application to be made to the court to open a default, for a new trial, or for an order to require further or other proceedings before the entry of final judgment; but in case no order of the court which affected the decision or the right to a final judgment was made within three months from the filing of the decision, the plaintiff was then entitled to final judgment as directed by the decision as of course. The court has no authority to refuse to enter final judgment because the party against whom the judgment is to be entered objects to it, or wants to make an application after the expiration of three months. The right of the plaintiff to move for final judgment is confined to 30 days after the expiration of the three months after filing the decision, and for the court to postpone the entry of final judgment beyond that time would affect the right of the plaintiff to enter final judgment upon the decision. Undoubtedly, before or after the entry of final judgment, the court would have power to open the default upon such terms as would be just. The defendant made such a motion. It was granted so that an opportunity was afforded him to come in and defend the action. He, however, has refused to comply with the terms imposed by the court as a condition of presenting his defense. There is nothing here disclosed that justified the court in refusing to grant the final judgment to which plaintiff was entitled.

The order appealed from should therefore be reversed, with \$10 costs and disbursements, and the final judgment proposed by the plaintiff entered. All concur.

(122 App. Div. 569.)

PEOPLE v. DAVIS.

(Supreme Court, Appellate Division, First Department. · December 6, 1907.)

1. PERJURY—MATERIALITY OF FALSE STATEMENT.

Code Cr. Proc. § 569, relating to the qualifications of bail, provides that a surety must be a resident and a householder or freeholder, worth the amount specified in the undertaking, exclusive of exempt property. Section 572 requires the sureties to justify in all cases by affidavit taken before the magistrate. Section 573 permits the district attorney or magistrate to further examine sureties upon oath concerning their sufficiency in such manner as the magistrate may deem proper. Section 575 provides

that, when the examination is closed, the magistrate must make an order either allowing or disallowing bail, etc. A proposed surety on a bail bond appeared before a magistrate and answered questions as to his qualifications, and signed the bail bond and affidavit of qualification, in which he swore that he was a resident freeholder and was worth \$1,000 over and above his just debts and liabilities; that his property consisted of a certain described house and lot of land worth a certain sum; and that the title was recorded in his name at the office of the register of the county. His statements as to the ownership of the property were false, and were known by him to be false. *Held*, that the false statements constituted perjury, since the sufficiency of the surety on a bail bond is the subject of judicial inquiry, and the statements made in the affidavit of the proposed surety were material to such issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 88–84.]

2. SAME—SUFFICIENCY OF EVIDENCE.

In a prosecution for perjury in swearing falsely to an affidavit of justification as a surety on a bail bond, evidence *held* to sustain a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 117–124.]

Appeal from Court of general sessions.

James H. Davis was convicted of perjury, and appeals. Affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Wilford H. Smith, for appellant.

Wm. Travers Jerome, Dist. Atty. (Robert S. Johnstone, of counsel), for respondent.

CLARKE, J. On December 28, 1906, Hon. Robert C. Cornell, one of the city magistrates of the city of New York, was sitting in the First District Magistrate's Court, and there was pending before him a complaint or information charging one Lavelle with the crime of assault. The magistrate after an examination made an order holding Lavelle for trial, and fixed the amount of bail. Thereafter the appellant, Davis, appeared before the magistrate, who questioned him concerning his property. He described his property, and said it was of record in his name. A bail bond and affidavit of justification was then prepared. Davis signed the undertaking and the affidavit. The magistrate duly administered the oath to Davis, and upon the statements contained in the affidavit he accepted him as surety. Lavelle and Davis, as surety, executed the undertaking, and acknowledged the execution thereof before the magistrate, and the prisoner was discharged from custody. In the affidavit Davis swore that he was a resident and freeholder within the county and state of New York, and was worth the sum of \$1,000 over and above all his just debts and liabilities, and that his property consisted of a house and lot of land on the south side of 122d street, 200 feet west of Amsterdam avenue, worth \$90,000, subject only to a mortgage of \$45,000, and that the title thereto was of record in his name in the office of the register of the county of New York. Davis was indicted for perjury for feloniously, knowingly, willfully, corruptly and falsely swearing to the truth of said statement. Upon the trial, it was conclusively shown that the statement as to the ownership of the property stated in the affidavit was false and known

to be false, and Davis was found guilty as charged. From the judgment entered thereon, this appeal is taken.

The appellant urges that the indictment is fatally defective, in failing to charge that the alleged false statements were made in a material matter, and in failing to state sufficient facts showing that such statements were made in a material matter. The indictment sets forth fully the substance and nature of the proceedings before the magistrate and the defendant offering himself as surety. It sets forth fully the facts showing the subject of inquiry depending before the magistrate, namely, whether he would accept the defendant as surety upon the undertaking therein described, and alleges that it was "then and there necessary that the said Robert C. Cornell, such magistrate as aforesaid, should know the circumstances of the property of the said James H. Davis in order that he might determine whether he would or should take, accept, and approve the said James H. Davis as such bail and surety upon the undertaking aforesaid." It is true that, to constitute the crime of perjury, the false statements must have been material to the issue or inquiry. The question here was whether the magistrate would accept Davis as surety, and to that end it was clearly material that he should know the circumstances of his property. Section 569 of the Code of Criminal Procedure provides that:

"The qualifications of bail are as follows: (1) He must be a resident and a householder or freeholder within the State, and unless the magistrate otherwise directs, within the county; (2) he must be worth the amount specified in the undertaking, exclusive of property exempt from execution. * * *

Section 572, Id., provides that:

"The surety or sureties must in all cases justify by affidavit taken before the magistrate. * * *

Section 573:

"The district attorney or the magistrate may therefore further examine the sureties upon oath concerning their sufficiency in such manner as the magistrate may deem proper. The questions put to the sureties and their answers must be reduced to writing, and must be substantiated by them."

Section 575:

"When the examination is closed, the magistrate must make an order either allowing or disallowing bail, and must forthwith cause the same with the affidavits of justification and the undertaking of bail to be filed with the clerk of the court to which the depositions and statement must be sent as prescribed in section 221."

It is clear from reading these sections together that the sufficiency of the surety is the subject of judicial inquiry, and that whether or no the prisoner will be admitted to bail upon the undertaking by the proposed surety depends upon the judicial determination that said surety has sufficient property to respond to the obligation in case there is a breach. Therefore what the surety produces by way of evidence, whether in his original affidavit or upon further justification upon question and answer, to establish his sufficiency is material to that issue. If the original affidavit sufficiently discloses the possession of property to satisfy the magistrate that the bail is good, there is no need for question and answer. In the case at bar the magistrate

did first question the proposed surety, and then the result of said inquiry was put in the form of an affidavit sworn to by the appellant.

If the statements as to the ownership of the specified property by Davis was not material, then there can never be any warrant for examination as to specific property. The bare statement that the surety is worth a certain sum would close the inquiry, and the provisions for justification are idle. Such holding would open wide a door for straw bail. "If the matter falsely sworn to is circumstantially material, or tends to support and give credit to the witness in respect to the main fact, it is perjury." *Wood v. People*, 59 N. Y. 123. Here the main fact was the sufficiency of the surety. The matter falsely sworn to tended to support and give credit in respect to that main fact, and so was perjury.

We have examined the record, and have found no errors committed to the prejudice of the defendant, and conclude that the evidence sustains the verdict.

Therefore the judgment should be affirmed. All concur.

(122 App. Div. 433.)

WUERTZ v. BRAUN et al.

(Supreme Court, Appellate Division, Second Department. November 20, 1907.)

CHattel Mortgages—Right to Foreclose.

A vendor of a piano is entitled to foreclosure of a purchase price mortgage as against the wife, notwithstanding the husband executed the same, where the piano is in her possession.

Appeal from Municipal Court, Borough of Brooklyn, Fifth District. Action by Otto W. Wuertz against Irma Braun and another. Judgment for defendant Irma Braun, and plaintiff appeals. Reversed, and new trial ordered.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and MILLER, JJ.

C. Bertram Plante, for appellant.

HOOKER, J. This action is to foreclose a lien on a piano. The appeal is by the plaintiff from a judgment dismissing the complaint upon the merits. The case was before this court on an appeal from a judgment dismissing the complaint at the first trial (*Wuertz v. Braun*, 113 App. Div. 459, 99 N. Y. Supp. 340), and we then held that the plaintiff made out a prima facie case and should not have been dismissed. The defendant Irma Braun is the wife of the defendant Isidor Braun. She alone was personally served and alone answers. Her husband deserted her between the time of the purchase of the piano and the commencement of the action.

The facts which were admitted by the defendant entitle the plaintiff to a judgment of the foreclosure of his lien. Irrespective of the evidence offered on behalf of the plaintiff, it appears from the evidence of the defendant and admissions made by her that she talked with the plaintiff about the purchase of a piano by her husband as a present for her son; that the piano was delivered at her house to

her husband, who at that time paid \$10 on account of the purchase price, and executed the chattel mortgage in evidence, and for whose foreclosure this action was brought; that some payments have been made on the the purchase price, but she is unable to state the exact status of the account; that, when her husband abandoned her, she went into possession of the piano, and it is now with her parents. The record shows indisputably that at the time of the commencement of the action the piano was in her possession, and failure to consent to a sale for the purposes of applying the proceeds in payment of the amount due is evident from the fact that, upon her motion, an order was made in the Municipal Court, soon after the commencement of the action, vacating a warrant of seizure which had theretofore been executed. The plaintiff sold the piano. The purchase price was not all paid. He took a chattel mortgage to secure the balance. There was due at the day of the trial the sum of \$77.90, and the plaintiff is entitled to the foreclosure of his lien, irrespective of whether the answering defendant or her husband executed the chattel mortgage. The complaint does not demand any personal judgment against the answering defendant, and it is therefore evident that the only possible defense that she could urge was that she had not been in possession. But the piano was seized at the time the action was commenced while under her physical control, and her only defense fails.

The judgment should be reversed and a new trial ordered, costs to abide the event. All concur.

(122 App. Div. 488.)

WELLS v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Division, Second Department. November 29, 1907.)

CARRIERS—CARRIAGE OF PASSENGERS—TRANSFERS.

Under Railroad Law, Laws 1892, p. 1406, c. 676, § 104, requiring a street railway to carry a passenger on a continuous trip between any two points on its road and to give a transfer to the passenger entitling him to make the trip, a passenger starting north and then transferring west was entitled to transfer south, and was not limited to a transfer in the same general direction in which he started—north.

Appeal from Municipal Court of New York.

Action by Fullerton Wells against the New York City Railway Company. Judgment for defendant, and plaintiff appeals. Reversed and a new trial ordered.

Argued before WOODWARD, JENKS, HOOKER, RICH, and GAYNOR, JJ.

Fullerton Wells, in pro per.

GAYNOR, J. The action is for the statute penalty of \$50 prescribed by section 104 of the Railroad Law, Laws 1892, p. 1406, c. 676, for refusing a transfer to a passenger. The plaintiff was at the corner of Lexington avenue and 102nd street, Manhattan borough, and wanted to go to the corner of Columbus avenue and 93rd street. These two points are on opposite sides of Central Park, the one on the East and the

other on the West side. The plaintiff took the defendant's car on Lexington avenue going north, and on paying his fare asked for a transfer ticket that would take him to the said point he was going to. The conductor said he could not give it to him, but gave him a transfer ticket to go west on the cars on 116th street to Columbus avenue. The plaintiff took a car west on that street and on giving the conductor the transfer ticket for his fare asked him for a transfer ticket south on a Columbus avenue car to his said place of destination, viz., the corner of the said avenue and 93rd street, but it was refused him. He took a Columbus avenue car south, and was obliged to pay another fare. The defendant claims that as the plaintiff started north at the beginning, he was not entitled to a transfer ticket to go south at any stage of his journey—that the transfers must all be in the same general direction as the start, and that while he could have had a transfer north on Columbus avenue he was not entitled to one south. There is no such limitation in the statute. The plaintiff could not get from his starting point to his destination except by going as he did north, then west, then south by Columbus avenue, unless he first went south, then west by 59th street, then north by Columbus avenue. Either of these was his direct way to get from the one point to the other. The statute requires a village or city street railroad company to carry a passenger on a continuous trip "between any two points" on its road, or any connecting roads or lines operated or controlled by it, for one fare, and to give a transfer to the passenger entitling him to make the trip. That means across town as well as through town.

The judgment should be reversed.

Judgment of the Municipal Court reversed, and new trial ordered; costs to abide the event. All concur.

CAUSULLO v. LENOX CONST. CO.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. DEATH—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—PROOF.

While less evidence will suffice to show lack of contributory negligence in actions for wrongful death, the plaintiff is not relieved of the burden of showing that defendant was negligent in the performance of some duty which it owed to deceased by a fair preponderance of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, § 78.]

2. MASTER AND SERVANT—DEATH OF SERVANT—WARNING—EVIDENCE.

In an action, for the death of a servant while working on a subway by contact with a dangerous electric rail, evidence held insufficient to warrant a finding that defendant was negligent in failing to warn deceased of the danger.

3. EVIDENCE—WEIGHT.

In an action for death of a servant by coming in contact with an electric rail, evidence of an employé on the same work who was not shown to have ever seen deceased, except on the day of the accident, that he did not hear any instructions given deceased on that day, and had never heard deceased warned of the danger of contact with the rail, was without probative force.

Appeal from Trial Term.

Action by Francesco Causullo, administrator of the estate of Carmine Pizzulo, deceased, against the Lenox Construction Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial on the minutes, defendant appeals. Reversed, and new trial ordered.

See 94 N. Y. Supp. 639.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAUGHLIN, HOUGHTON, and LAMBERT, JJ.

Frank V. Johnson, for appellant.

Thomas J. O'Neill, for respondent.

LAMBERT, J. The defendant, a domestic corporation, was engaged in doing certain work in connection with the construction of the subway on Lenox avenue. Plaintiff's intestate was one of the laborers employed, engaged in mixing and delivering to the bricklayers and others concrete upon the work, which was being placed over the roof of the subway and under the tracks of the surface railroad, operated by a third rail beneath the surface. Plaintiff's intestate came in contact with this third rail highly charged with electricity, and his death resulted. The complaint charged that the injuries resulting in death were caused by the negligence of the defendant in its failure to supply the deceased with "a suitable and proper place within which to do his work, and that the place where the deceased was directed and obliged to do his work was dangerous, unprotected, unsafe and unguarded, and through its failure to supply the deceased with competent and suitable foreman to guide, guard, and direct deceased in his work, by reason of which he was struck by an electric wire or current." A notice under the employer's liability act (Laws 1902, p. 1748, c. 600) was served; but it was found to be defective, and was not admitted in evidence, so that we have merely a common-law action for negligence, and no claim appears to have been seriously made upon the trial that the defendant failed in providing as safe a place in which to perform this labor as the circumstances of the case permitted; so that the real issue presented was whether the plaintiff's intestate was such an inexperienced or "green" workman that it became the duty of the defendant to give him instructions or warnings. That was the theory on which the case went to the jury, and the only questions necessary to determine here are whether the evidence justified the finding that the defendant was negligent in this respect, and whether the plaintiff has shown his intestate to be free from negligence contributing to the result.

It has been held that in cases where the accident results in death less evidence will suffice to show lack of contributory negligence; but we know of no rule which relieves the plaintiff of the duty of showing that the defendant has neglected some duty which it owed to the deceased by a fair preponderance of evidence under any circumstances; and, tried by this test, we are of the opinion that the judgment and order appealed from should be reversed, as being against the weight of evidence. The theory being that the deceased was a "green"

man, sent into a dangerous situation, the plaintiff called as a witness one Yost, a bricklayer, and he was asked if he had ever seen the deceased working in the conduit on any other day before the day of the accident, and he answered in the negative. The same witness also testified that he did not hear any instructions given to the deceased on the day of the accident, and that he had never heard the deceased warned of the danger of contact with the third rail. This is all the testimony in the case, so far as we are able to discover—and the respondent does not call attention to any other—which even suggests that there was a neglect of duty on the part of the defendant to warn him of his danger. This is clearly insufficient to show that the defendant had failed in its duty; for the testimony of one man, who does not appear to have been present at all times, that he has not heard such warning, is clearly of no probative force. So far as Yost's testimony goes, it does not appear that he ever saw the deceased except on the day of the accident, though it clearly appears from the evidence of various witnesses that he was employed at least two months in the capacity of a common laborer, mixing concrete, carrying the same to others, and doing all kinds of coarse work about the construction. On the part of the defendant, Roberts, the foreman of the bricklayers, testified that he sent the deceased to help the bricklayers, and that:

"I told him to look out for the third rail, that it was dangerous, and he would be likely to be killed. He says, 'Me watch, me work at this place longa time.' * * * Five minutes before he was killed I was down in the hole, and he was joking with the bricklayers for whom he was dumping stuff, and I caught him with his head very close to the rail, and I got him by the shoulder and partly dragged him down, and I said to him, 'Look out! You bye and bye in the box.' And he said: 'Me watch; me no afraid; me watch; me work at this place longa time.'"

The general foreman, Sinclair, testified that he had seen the deceased doing this kind of work; that he had been there from six weeks to two months. Munroe, the foreman of the Italian laborers, testified that the deceased had been in his gang for a week doing this kind of work; that in doing it they had to work about the third rail, and that he warned the decedent of the dangers of this third rail. One San Giovanni, an Italian laborer, testified that he had known the deceased for seven months; that they had worked together on this particular work, where the third rail was exposed for six weeks or more, and that their work was all about the place; and that he heard the foreman warn the deceased and others every day in reference to the third rail. He likewise testified that he personally warned the deceased just before the accident, and that the deceased responded that he was not drunk. Capo Bianco, another foreman, testified that the deceased had worked in his gang five or six months doing this general work in and around the construction of the subway; that he worked in under these tracks; that he had talked with the deceased every morning about the danger of the third rail; that he had schooled him; that he had himself come into close contact—touching his hat—with the third rail in the presence of the deceased, and that he had made this the occasion of a warning.

There is no proof to contradict this array of evidence to show that the deceased had ample warning; that he knew as well as the defendant might be presumed to know; that he was working where he was exposed to the dangers of this third rail, and there was therefore no reasonable justification for the jury to find that the defendant had negligently exposed him to dangers, without giving him warning. It is not necessary to show that the defendant, through its officers, called decedent's attention to the danger. It is for the plaintiff to show that there was a neglect of duty on the part of the defendant, and the evidence not only fails to show this, but it is overwhelming that the deceased knew the situation and the danger to be apprehended, and he must be deemed to have accepted the risk of the employment.

Because the verdict is against the weight of evidence the judgment and order appealed from should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur. HOUGHTON, J., in result.

(122 App. Div. 595.)

LOUGHRAN v. JORDAN L. MOTT IRON WORKS.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—ACTIONS—EVIDENCE OF NEGLIGENCE—SUFFICIENCY.

In an action for injuries to a minor employé in defendant's factory, evidence examined, and held insufficient to show negligence on the part of defendant in failing to provide a suitable place for work and proper appliances, or to sufficiently guard dangerous machinery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 964-977.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Where, in an action for injuries to a minor employé caused by his getting his hand between two cogwheels, alleged to have occurred as a result of plaintiff's slipping on the platform surrounding the machine on which he was working, the evidence showed that plaintiff knew that the platform was slippery, and that the cogwheels were uncovered, and also showed that the platform was four feet wide and the cogwheels were at least four feet from the front of the machine, and that plaintiff had to turn himself half way around in order to get his injured hand between the cogs, it showed him to be guilty of contributory negligence, in the absence of any explanation as to why he placed himself in the position in which he was when injured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 706-709.]

Laughlin, J., dissenting.

Appeal from Trial Term.

Action by Thomas Loughran, an infant, by his guardian, against the Jordan L. Mott Iron Works. From a judgment for plaintiff, and an order denying a motion for new trial, defendant appeals. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAUGHLIN, HOUGHTON, and LAMBERT, JJ.

Eugene L. Richards, for appellant.

Thomas J. O'Neill, for respondent.

McLAUGHLIN, J. The plaintiff, a lad nearly 15 years of age, was employed at a machine in defendant's factory. The machine was surrounded on the sides and back by a platform about nine inches from the floor, and, as the operator faced the machine, the platform on his left was about a foot wide and on his right about four or five feet wide. Around the platform was a railing made of pipe; the upper piece being about four feet from the floor and the lower one about a foot and a half. This railing was set in the floor, and, except for an opening some two feet at one of the rear corners, surrounded the platform on the three sides, and was not more than an inch or two from its edge. The platform and railing did not extend past the front of the machine on either side, at least, to any extent, and between the front of the machine and the wall was a space of two feet or more. The plaintiff, while engaged at work, sat on a bench which rested on the floor in front of the machine, and directly behind him was a window. At the rear of the machine, four feet from the front, were two cogwheels, in vertical position; the upper one being three or four feet in diameter, and the lower one somewhat smaller. The plaintiff's work was to punch holes in pieces of tubing, inserting them in the machine one by one, and operating the press by means of a pedal. On the day of the accident his right hand was caught between the cogwheels and injured in such a way that several of the fingers had to be amputated. He claims that his injuries were caused by defendant's negligence, in that it permitted grease or other substances to accumulate upon the platform where he was put to work, and because the defendant had neglected to encase or cover the cogwheels. He had a verdict of \$7,000, and, from the judgment entered thereon and an order denying a motion for a new trial, defendant appeals.

The plaintiff testified, in substance, that he had been at work operating the machine something like two weeks; that the tubes to be punched—which were about a foot and a half long—were brought to him in a box which was placed at his left hand; that, after punching the holes in the tubes, he was directed to replace them in the same box, and no other one was provided for him; that, after a tube had been punched, he would throw it on the platform at his right until a sufficient number had accumulated, when he would wipe the oil from them, as he had been directed to do, and replace them in the box; that the platform was very greasy and slippery from oil from the machine and tubes; that he complained of this to the foreman prior to the accident, but was told not to mind it, but go ahead with his work; that, while he was picking up the pieces of tubing which he had thrown upon the platform, his foot slipped, he threw out his hand to save himself, and in that way the accident occurred. He was the only witness produced on his behalf; and the material parts of his testimony are not corroborated. On the part of the defendant several witnesses were produced, who contradicted the plaintiff in many respects. The witness Walsh, who was not employed by defendant at the time of the trial, but was at the time of the accident, testified that he was the one who employed the plaintiff and put him at work; that he had worked at the machine about three months when the accident happened; that he never made any complaint to him of the condition of the platform or of its being

slippery or greasy; that the plaintiff's work did not require him to go upon the platform or to have anything to do with the machine, except to operate the pedal; that his work consisted of putting the tubing in a proper place and then starting the machine, and, when the holes were punched, removing it from the bed of the machine and putting it in a box on his right hand side, and, when the same was filled, taking it to the proper department; that boxes were furnished for that purpose, and he was using one on the morning of the day the accident occurred; that there was no grease or oil on the tubing or platform. He further testified, which is uncontradicted, that occasionally some of the tubing would fall on the floor, and, to prevent its getting near the machine or inside the railing, the platform was put up.

The witness Munn testified that on the day of the accident he was foreman of the polishing department, and was at work within 20 feet of the plaintiff when he was hurt; that his attention was called to the accident by seeing two or three men running that way, and he went immediately to the plaintiff's assistance; that his right hand was then in between the cogs; that the plaintiff had been at work upon the machine upwards of a month; that, when the plaintiff had filled the box with tubing, it was his duty to take it into the witness's department; that there was not any oil or grease on the tubing, and that he never noticed any on the floor; that, if there were grease on the tubing, there had been no occasion for plaintiff to wipe it off, because it would be in better condition for polishing with the grease on. The witness Alferts testified that he was also employed in the factory on the day of the accident; that the plaintiff obtained the tubing which he punched from his department; that it was in a box which he had on his left when he was operating the machine, and that the witness told him to get a box to put it in after he punched it so as to save time; that he had seen the plaintiff throw pieces of tubing on the platform, and had cautioned him not to do it; that he had seen the plaintiff go through the railing and across the platform and had stopped him and told him not to go there; that he would "do that once too often." The plaintiff was recalled and admitted that there were other boxes in the factory, but testified that he was told to put the tubes in the same box in which they came. He did not deny that he was told by the witness Alferts not to throw them on the platform, or that he was told by him to keep off the platform. Nor did he contradict the testimony of the witness Walsh, or offer any testimony to the effect that the platform was not built for the very purpose of preventing the tubing getting inside the railing and near the machine.

At the close of the trial, therefore, the facts were uncontradicted that the defendant had substantially inclosed the machine with an iron railing, and, in addition to this, had built a platform to prevent the tubing when thrown on the floor from getting inside the railing and near the machine; that the plaintiff had been told not to throw the tubing on the platform, and also told not to go there himself; and that there were boxes in which he could put the tubing after he had punched it. Under such a state of facts, I do not think it can be said the defendant was negligent, and a finding to that effect is against the weight

of evidence. Not only this, but the evidence does not satisfactorily show that the plaintiff himself was free from negligence. He knew, according to his own testimony, that the platform was slippery, and that the cogwheels were not covered. His right hand is the one that was injured. The platform upon which he went was at least four feet wide, and the cogwheels were located at least four feet from the front. He therefore had to travel this distance, and then turn half way around in order to get his right hand between the cogs. No explanation is given why he had to place himself in this position and directly in front of the machinery which injured him. In either view, therefore, it seems to me that justice requires there should be a new trial.

The judgment and order appealed from is reversed, and a new trial ordered, with costs to appellant to abide event.

PATTERSON, P. J., and HOUGHTON, J., concur.

LAMBERT, J. I concur in the reversal of the judgment entered, and the order denying a new trial in this case, upon the ground that the clear weight of the proof on the question of the negligence of the defendant is adverse to the contentions of the plaintiff. The fact that the plaintiff was at the time of the accident less than 15 years of age, with little experience in the operation of machinery, and the dangers incident thereto, was, in the absence of adequate instructions, sufficient to carry the question of his contributory negligence to the jury.

LAUGHLIN, J. (dissenting). The foreman of the defendant admitted upon the stand that he knew that the machine at which he directed this boy only 14 years and 9 months of age, to work, was dangerous. The exposed cogwheels which inflicted the injuries were within a few feet of the table at which the boy was working, and there was no intervening guard or railing or other obstruction to prevent access thereto. The defendant failed to guard the cogwheels as required by section 81 of the labor law (Laws 1897, p. 480, c. 415), and that alone was evidence of its negligence sufficient to take the case to the jury and to sustain the verdict on that branch of the case. As I view the evidence, it can neither be said as matter of law that the boy was guilty of contributory negligence, nor that the verdict in his favor is against the weight of the evidence on that question. According to his testimony, he was doing the work as he had been instructed to do it, and had done it for two and one-half weeks, and as his predecessors had always done it while he had been employed there, for a period of about eight months. The general foreman who assigned the plaintiff to this work of punching holes in the pipe denies that the proper performance of the work required that the boy should go upon the platform where he met with the injuries, or that he ever saw him upon the platform while the machinery was in motion; but he does not deny that he observed or knew that the plaintiff was throwing the punched tubing upon the platform, and he does not state the instructions that were given to him. According to the testimony of

the plaintiff, he had never put the punched tubing into a box on the right. The general foreman says that it should have been put in a box on the right, and, while the testimony of the plaintiff is controverted by evidence tending to show that he was observed at times using a box on the right and that he was using such a box on the morning of the accident, there is no evidence that he was using such a box during the afternoon, and no one testifies that a box had been provided for his use that afternoon or was found there after the accident. The general foreman says he does not know where the boy would put the pipes if no box were provided for that purpose. A department foreman, called by the defendant, testified that he instructed the plaintiff how to operate the machine, and testified, further, on direct examination:

"He took those pieces of tube from my department in a box. They were in a box. He had the box on the left of where he was operating, and I told him to get the box after he punched them, and put them in the box to save the time of picking them up again, and put them back into the box."

If those were the instructions, they were, to say the least, ambiguous on the point as to whether there was to be more than one box. The plaintiff testified that his instructions were to wipe the oil off the tubing after punching them, and to put them back in the same box from which he had taken them. This required that they be thrown on the floor or elsewhere until all in the box had been punched. This same department foreman testified that he had seen the plaintiff throw pieces of tubing onto the platform, instead of putting them into the box, and that some would go onto the floor and some upon the platform. He says that he did not speak to the plaintiff about this the day of the accident, but "I reminded him previous to that date. I can't say how many times I had to speak to him about keeping those things off that platform"; and that he also warned plaintiff against making a short cut across this platform, instead of going around the rail to reach another part of the department. The plaintiff denied that he was so warned, and testified that the floor below the platform was all occupied, so that there was no place to throw the punched tubes, excepting onto the platform, which merely required that they be dropped or shoved off the end of the table. Another department foreman who had occasion to pass the place where the plaintiff was working frequently could not testify that he had ever seen him using a box on the right in which to put the punched tubing. Unless the plaintiff committed perjury, he was at the time of receiving the injuries engaged in the performance of his duties as he had been instructed to perform them, and as the general foreman who assigned him to the work had frequently observed him performing them. There is no room for an honest mistake with respect to his testimony, and, in the circumstances, I think it cannot be said that it is so overborne by the testimony of foreman, who would at least be censurable for failing to give the boy further instructions with reference to the performance of his duties, that the verdict is against the weight of the evidence. I therefore vote for affirmance.

(122 App. Div. 535.)

MEROLLA v. LANE

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. TRUSTS—POWER OF SALE OF TRUSTEE—EXECUTION OF POWER—CONVEYANCE OF TRUST PROPERTY.

Testator devised an undivided one-fourth interest in certain property to each of his four children. One of these children by deed conveyed his interest to another of such children, who in turn conveyed such interest back to the grantor, in trust for the trustee's three children during their lives, with remainder to the issue of such children, and, in default of issue, to the trustee in fee simple. The deed of trust also invested the trustee with power within his discretion to convey in fee simple so as to vest absolute ownership in the purchaser, and to reinvest the proceeds upon the same trusts as the property was subject to. Subsequently the trustee joined with the other three children of the original testator in a conveyance of the entire property with covenants of quiet enjoyment and general warranty, and without reciting the trust. At the time of such conveyance, there were no children of any of the cestuis que trustent, but subsequent to such conveyance a child was born to one of them. *Held*, that the conveyance in which the trustee joined was a conveyance of an undivided three-fourths of the entire property owned by the other grantors and the individual interest of the trustee in the undivided one-fourth, which was merely a vested remainder therein, and which was subject to be and which was actually divested by the birth of his grandchild, and was not an execution of the power of sale given him by the trust deed, and hence did not pass the title of the property held by him thereunder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 899.]

2. TENANCY IN COMMON—RIGHTS OF CO-TENANTS—ADVERSE POSSESSION.

Where a conveyance of property vested in the grantee title to an undivided three-fourths thereof, leaving an undivided one-fourth in one of the grantors as trustee for third persons, the grantee became a tenant in common with the trustee and the cestuis que trustent, and possession by him of the entire property was not adverse to such tenants in common, in the absence of ouster.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, §§ 42-52.]

Appeal from Special Term.

Action by Louis Merolla against Margaret Lane. From a judgment entered upon a decision of the court at Special Term dismissing the complaint, plaintiff appeals. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Max L. Schallex, for appellant.

Claude V. Pallister, for respondent.

INGRAHAM, J. The defendant agreed to sell to the plaintiff certain real property, the title to which the plaintiff refused to accept, upon the ground that the defendant could not give a marketable title. This action was then brought for a specific performance of the contract. The court found that the defendant had a marketable title and dismissed the complaint. The property was owned by one Elihu Phinney, who died on February 9, 1863, leaving a last will and testament by which he devised the property to his four surviving children. One of these children, Henry F. Phinney, and his wife, conveyed an undivided fourth interest in this property to Annie W. Phinney,

his sister, by a deed dated the 30th of December, 1863, which was duly recorded on April 5, 1864; whereupon the grantee, Annie W. Phinney, by a conveyance dated the same day, which, reciting the conveyance to her from Henry F. Phinney and wife, conveyed the said property to the said Henry F. Phinney in trust, to receive the rents and profits of the property conveyed and to apply the rents, incomes, and profits, one-third part thereof to each of his three children during their lives, and upon the death of each child, as to the one-third part held for each child, to assign, transfer, and convey the same in fee simple absolute as to the real estate and in absolute ownership as to the personal property to the issue then living of such child, but, in default of issue, to the survivors, the issue of any one child to take the parent's share; and, in the event of failure of issue of all three children, then to convey the said property to Henry Frederick Phinney, to his own use and benefit forever, with power to convey and transfer the fee of the said property to the beneficiaries, and with the further power, within his discretion, from time to time whenever he should deem it expedient and proper, "to sell, grant and convey in fee simple absolute as to the real property and as to the personal property so as to vest the absolute ownership thereof in the purchase and upon such terms as to price and credit and if on credit as to security as to him shall appear judicious, any property real or personal which shall be held by him upon trust to receive and apply the rents and profits thereof as herein mentioned, and upon any such sale grant or conveyance to reinvest the proceeds in any way he may think judicious such proceeds when so reinvested to be held respectively upon the same trusts as the property from whose sale, grant or conveyance they arose and subject to the same powers and to the same limitations over as such property would have been if not so sold, granted or conveyed." And containing the following declaration:

"I further declare that the true construction of this deed in that respect is that it divides the property thereby granted and conveyed into three parts to be held on separate trusts and that the trust as to each part ceases on the death of the child above named of said Henry Frederick Phinney to whose use its rents and profits are directed to be applied and such part is then to belong absolutely to the issue of such child if any living, if none then to the living brothers and sisters of such child and the issue of its deceased brothers and sisters in the proportions mentioned in this deed, and if none such then to Henry Frederick Phinney so that the absolute ownership of no part of the property is suspended for more than one life now in being the trust as to each part may also be terminated under the discretionary powers given as above mentioned even before the decease of the respective cestui que trust."

And this conveyance was duly recorded on April 5, 1864.

There was here created a trust for the life of the three children of Henry, with a remainder to the issue of such children, and, in default of issue, with a remainder to Henry Frederick Phinney. By indenture dated the 22d of February, 1867, Henry Frederick Phinney and wife united with the other owners of the estate of Elihu Phinney in a conveyance of the property in question to Edward Birmingham. This was the usual form of a conveyance of the grantor's individual property without reciting the trust, or without purporting to exercise the power, with a covenant of quiet enjoyment and a general cove-

nant of warranty. This was acknowledged with the usual form of acknowledgment for an individual conveyance. The consideration was stated to be \$1,800, and the conveyance was recorded on March 26, 1867. There was evidence that Susan Cooper Irving, a daughter of Henry Frederick Phinney, and her son, were alive at the time of the trial. It also appeared that on the 28th of January, 1905, there was presented to the Supreme Court a petition of Susan Cooper Irving, formerly Susan Cooper Phinney, in which she set out these various conveyances by which a trust was created for her benefit, alleging that on the 21st of October, 1874, the petitioner was married to Jacob Sutherland Irving, who died on the 1st day of April, 1881, leaving one son, Henry Sutherland Irving, who was born on the 2d of August, 1875; that on the 28th day of October, 1875, Henry Frederick Phinney died without having released, assigned, transferred, or conveyed to either of his said children for whom this property was held in trust any of the rights or interests under said share so held in trust for each of them under the deed of trust, leaving, him surviving, Susan Cooper Irving, the petitioner, Frederick Phinney, and Charles John Phinney, his three children for whom the trust was created, his next of kin and heirs at law, and leaving a last will and testament, which was duly admitted to probate, whereby he appointed one Charles K. McHarg his successor in the trust created in the said deed of trust; that on the 30th day of July, 1903, McHarg died without having exercised any of the powers as trustee under the said deed of trust; that on the 14th day of December, 1892, Frederick Phinney, one of the children of Henry Frederick Phinney, died unmarried and without issue; and that on the 6th day of November, 1902, Charles John Phinney, one of the children of Henry Frederick Phinney, died unmarried, without issue, and without having assigned, transferred, or conveyed any of the property that vested in him and the share or interest of said Charles John Phinney under said deed of trust. And upon this petition an order was entered appointing Henry Sutherland Irving, the only son of the petitioner, as trustee to execute the trusts and powers remaining unexecuted under and by virtue of this deed of trust of Annie W. Phinney to Henry Frederick Phinney, dated January 13, 1864.

There was no evidence that Henry Frederick Phinney received the consideration named in this deed in the conveyance to Birmingham in 1867. If this petition can be taken as proof of the facts stated therein, it would appear that at the time of the conveyance to Birmingham there were no children of either of the beneficiaries of the trust, and Henry Frederick Phinney therefore was vested with a remainder in the property which was subject to be divested by the birth of a child to either of his children, and that such remainder was not so divested until the 2d of August, 1875, when Henry Sutherland Irving was born. Upon the birth of Henry Sutherland Irving, August, 1875, he became vested with a remainder in all of this property held in trust. Henry Frederick Phinney died on the 28th of October, 1875, after this remainder had vested in his grandson. He appointed as his successor in trust McHarg, who died on the 30th of July, 1903.

The title of the defendant to the property must rest upon one of two propositions: First, that the conveyance to Birmingham, in which Henry Frederick Phinney and his wife joined, was an exercise of the power of sale contained in the trust deed; or, second, adverse possession. The conveyance to Birmingham did not recite the trust, nor did the grantors or either of them purport to exercise the powers or to convey anything, except their individual interests. The conveyance is a simple bargain and sale, with a covenant of quiet enjoyment and a general covenant of warranty. There can be no question but that Henry Frederick Phinney had a vested remainder at the time he executed this conveyance which he could convey, and which would entitle him to the fee of the property upon the death of his three children without issue.

In *Mutual Life Ins. Co. v. Shipman*, 119 N. Y. 324, 24 N. E. 177, it was held that the provision of the Revised Statutes in relation to the execution of a power in trust, by which "every instrument executed by the grantee of a power, conveying an estate or creating a charge, which such grantee would have no other right to convey or create, unless by virtue of his power shall be deemed a valid execution of the power, although such power be not recited or referred to therein," was not intended to change the then existing rule; that whenever, in addition to a power, the grantor is also invested with other independent interest or powers, whether legal or equitable, with respect to the same property, the rule of the statute does not apply. In that case the testator died leaving, him surviving, a widow and seven children, and owning real estate which he devised to his wife so long as she should remain his widow, and upon her death or marriage to the children born to him by her. The widow was made executrix of the will, and was authorized and empowered to mortgage, lease, and dispose of such property for the purpose of carrying into effect the provisions of the will. After the death of the testator, the widow married again, and subsequently executed a mortgage in her individual name to secure the repayment to the mortgagee of a loan of money. The mortgage contained no reference to the character of the mortgagor, as executrix, or to the power to mortgage contained in the will; but appeared, on its face, to be the individual mortgage of the widow. The question in that case was whether the mortgage was an execution of the power conferred by the will to mortgage the whole estate, or was to be restricted to the individual interest which the mortgagor had as doweress in such lands. It was held that, but for the provisions of the Revised Statutes relating to powers, there could be but little doubt that it would be held to convey only such interest as the mortgagor possessed in her individual right (citing *Perry on Trusts*, § 511; *Sugden on Powers* [3d Am. Ed.] 477; 4 *Kent's Commentaries* [11th Ed.] p. 371), and it was said, referring to the statute:

"The rule was founded in reason and good sense, and was intended to provide that whenever a single power exists, under which a grantor may convey or mortgage real estate, his conveyance is attributed to the exercise of the power actually possessed by him; but that whenever, in addition to a power, he is also invested with other independent interests or powers, wheth-

er legal or equitable, with respect to the same property, under the authority of either of which he may lawfully act, the rule of the statute should not apply."

And it was held that, a woman having a right of dower and a power to sell or mortgage real property, a conveyance or mortgage which does not purport to be in execution of the power only related to the individual interests of the mortgagor or grantor. It was then further said:

"Although this right, while unassigned, did not give her a legal estate in the land, it is now well settled that it was a legal interest and constituted property which was capable in equity of being sold, transferred, and mortgaged by the dowress, and liable to be reached by creditors in payment of her debts. * * * The real question under the statute would seem to be whether the mortgagee had a transferable interest in the mortgaged premises—one which would be available in the hands of the transferee as security for a debt. If so, then her interest was sufficient to bring her within the reason and meaning of the statute. * * * It is quite obvious that an interest by a grantor in real estate, whether legal or equitable, that is effectual to create a transfer of property, is equally persuasive as any other in furnishing a motive or reason for making or receiving a particular conveyance, and would furnish an equally strong circumstance from which the imputation of a legal intent might be derived. Both equitable and legal interests in real estate are valuable and capable of transfer and are equally effective in determining the intent with which a particular conveyance is made.

And this case was followed in *Weinstein v. Weber*, 58 App. Div. 112, 68 N. Y. Supp. 570, affirmed 178 N. Y. 94, 70 N. E. 115.

Certainly, in this case, a vested remainder in real property, which, as the record then stood, would entitle the grantor to the fee upon the death of his three children, was as substantial an interest in the property as an unadmeasured right of dower. The fact that the trustee joined with other persons, who were owners of interests in this property, in a conveyance of it which on its face conveyed only the grantor's individual interest, was not an execution of the power of sale, and the title of the property that was held by him in trust did not pass under the conveyance.

Upon the question of the adverse possession, I do not think a title was established which a purchaser was bound to take. Under the conveyance, the grantee would be entitled to three-fourths of the property, and he thereby became tenant in common with Henry Frederick Phinney as trustee. The trust as to one-third terminated in 1892, as to another one-third, in 1902, and as to another one-third it had not terminated at the time of the trial. The possession under this conveyance was found to have commenced in 1870, when the trust still existed as to all the property. It does not appear when either of these cestuis que trustent were born, but they were all apparently alive on the 30th of January, 1864, when the trust deed was executed. Generally, the possession of one tenant in common is the possession of his co-tenant, and to justify a claim of adverse possession there must be express evidence of ouster of the tenant in common against whom adverse possession is claimed. There is no evidence of such ouster, or any claim that the title held was adverse to the trust estate. It does appear that a new trustee has been appointed who claims an interest in the property, and, in view of this claim and uncertainty as to the

possession as adverse to the trust estate, I do not think that the title was marketable.

The judgment should therefore be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

(122 App. Div. 512.)

PALTEY et al. v. EGAN et al.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. ADJOINING LANDOWNER—LATERAL SUPPORT—BUILDINGS—COMMON LAW.

The right of support, as between the owners of contiguous lands, existed at common law in respect of land only, and not of the buildings thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adjoining Landowners, § 21.]

2. SAME—STATUTORY PROVISIONS—LANDLORD AND TENANT.

New York City Building Code, § 22, which provides that persons making excavations of 10 feet or more in depth must support the walls of contiguous buildings, and preserve them from injury, if afforded license to enter on the adjoining land, applies only where the adjoining building belongs to a person other than the one making the excavation, and places no obligation on the owner of a building to his lessee thereof to protect the walls of the building when excavating near it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adjoining Landowners, § 22.]

Laughlin and Lambert, JJ., dissenting.

Appeal from Trial Term.

Action by Adolph Paltey and another against Patrick B. Egan, impleaded with the Dearborn Construction Company and another. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAUGHLIN, HOUGHTON, and LAMBERT, JJ.

James Kearney, for appellant.

Charles Goldzier, for respondents.

PATTERSON, P. J. The defendant Egan was the owner of two lots of land with the buildings thereon, known as "Nos. 65 and 67 East Eighth street," in the borough of Manhattan, in the city of New York. The plaintiffs on April 1, 1904, hired from the defendant Egan the third loft of the building No. 65 East Eighth street for a period expiring January 1, 1905, at a monthly rental of \$50, and occupied the same until the 30th of May of the same year. The plaintiffs had upon the premises merchandise and other personal property. On the day last mentioned the building (No. 65) collapsed, and according to the averment of the complaint property of the plaintiffs of considerable value was destroyed thereby. It is alleged in the complaint that the building fell and the property was destroyed because the defendant Egan (and others sued with him) wrongfully, illegally, and negligently dug into and upon the ground of the adjoining premises (No. 67) in excess of 10 feet in depth below the curb, and wrongfully, illegally, and negligently failed properly to

shore up the said premises occupied by the plaintiffs, or otherwise to support them, as required by law, although they could have obtained permission from the owner and tenants of the said premises to enter the same for the purpose of making such shoring, and although such support, shoring, and appurtenances for the safety of the said premises could have been made on the outside thereof upon the premises occupied by the defendants for the purpose of the digging, as aforesaid, and wrongfully, illegally, and negligently dug away and weakened the foundations of the premises occupied by the plaintiffs as aforesaid, by reason whereof and of the defendants' negligence and without any negligence on the part of the plaintiffs, the said building occupied by the plaintiffs, as aforesaid, fell and was destroyed, and the property of the plaintiffs being in and upon the said premises, as aforesaid, of the value as aforesaid, was totally destroyed. The defendant Egan in his answer denied those allegations of the complaint, and set up as an affirmative defense that he had contracted with the Dearborn Construction Company (one of the defendants) to do certain work and perform and furnish materials for remodeling the building No. 65 East Eighth street, and for building an extension to the building No. 67 East Eighth street, in accordance with plans and specifications on file with and approved by the building department of the city of New York, and that the Dearborn Construction Company had possession of and the entire and exclusive control of such work, and workmen and the furnishing materials under its contract, and was still in the possession of such buildings at the time of the fall thereof mentioned in the complaint. The Dearborn Construction Company failed to appear on the trial of the cause, and a verdict was rendered against the defendant Egan and that company. The defendant Egan made a motion for a new trial on all the grounds stated in section 999 of the Code of Civil Procedure, which motion was denied, and, from the judgment entered upon the verdict and from the order denying a motion for a new trial, the defendant Egan appeals.

On the trial the last named moved to dismiss the complaint at the close of the plaintiffs' case in chief, on the ground that the plaintiffs had failed to sustain any of the allegations of negligence set forth in the complaint, which was all the negligence alleged upon which the action was brought, and at the conclusion of the whole case the motion was renewed on the same grounds, and on the additional ground that it appeared in evidence that the defendant Egan employed a competent architect and a competent builder; and that the work being done under plans and specifications approved by the building department of the city of New York, and the work then being in the hands of an independent contractor, he, Egan, was absolved from liability. The motion for nonsuit being denied, the case was sent to the jury by the trial justice upon the specific ground that the defendant was liable, if at all, only because of a violation of section 22 of the Building Code of New York, which provides that all excavations for buildings shall be properly guarded and protected, and that, whenever an excavation of either earth or rock for building or other purposes shall be intended to be or shall be carried to the depth of more than ten feet below the curb, the person or per-

sons causing such excavation to be made shall at all times from the commencement until the completion thereof, if afforded the necessary license to enter upon the adjoining land, and not otherwise, at his or their own expense, preserve any adjoining or contiguous wall or walls, structure or structures, from injury, and support the same by proper foundation, so that the said wall or walls, structure or structures, shall be and remain practically as safe as before such excavation was commenced, whether the said adjoining or contiguous wall or walls, structure or structures, are down more or less than ten feet below the curb.

The trial justice specifically charged the jury that:

"If this defendant, Egan, caused this excavation to be made, it became his duty under the statute to guard and support this adjoining structure so as to preserve it in such manner that it remained practically as safe as before such excavation was commenced. If he failed to do so, and the falling of the wall and the collapse of this building were due to such failure on his part to comply with the statute, he is liable for the damages resulting to plaintiffs from such failure to comply with the statute."

He also charged the jury as follows:

"If you find that the collapse of the building was not caused by a failure on the part of the defendant Egan to properly shore up and protect and support the building occupied by the plaintiffs during the progress of the excavation work, * * * the plaintiffs would not be entitled to recover in this action, for the reason that such a cause of action is not set up in the complaint."

It is thus obvious from the whole case that the liability of the defendant Egan sought to be enforced in this action was presented to the jury as arising solely from a violation of or noncompliance with the provisions of section 22 of the building law applying in the city of New York, and upon the theory that the violation of a statute which imposes a duty upon any person may furnish a right of action for damages to any one who has an interest in its observance; it being shown that the injury was the direct or necessary result of such violation. *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *Huda v. Am. Glucose Co.*, 154 N. Y. 474, 48 N. E. 897, 40 L. R. A. 411; *Pauley v. S. G. & L. Co.*, 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194. It is disclosed by the record that there was a wall standing upon Egan's land which separated the two buildings. It is also clearly established that the defendant Egan and his contractor did not excavate to the depth of 10 feet below the surface, although in his evidence one of the plaintiffs indulged in a mere guess that such excavation was actually made. It does appear, however, that the fall of the building was caused by some negligence of Egan or the contractor. The front of building No. 65 had been taken out, and in the progress of the work of alteration of the buildings a mass of debris or material was deposited upon one of the floors of the building No. 65, and a supporting beam was withdrawn from the wall. It was undoubtedly the superincumbent weight of this mass of material, in connection with the general weakening of the structure, that caused the disaster. Whether the plaintiffs might maintain an action against their landlord for damages sustained by reason of this negligence it is not now material to inquire. The trial

judge instructed the jury that damages caused by such negligence could not be recovered in this action, and therefore the single question upon this appeal relates to the existence of a liability of the defendant Egan, based solely upon his failure to comply with the provisions of the building law above referred to. If such liability exists, the trial judge was quite right in stating to the jury that the defense of the work being under the charge of an independent contractor could not avail the owner, for he, being under a statutory duty, was bound to perform it; but we are of opinion that those portions of section 22 of the building law, the violation of which was regarded by the trial judge as furnishing a cause of action to the plaintiff, are not applicable under the facts disclosed by this record and in an action between the tenant and his landlord. The section referred to is substantially a re-enactment of chapter 6, p. 11, Laws 1855, and was intended to and does only relate to the duty and obligation of one owner of land under given circumstances to protect the land and building of an adjoining owner. As was said in the much quoted case of *Dorrity v. Rapp*, 72 N. Y. 309, by the common law, an owner of land contiguous to the land of another, upon which a building is erected, is not bound to protect the owner of the building against injuries which may result thereto from excavations on his own land, in the absence of any right by prescription or grant in the owner of the building to have it supported by the land of the person making the excavation. The natural right of support as between the owners of contiguous lands existed in respect of land only, and not the buildings or erections thereon. One owner was not under obligation to shore up his neighbor's house, nor was there any duty arising from contiguity merely upon the owner intending to excavate simply to give his neighbor notice of his intention. As pointed out in the case cited, that being the state of the common law, the Legislature in 1855 interposed to regulate the exercise by owners of land in the cities of New York and Brooklyn of the right of excavation, and to afford the owners of buildings a new protection from injuries from excavations on adjoining lands; and it is said in that case that the primary object of the statute was to cast upon the party making an excavation upon his land, exceeding 10 feet in depth, the risk of injury resulting therefrom to the wall of an adjoining owner, and the burden of protecting it. The proviso, "if afforded the necessary license," was inserted simply to meet the contingency of a refusal by the owner of the adjoining building to allow the party making the excavation to enter upon his premises to shore up, or otherwise support his wall. Unless he was permitted to do so, his entry for that purpose would be a trespass.

It is obvious, we think, that the scope of this statute is confined to relations existing between different owners of contiguous lots of land with buildings thereon, and hence, where the same person owns both pieces of property, the statute does not apply. There may be a liability of the defendant Egan for the damage which the plaintiff sustained by reason of the acts of Egan or of his agents resulting in loss and damage to the plaintiffs. We are not called upon to decide that question in this action, but we are limited to the consideration of a right of action based upon noncompliance with the requirement of a

law which applies only to adjoining owners of property, and concerns their right and obligations, and does not regulate the relations existing between landlord and tenant.

We therefore are of the opinion that this action was brought under a misconception of the plaintiffs' proper rights and remedy, and that the judgment and order must be reversed, and a new trial ordered. We do not intend hereby in any way to decide or intimate that the plaintiffs may not maintain a properly constructed action against the defendant Egan for damage sustained by reason of the collapse of the building in which their merchandise was stored.

Judgment and order reversed, and a new trial ordered, with costs to the appellant to abide the event.

McLAUGHLIN and HOUGHTON, JJ., concur.

LAUGHLIN, J. (dissenting). I am of opinion that the statute in question was intended to impose a liability for the benefit of a tenant or occupant of a building, as well as in behalf of an adjacent owner. The former statute, which has been superseded by the Building Code of New York, was declared to be remedial in its nature, and it was liberally construed to impose a liability within the spirit, but beyond the letter, of the law. *Bernheimer v. Kilpatrick*, 53 Hun, 316, 6 N. Y. Supp. 858, affirmed 127 N. Y. 672, 28 N. E. 255. The Building Code of New York is entitled, "A remedial ordinance," and section 2 thereof provides as follows:

"This ordinance is hereby declared to be remedial, and, as to be construed liberally, to secure the beneficial interests and purposes thereof."

Although enacted by the municipal legislative body, it was ratified by the Legislature, and has the force and effect of a legislative enactment. *Greater New York Charter*, Laws 1901, p. 179, c. 466, § 407; *City of New York v. Trustees*, 85 App. Div. 355, 83 N. Y. Supp. 442, affirmed 180 N. Y. 527, 72 N. E. 1140. The majority of the court, according to the opinion about to be announced, take the limited view that the statute is only intended for the benefit of the owner of the fee, and that it does not inure to the benefit of a tenant. There was some evidence that the excavation was more than 10 feet in depth, but, as I view the case, that is immaterial. Section 22 of the Building Code clearly enjoins upon a party about to excavate or cause the excavation of lands to the depth of more than 10 feet beyond the curb the duty of preserving the wall of the building on adjoining land from injury by supporting the same "by proper foundations, so that the said wall or walls, structure or structures, shall be and remain practically as safe as before such excavation was commenced, whether the said adjoining or contiguous wall or walls, structure or structures, are down more or less than ten feet below the curb." The defendant was not the owner of the fee of either premises, but he had a leasehold interest for a long term of years of both No. 65 and No. 67 East Eighth street. If the excavation had been carried to the depth of more than 10 feet below the curb, and damages were caused thereby, under this provision of the law the defendant would be liable absolutely for the collapse of the building. *Dorrry v. Rapp*, 72 N. Y. 307. This court is

about to decide, however, that the liability would only extend to the owner of the adjacent building which collapsed, and not to a tenant or occupant thereof. In *Cohen v. Simmons*, 66 Hun, 634, 21 N. Y. Supp. 385, affirmed 142 N. Y. 671, 37 N. E. 571, an action by a tenant for years for damages was sustained under the former statute. I see no ground for construing the statute as applying to some tenants, and not to all, and in the case last cited the court, at General Term, in overruling the objection that the action could be maintained only by the owner of the fee, say:

"We have examined the statute in vain to find any such restriction as to the right to recover. It would appear that anybody who was injured by a violation of the statute has a right to maintain an action for the damages sustained thereby."

The duty is not imposed in terms for the protection of the building only, and I see no ground for precluding a recovery for damages to other property. If the excavation had not been made to a depth of more than 10 feet below the curb at the time of the accident, then the defendant, as the owner of the building which collapsed, was liable for having failed to secure the wall under the following provisions of section 22 of the Building Code, to wit:

"If such excavation shall not be intended to be, or shall not be, carried to a depth of more than 10 feet below the curb, the owner or owners of such adjoining or contiguous wall or walls, structure or structures shall preserve the same from injury, and so support the same by proper foundations that it or they shall be and remain practically as safe as before such excavation was commenced, and shall be permitted to enter upon the premises where such excavation is being made for that purpose, when necessary."

The provision last quoted is quite significant as bearing upon the true construction of the statute, and I think is a complete answer to the contention that the statute was only intended for the benefit of the owner of the adjoining building. This provision of the Building Code provides, in effect, that the owner of the building adjacent to the excavation must protect his own building in such manner that the same shall remain practically as safe as before, in case the excavation is not to be carried over 10 feet. Surely the Legislature would not deem it necessary to require the owner to do something for his own protection. It is manifest, therefore, that it was intended to safeguard the rights of others. It may be said that it was intended merely to prevent the building falling upon the premises upon which the excavation was to be made, to the damage or delay of others engaged in the work of construction; but there is nothing in the language employed to indicate that it was intended to limit the duty to the protection of those. The duty is imposed in broad unqualified terms, without any specification of the party or parties for whose benefit its performance is required. If the duty of the defendant, as owner of the premises upon which the excavation was being made, did not arise until the excavation reached a depth of more than 10 feet below the curb, then until that time his duty as owner of the premises upon which the building collapsed existed, and upon either theory he is liable. I therefore vote for affirmance.

LAMBERT, J., concurs.

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(122 App. Div. 523.)

BRADFORD v. BANKERS BROS. CO.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

MASTER AND SERVANT—INJURIES TO SERVANT—EVIDENCE—NEGLIGENCE.

In an action for the death of plaintiff's intestate, while in the employ of defendant, caused by the fall of part of a trapdoor of an elevator shaft, evidence examined, and *held* not to show that defendant had control of the building or its appliances, which would make it chargeable with negligence in respect thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 954-977.]

Appeal from Trial Term.

Action by Emily Bradford, as administratrix of Charles Bradford, deceased, against Bankers Bros. Company. From a judgment for plaintiff and an order denying a motion by defendant for a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Charles M. Weeks, for appellant.

Edward J. Gavegan, for respondent.

INGRAHAM, J. This action was brought to recover damages sustained by the next of kin of the plaintiff's intestate by reason of his death. The complaint alleges that the deceased was in the employ of the defendant, and that the defendant was in possession and control of a certain building known as No. 141 West Thirty-Eighth street, together with the elevator therein and all other parts of said building; that on the 20th day of June, 1905, while the plaintiff's intestate was in the basement of said building engaged in lifting materials, the property of the defendant, on the aforesaid elevator, by reason of the negligence of the defendant, its agents, servants, or employes, and by reason of the neglect of duty in the said several respects, a part or portion of said elevator or trapdoor thereof or other material was suddenly and without any warning to the said plaintiff's intestate dropped down through the elevator shaft, striking this plaintiff's intestate on the head with such force and violence as to cause his death immediately thereafter. Upon the trial it was proved that the defendant leased the premises in question for the term of three years from the 7th of October, 1902, and entered into possession of said premises under that lease; that on the 14th of January, 1905, the defendant leased the premises to another for a term beginning upon the date of the lease, namely, the 14th of January, 1905, and ending on the 7th day of October, 1905, the date of the expiration of the defendant's lease; that by an instrument dated the same day the defendant sold to its lessee certain personal property then upon the said premises, which included one elevator, two gas engines, two electric motors, and various other machinery and personal property, and at the same time there was executed an instrument whereby it was provided that the defendant was to have "the following rights with respect to the premises at 141-143 West Thirty-Eighth street which have this day been sublet by Bankers Bros. Company and

others to the United States Agency of the Michelin Tire Company: (1) The right to occupy until February 1, 1905, the small inclosed office on the second floor, that being an office about 8x10 feet. (2) The right to leave seven machines which are now on the premises in dead storage on the premises until February 1, 1905." Under these instruments the possession of the premises was turned over to the Michelin Tire Company on January 15, 1905. On the morning of January 20, 1905, the deceased, with other employés of the defendant, went to the premises in Thirty-Eighth street to remove certain goods and machinery that belonged to the defendant. Part of this machinery was in the basement, and part upon the ground floor. The deceased and other employés of the company were in the basement putting goods of defendant on the elevator, when a crash was heard. The foreman, who was on the street floor, called, "Look out!" but the deceased was struck on the head with a board coming down through the elevator shaft. This board was part of a trapdoor that had been used to protect the floor on the upper story. At the time of the accident, most of the defendant's property was out of the building, and the men were engaged at this time in getting out the last of what was left from the basement. The Michelin Tire Company had commenced to move in on the 14th of January, and on the 15th took charge of the building. The defendant moved out on the 14th. The Michelin Company had charge of the elevator at the time of the accident which was run there by their employé, and the defendant had nothing to do with either the elevator or the building, and the allegation of the complaint that the defendant was in possession and control of the building or elevator was entirely disproved.

The evidence of the defendant quite satisfactorily established that this trapdoor was tied in this position by the Michelin Tire Company's employés on the morning of the accident. The witnesses who testified that the trapdoor caught and was not tied were those in the basement, while those who actually tied up the trapdoor, and who examined it immediately afterward, established that the elevator was tied in this position by the employés of the Michelin Company. An examination of this trapdoor after the accident showed that one side of it was tied, and that it had fallen away upon the other side. The evidence is uncontradicted that the rope which was used to tie up the trapdoor had been brought to the premises by the Michelin Company after the defendant had relinquished possession. It is quite clear that there was no evidence to justify the finding that the defendant was guilty of negligence. It had delivered possession of the premises to a new tenant, had parted with all its interest in the elevator and machinery which had been delivered to the Michelin Company, and the defendant had no control of the premises or authority to interfere with the operation of the machinery, and neither claimed nor exercised any control over it. The fact that the employés of the Michelin Company for their own purposes created the condition which was the cause of the accident is proved by a great preponderance of the evidence. The defendant was not chargeable with knowledge of the methods that had been adopted by the Michelin Company in the control and use of this ele-

vator, or with a duty to examine the elevator to see whether or not it was safe. There is no question of furnishing a safe place to work, for the place at which the deceased was at work was not furnished by the defendant. The cause of the accident itself is unexplained. The most probable cause would appear to be that the trapdoor was only securely tied on one side, and the weight of the iron plate forced off the boards from the unsecured side. Assuming that the principle of *res ipsa loquitur* would justify the conclusion that there was a negligent operation or management of the elevator, this would be evidence only against those in possession of or in charge of the building or elevator, and not against a third person who had no duty in relation to either.

The defendant and its employes were mere licensees removing from the building material which belonged to the defendant, but with no control over the building itself or its appliances, and for an accident caused by the negligence of the Michelin Company the defendant is not responsible. The plaintiff has recovered from the Michelin Company, who was guilty of negligence that caused deceased's death, and there is nothing to charge the defendant with negligence or liability.

The judgment and order appealed from must be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

(122 App. Div. 548.)

MURPHY v. HART.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. GUARANTY—ACTION—COMPLAINT.

A complaint alleged that plaintiff agreed with H. to sell and convey, and H. agreed to purchase, certain real estate on a named date; that on the same day, to induce plaintiff to execute the contract, the defendant executed and delivered to the plaintiff an instrument, whereby she guaranteed that H. would be prepared and willing to carry out the contract; that at the time fixed plaintiff was ready and willing to carry out the agreement, but that H. refused to perform, whereby the plaintiff suffered damage. *Held*, that the complaint stated a cause of action on a guaranty that H. would perform the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, § 99.]

2. VENDOR AND PURCHASER—BREACH OF CONTRACT—ACTION BY VENDOR—PLEADING—PERFORMANCE BY PLAINTIFF.

Under Code Civ. Proc. § 533, providing that in pleading performance of a condition precedent in a contract the facts constituting performance need not be stated, but the party may state generally that he duly performed all the conditions on his part, the allegation in a complaint on a contract to convey land by a deed, with the usual covenants, that plaintiff has duly performed each and every one of the terms of the agreement on her part to be performed, is a sufficient allegation of a tender by the plaintiff of the deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, § 1039.]

3. GUARANTY—CONSTRUCTION.

In construing a guaranty, the words are to be given their ordinary significance to reach the intention of the parties, and effect must be given to such intention, and as a general rule, if the construction is ambiguous, it is to be construed against the guarantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, § 28.]

4. SAME—SCOPE AND EXTENT OF LIABILITY.

Where defendant guaranteed that H. would be ready and willing to carry out a certain contract with plaintiff, this was equivalent to a guaranty that he would perform the contract; and was not a mere contract of indemnity, and no notice of H.'s default was necessary to render defendant liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, § 56.]

Appeal from Special Term.

Action by Ida F. Murphy against Frieda Hart to recover for damages resulting from a breach of contract. From an interlocutory judgment overruling a demurrer to plaintiff's amended complaint, defendant appeals. Affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

William V. Goldberg, for appellant.

Wm. M. Seabury and Max D. Steuer, for respondent.

INGRAHAM, J. This complaint alleges that the plaintiff on the 21st of April, 1904, entered into an agreement with one Max Hart, a copy of which is annexed to the complaint. By this agreement the plaintiff agreed to sell and convey, and Max Hart agreed to purchase, a certain piece of real property located in the city of New York, for the sum of \$27,000, balance by taking said property subject to a mortgage of \$22,000, the plaintiff to deliver to Max Hart a proper deed containing the full covenants and warranty, said deed to be delivered on the 30th of December, 1904. On the same day, to induce the plaintiff to execute this contract, the defendant executed and delivered to the plaintiff an instrument whereby she guaranteed that:

"Max Hart, the purchaser mentioned in this contract, will be prepared and willing to carry out the within contract on the specified date, or on such adjourned date as they mutually set or agree upon, provided that the said property shall, so far as the title is concerned, remain unchanged."

It is further alleged that at the time and place fixed for performance by the terms of the said contract, to wit, on the 30th day of December, 1904, the plaintiff was ready, able, and willing to carry out each and every one of the terms of the said agreement, but that the said Max Hart was not prepared or willing, and failed and refused to carry out the said contract, and did not carry out the same; that on the said 30th of December, 1904, the said property, so far as the title thereto was concerned, remained unchanged, and that the said plaintiff has duly performed each and every one of the terms of the agreement on her part required to be performed; that the property mentioned did not exceed in value \$300 over and above the incumbrances thereon, to which the said Max Hart was to take the property subject. Therefore the plaintiff was damaged in the sum of \$4,700, for which amount judgment was demanded. The defendant demurred to this complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and this demurrer was overruled at Special Term.

Max Hart agreed to pay \$5,000 in cash on the delivery of the deed, which should contain the usual full covenants and warranty, and suffi-

cient for conveying the fee simple of the premises free from all incumbrances, except the mortgage for \$22,000. There can be no question but that, upon the tender of a deed by the plaintiff which insured such a title, Max Hart would be liable to the plaintiff for that sum of \$5,000, and the plaintiff could have maintained an action at law to recover that amount. The defendant guaranteed that Max Hart "will be prepared and willing to carry out the within contract on the specified date." By the demurrer, the defendant admits that the plaintiff was ready, able, and willing to carry out the said agreement, but that the said Max Hart was not prepared or willing, and failed and refused, to carry out the said contract, and did not carry out the same. The allegation that the plaintiff has "duly performed each and every one of the terms of the agreement, on her part required to be performed," is a sufficient allegation of a tender by the plaintiff of the deed. Section 533 of the Code of Civil Procedure provides:

"In pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance; but the party may state, generally, that he or the person whom he represents, duly performed all the conditions on his part."

Here the condition on the part of the plaintiff to entitle her to recover from Max Hart was that she should tender him a deed of the premises. That was the condition precedent of any liability of Max Hart to the plaintiff, and, if the obligation of defendant was a guarantee of performance, I do not see that there is any distinction between the performance of a contract necessary to hold a contracting party and that necessary to hold a guarantor. In construing a guaranty, like the construction of any other written instrument, the words used are to be given their ordinary significance to arrive at the intention of the parties, and the effect must be given to such intention. As a general rule, in the construction of such agreements, if the instrument contains any ambiguous words or expressions, it is to be construed against the surety, and not against the plaintiff. *Jackson v. Swart*, 182 N. Y. 373, 75 N. E. 226; *Smith v. Molleson*, 146 N. Y. 241, 42 N. E. 669. The question here is what did the parties mean when the defendant guaranteed that her principal would be "prepared and willing to carry out" the contract? The defendant certainly intended to guarantee something; and to give any effect to such an instrument it must, I think, be held that the intention was to guarantee performance. If a person is ready and willing to carry out a contract, the presumption certainly is that he will perform. In *Maloney v. Nelson*, 144 N. Y. 182, 39 N. E. 82, the obligation of a surety is examined with care and the authorities collated. The obligation of the court in considering an instrument of this kind to get at what the parties intended irrespective of the express form of the instrument is recognized. The court there said:

"In this respect, the case differs from those cases where an individual agrees to do a particular thing, such as to pay money to a third party in exoneration and discharge of the original liability of his principal to such third party. In such case, it may be conceded that the right of action becomes complete on the defendant's failure to do the particular thing he agreed to do."

If, therefore, this agreement was, as I construe it, a guaranty that Hart would perform the contract, upon his failure to perform there arose a cause of action in plaintiff's favor against the defendant for the damages sustained by reason of his failure to perform, which was itself an original contract of the defendant, and for the damages which flowed from Max Hart's failure to perform the defendant was liable. The contract cannot be construed as one of indemnity only. There is no reason why the defendant should not guarantee that Max Hart would perform, and, having guaranteed such performance, his failure to carry out the contract at once imposed an obligation upon the defendant to respond to the damages caused by the nonperformance against which the defendant had guaranteed. No notice of default, therefore, was necessary; but an independent obligation arose upon the failure of Max Hart to perform the contract.

The option that defendant reserved to avail herself of Max Hart's control if he failed to perform, so that she could acquire the property for herself, confirms the construction that there was an obligation on her to perform if Max Hart did not. By performing, she could release herself from the obligation to respond from the damages that flowed from his default. This guaranty related to the contract with Max Hart. It guaranteed performance on the "specified date," or the adjourned date. The complaint alleges that at the specified date Max Hart was not prepared or willing, "and failed and refused, to carry out said contract." Defendant had notice of the day Max Hart was to perform. She was not entitled to notice of the "specified day," and, if she wished to exercise her option to acquire the property, she was bound to be there ready to perform.

I think, therefore, that a good cause of action was alleged, and that judgment should be affirmed, with costs, with leave to defendant to answer within 30 days on payment of costs in this court and in the court below. All concur.

BRENNAN v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, Second Department. December 5, 1907.)

APPEAL—DECISIONS REVIEWABLE—DECISION IN INTERMEDIATE COURTS.

Under Const. art. 6, § 9, and Code Civ. Proc. §§ 190, 191, limiting the jurisdiction of the Court of Appeals to review orders of the Appellate Division granting new trials to "orders granting new trials on exceptions," the Court of Appeals is without jurisdiction of an appeal from an order of reversal by the Appellate Division of a judgment and an order of the trial court denying a motion for new trial made on the minutes, on grounds other than exceptions or in addition to exceptions, under Code Civ. Proc. § 999, authorizing a motion for new trial on the minutes on exceptions, or because the verdict is for excessive or insufficient damages or otherwise contrary to the evidence or contrary to law, unless it affirmatively appears that the Appellate Division has affirmed on the facts, and it is not enough that the Appellate Division reverses on exceptions only; and hence where a judgment and an order denying a motion for new trial on the minutes, made on all the grounds specified in section 999, were reversed by the Appellate Division, and a new trial granted on the ground that defendant's motion at the close of the evidence to dismiss, because of

its insufficiency, should have been granted, and that the exception to the denial was good, such order of reversal by the Appellate Division was not appealable to the Court of Appeals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 860.]

Action by Sadie Brennan against the city of New York. A judgment for plaintiff and an order denying a motion for a new trial on the minutes having been reversed by the Appellate Division, plaintiff moves to amend the order of reversal, so as to make it certify that the reversal is "upon the law solely, the court having examined the facts and found no error therein," so that she may appeal to the Court of Appeals. Motion denied.

Argued before JENKS, HOOKER, GAYNOR, RICH, and MILLER, JJ.

Robert Stewart, for the motion.
James W. Covert, opposed.

GAYNOR, J. This is an action for damages for negligence. The plaintiff recovered a verdict, but the judgment and the order denying the motion for a new trial on the minutes have been reversed by us and a new trial granted, on the ground that the motion of the defendant at the close to dismiss should have been granted, and that the exception to the denial thereof is good. The plaintiff now moves us to amend our order of reversal so as to make it certify that the reversal is "upon the law solely, the court having examined the facts and found no error therein," so that she may appeal to the Court of Appeals.

In a case like this, i. e., of a judgment on a verdict, an appeal may come here in three ways, first, from the judgment only, which appeal brings up questions of law raised by exceptions only (*Boos v. World Mut. L. Ins. Co.*, 64 N. Y. 242; *Third Ave. R. Co. v. Ebling*, 100 N. Y. 101, 2 N. E. 878); second, from the order denying the motion for a new trial on the minutes only, which appeal may bring up questions on exceptions only, or on the facts only, or the ground that the verdict is contrary to law in a particular not raised by an exception—for some questions of law may be raised on such a motion, and reviewed by us on appeal from the order, but not by the Court of Appeals, without an exception (*Tate v. McCormick*, 23 Hun, 218; *Standard Oil Co. v. Amazon Ins. Co.*, 79 N. Y. 506; *Bishop v. Auto. Reg. Co.*, 19 App. Div. 268, 46 N. Y. Supp. 97; *Weizinger v. Erie R. Co.*, 106 App. Div. 414, 94 N. Y. Supp. 869; *Allen v. Corn Exchange Bank*, 181 N. Y. 282, 73 N. E. 1026); or on all of these grounds, dependent on the grounds on which the motion was made, for such a motion may be made "upon exceptions; or because the verdict is for excessive or insufficient damages, or otherwise contrary to the evidence, or contrary to law," or on all of these grounds (*Code Civ. Proc.* § 999)—and the appeal presents only the grounds shown by the record to have been raised on the motion (*Walsh v. Mead*, 8 Hun, 387; *Hinman v. Stillwell*, 34 Hun, 178; *Dodge v. Mann*, 85 N. Y. 643); and, third, from both the judgment and the order (as is the case before us).

In the last case, i. e., an appeal to us both from the judgment and the order, our order of reversal is therefore not appealable to the Court of Appeals if it reverse both the judgment and the order, unless the record show that the motion on the minutes was on exceptions only for the Court of Appeals has not jurisdiction to review orders of the Appellate Division granting new trials generally, but only "orders granting new trials on exceptions." Const. art. 6, § 9; Code Civ. Proc. §§ 190, 191; *Allen v. Corn Exchange Bank*, 181 N. Y. 278, 73 N. E. 1026.

But if the record show that the motion on the minutes was made on the ground of excessive or insufficient damages, or that the verdict was against the weight of evidence, or that the evidence did not support it, or that it was contrary to law in a particular not raised by an exception, then the order must be affirmed by us in that particular, while we reverse the judgment, in order to make our order appealable to the Court of Appeals; for in that case the record would show that we reversed on exceptions only.

An order by us reversing both the judgment and the order being thus not appealable to the Court of Appeals, where the motion on the minutes is made on grounds other than exceptions, or in addition to exceptions, our record should show that we affirm the order on all the grounds other than the exceptions in order to make our order appealable. It is not enough that it shows that we reverse the order on exceptions only; it must show that we have reviewed and affirmed it in the other respects; for otherwise it could not be known but that we would have reversed it in such other respects if we had considered them; and if the case could go up on appeal from us in that condition, and our order should be reversed and the judgment of the trial court reinstated, the respondent would thus finally lose without having had such other questions, including the question of the weight of evidence, reviewed by us at all.

Now, in the case before us the motion for a new trial on the minutes was made by the defendant on all of the grounds specified in section 999 of the Code of Civil Procedure, and denied. It therefore follows that we must affirm the order on all grounds other than the exceptions in order to make our order appealable. After considering all of the questions presented, we have reversed on the ground that the evidence was insufficient to go to the jury—that there is no evidence to support the verdict. There was a motion by the defendant for a dismissal at the close of all of the evidence, and an exception taken to its denial. The judgment and order are both reversed on that exception. Can we say that except for that exception we would have affirmed the order? No, because even if there were no such exception it would have been the duty of the trial judge to grant the motion for a new trial on the minutes (one of the grounds on which it was made being that the verdict was contrary to the evidence and the law), and for us to review and reverse his order refusing to do so; for where there is no evidence to support a verdict, that error, in the absence of an exception to a denial of a motion to dismiss or to direct a verdict, is nevertheless presented by the motion on the minutes on the ground that the verdict is against the law, or the evidence. Beckwith

v. N. Y. C. R. Co., 64 Barb. 299; Shearman v. Henderson, 12 Hun, 170; Lucas v. McEnerna, 19 Hun, 14; Kelly v. Frazier, 27 Hun, 314; Weizinger v. Erie R. Co., 106 App. Div. 414, 94 N. Y. Supp. 869; Algeo v. Duncan, 39 N. Y. 313; Allen v. Corn Exchange Bank, 181 N. Y. 282, 73 N. E. 1026. In such a case our reversal of the order would not be on an exception, and therefore would not be appealable. But in a case where there is such an exception, our reversal is upon an exception. Does that make it appealable? Evidently not, unless we first assume a thing we have decided to the contrary (and probably could not really make ourselves assume, however hard we might try to delude ourselves to the contrary), i. e., that the evidence was sufficient to go to the jury, and then decide on that assumption that the verdict was not against the weight of evidence, and affirm the order on that head or ground; for otherwise the weight of evidence will never be considered if our order of reversal should be reversed and the judgment affirmed. It is plain that in such a case we could not affirm on the facts, and therefore that it is not a case where an appeal can be had from our order of reversal.

As was repeated in a recent case, "under the present limitation of the Constitution, in no case tried before a jury in which a motion for a new trial has been made on the ground that the verdict is against the evidence can we entertain an appeal from the order unless it affirmatively appear that the Appellate Division has affirmed the facts"—which I suppose must mean "on" the facts to mean anything. Allen v. Corn Exchange Bank, 181 N. Y. 278, 73 N. E. 1026. The decisions to the same effect are collected in Mr. Cardozo's scientific and careful book on the subject of the jurisdiction of the Court of Appeals (section 19). It should not be overlooked that a mistake was made in Reich v. Dyer, 180 N. Y. 107, 72 N. E. 922, and that the decision there is overruled by that in Allen v. Corn Exchange Bank, *supra*. The rule becomes plainer on reading these two cases together. As to the opinion in Albring v. N. Y. C. & H. R. R. Co., 174 N. Y. 179, 66 N. E. 665, I suppose I may say that I am not certain that I understand its meaning at all—and my doubt in that respect is increased by the opinion in Allen v. Corn Exchange Bank.

The motion should be denied. All concur.

(122 App. Div. 428.)

LYNCH v. AMERICAN LINSEED CO.

(Supreme Court, Appellate Division, Second Department. November 29, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—QUESTION FOR JURY.

In an action for injuries to a servant from being drawn into the leg of an elevator for elevating grain, evidence *held* to present a question for the jury whether the master was negligent in not taking reasonable precautions to prevent such an accident, if it could reasonably have been foreseen.

2. SAME—PLACES REQUIRED FOR WORK—CARE REQUIRED OF MASTER.

The fact that a servant fully appreciated the danger incident to his employment does not relieve the master from every reasonable care and

precaution to guard against every probable danger to the servant, since it is the duty of the master to furnish a safe place for his employes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 171-173, 179.]

3. SAME—EVIDENCE—SUFFICIENCY.

In an action for injuries to a servant from being drawn into the leg of an elevator, evidence that certain devices, which could have been easily provided, would have been a considerable protection, is sufficient to sustain a finding that defendant was negligent in failing to provide such devices.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 958-965.]

4. SAME—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to a servant, evidence examined, and held to show that the servant in no way contributed to the injury.

5. DAMAGES—PERSONAL INJURIES—EXCESSIVE.

Where plaintiff's legs were crushed and mangled by being drawn into the leg of an elevator, so that he suffered injuries confining him to the hospital for months, and after employing many doctors he still suffered and was crippled for life, a verdict for \$20,000 was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 372-396.]

Appeal from Trial Term, Richmond County.

Action by Jeremiah F. Lynch against the American Linseed Company. From a judgment for plaintiff, and an order denying defendant's motion for a new trial, defendant appeals. Affirmed.

Argued before WOODWARD, JENKS, HOOKER, RICH, and MILLER, JJ.

Frederick Hulse, for appellant.

Richard J. Donovan (Herbert D. Cohen, on the brief), for respondent.

WOODWARD, J. This case comes on appeal for the third time. On the first trial a verdict was awarded the plaintiff in the sum of \$10,000. The judgment entered thereon was reversed on the ground that the plaintiff had assumed the risk, and a new trial was ordered. 95 App. Div. 628, 88 N. Y. Supp. 1106. On the second trial the jury gave the plaintiff a verdict for \$5,000; the complaint was dismissed after the verdict was rendered, the court having reserved its decision on a motion to dismiss, and from the order and judgment entered thereafter the plaintiff appealed to this court, by which the judgment and order were unanimously reversed, and a new trial ordered. *Lynch v. American Linseed Co.*, 113 App. Div. 502, 99 N. Y. Supp. 260. On the third trial a verdict was found for the plaintiff in the sum of \$20,000, and from the judgment entered thereon comes this appeal. The action is for negligence; the plaintiff alleging injuries which have made him a cripple for life. The injuries are conceded, but as to its responsibility therefor the defendant sets up a general denial.

The plaintiff was employed by the defendant in unloading a barge of linseed at their works in Port Richmond, S. I. The grain was hoisted into the warehouse by means of an elevator; the leg of the shaft being sunk deep into the grain in the boat. In the elevator was an endless chain of steel buckets which revolved with such rapidity

as to become virtually invisible. The seed was about four feet below the deck, and as soon as the grain around the bottom of the shaft was exhausted the men would go down to shovel the seed toward the leg, which as it continued to drop would then draw up the grain as before. Sometimes before the grain around the leg was fully exhausted the linseed which, according to the testimony, was of all seeds "the quickest with life," would by its own gravity slide down with such force toward the open space that a man might be carried with it into the lower part of the leg, a space about 2 feet wide by $2\frac{1}{2}$ feet high, where the buckets could be seen to revolve. The upper part of this space was sometimes covered by a slide, but this, it appears, was often down, and the plaintiff, who had been employed at this work but a few hours, claims that he had never seen this space uncovered until the time he was injured.

On the day of the accident the plaintiff, with others, was ordered below to shovel grain into the leg. It seems that the only way of descending to the hold was through the hatch in which the elevator was running. The opening was just large enough to admit a man's body, and there was nothing to go down by except the combing of the hatch and the elevator leg. The plaintiff, following the example of the other workmen, put one hand on this combing and the other on the elevator, and let himself down into the seed. The suction, caused by a sudden exhaustion around the bottom of the leg, drew him feet foremost into the unprotected part of the elevator beneath the seed. The revolving steel buckets mangled his legs and crushed the bones, and, as it was some time before the machine could be stopped, he suffered injuries which have crippled him for life. He was in the hospital for months, and has tried many doctors, but still suffers. Whether the defendant was negligent was a question for the jury. The defendant assumes that the danger was fully appreciated by the plaintiff, but that, however, does not relieve the defendant from every reasonable care and precaution to guard against every probable danger to its servant. The employer necessarily assumes the duty of furnishing a safe place for his employes. The assumption of his work by the employe always presupposes the adequate protection by the master from all avoidable danger. The place where the plaintiff was forced to work proved to be unsafe and dangerous, and the testimony of the defendant's witnesses that they had never known of a similar accident only disproves the defendant's contention that the danger was so obvious as to place the whole risk upon the plaintiff.

The question is: Were any precautions omitted which a prudent man would be likely to have taken to avoid accident and to obviate danger. If, as the defendant argues, reasonable care is here to be construed from what is customary, then surely he has little to sustain him. From the new testimony, which I consider very important, brought out at the last trial, much of it by the defendant's own witnesses, it appears that additional bars and rungs would have been a considerable protection; also, that such could easily have been provided, and that they were in use at several other elevators belonging to other companies. The jury was therefore authorized to find the defendant negligent because of their omission. Reasonable care is what ought to have been

observed. It was shown that there was no ladder on the leg; that such a ladder was important, and could very easily have been provided. The defendant holds that, because of the omission of such rungs, it does not follow that the accident would not have happened. I think, however, that it is safe to consider such omission as one of the proximate causes. If the facts of the situation were such that an accident could reasonably have been foreseen by the employer, and if, also, it appears that no reasonable precaution was taken to prevent such accident, the plaintiff is entitled to recover. The jury so found, and I fail to see how they could have done otherwise.

In *Texas & Pacific Ry. Co. v. Behymer*, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. Ed. 905, the court says:

"What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."

Of such reasonable prudence the defendant was able to furnish no proof. Furthermore, what was a reasonably safe place was for the jury to determine.

The case of *McGovern v. Central Vermont R. R. Co.*, 123 N. Y. 281, 25 N. E. 373, in many respects like the case at bar, holds that:

"The place in which the master required the servant to work was clearly unsafe, and it was a question for the jury to determine whether the master had adopted all reasonable precaution to shield him from the danger he was exposed to in the place assigned to him for labor, before requiring him to occupy that place."

The defendant's point that there were others who used an elevator similar to that used by him does not relieve him of his responsibility, for, as in the case of *Gottlieb v. N. Y., L. E. & W. R. R. Co.*, 100 N. Y. 462, 3 N. E. 344, "the defect was an obvious one, easily discoverable by the most ordinary inspection."

It is plain, furthermore, that the plaintiff, who was an ignorant laborer, having been engaged in this work for only a few hours, should not have been expected to fully appreciate the danger of the place. Nor does it follow that, if he had been warned and had had a thorough appreciation of the danger, he would have been able, under the circumstances, to save himself from the rapidly moving linseed, for it was shown that when the linseed was hardened into cakes, as was often the case, it had a tendency to fall in masses, and it was partly to this that the accident was due. The leg therefore should have been guarded.

There was much new testimony by experts to the effect that bars across the opening would not have interfered with the operation of the machinery, while it would have given adequate protection to the men. It was shown, too, that the plaintiff in no way contributed to the accident. Being a new man, he followed the procedure of the other workmen, and as he was being drawn down by the falling seed he did all he could to save himself. He used ordinary diligence and due care, and more should not be required of him. The defendant, on the other hand, should have known that it was only a question of time when such an accident would happen. Inasmuch as they failed to warn

the plaintiff and to provide proper means and methods of access and adequate protection, and also because they sent down the laborers while the machinery was running and before the seed around the leg was sufficiently exhausted, and, furthermore, because they failed to have a leg tender, such as was employed at other places, and to provide a method to stop the machinery quickly in case of accident, the defendant is clearly responsible. In view, also, of the plaintiff's terrible injuries, which, after six years, still render him unable to earn his living, and of his prolonged suffering, I do not consider the verdict excessive.

The judgment and the order appealed from should be affirmed, with costs. All concur.

(122 App. Div. 527.)

In re O'SULLIVAN.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

ATTORNEY AND CLIENT—DISBARMENT OF ATTORNEY—GROUNDS.

An attorney who received from a woman \$300, to obtain the release of the woman's husband from prison, agreeing to return \$250 of the money if he did not secure a pardon, and thereafter, on failing to obtain the pardon, refused to return the money, and appropriated it to his own use, was guilty of misconduct requiring his disbarment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 55, 56.]

Laughlin, J., dissenting.

Proceedings to disbar Michael O'Sullivan, an attorney. Disbarred. Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and HOUGHTON, JJ.

Thomas D. Hewitt, for petitioner.

Edward Lauterbach, for respondent.

INGRAHAM, J. Michael O'Sullivan was admitted to practice as an attorney and counselor at law in July, 1895. Some time after his admission it appears that he was appointed a deputy fire marshal in the city of New York, and in the performance of his duties he made charges against one Adolph Meyer for setting fire to a tenement house in the city of New York. Meyer was subsequently indicted by the grand jury, pleaded guilty, and was sentenced to imprisonment for 20 years. Subsequently the respondent lost his position in the office as fire marshal and was appointed deputy tax commissioner of the city of New York. While deputy tax commissioner, the wife of Meyer applied to the respondent to secure the release of her husband. The respondent went to Sing Sing prison, where Meyer was confined, and had an interview with him. Shortly after this visit to Sing Sing, Meyer's wife again called on the respondent, and said that she had received a letter from her husband telling her to call upon him; that she had \$300 which she would be willing to pay if she had any reasonable assurance that her husband could be pardoned. Mrs. Meyer's testimony is that the respondent first suggested to her that she should place \$300 in money that she then had in his hands, and that he

would get her a lawyer; that after conversation with her brother-in-law Mrs. Meyer went to the respondent, who said that he could get her husband out; that she then gave him the money, and he gave her the following receipt:

"Received from Mrs. Emily Meyer \$300 to be used for legal services in procuring the discharge from State's Prison her husband, Adolph Meyer, \$250 to be returned in case said prisoner is not discharged.

"[Signed]

Michael O'Sullivan."

The respondent's account of this interview was that the woman told him that she was willing to pay the \$300 if she had any reasonable assurance that this man could be got out on a pardon; that the respondent told her that he was a deputy tax commissioner, and was not practicing law, but that if she decided on paying the money, and made him custodian of the money, he would secure an attorney for her in the matter; that she conferred with somebody and then came back and deposited the \$300 with him, when he gave her the foregoing receipt; that it was agreed that he was to engage an attorney and was to pay him a retainer of \$50. The respondent also testified: That he did engage an attorney, and paid him \$50. This attorney did nothing in the matter of securing a pardon for over a year, when he died. The respondent then tried to get some of the papers from him, but finally gave it up. He then communicated with Mrs. Meyer, and said that he would have to get another attorney, to which she said: "All right." That he then employed another attorney, to whom he paid \$25. This other attorney did nothing, and things remained in this situation until the spring of 1905, when the respondent got signatures to a petition for the pardon of Meyer, which petition was presented to the Governor. Subsequently the respondent went to Albany and saw the Governor about it, but the application for a pardon was denied. In September, 1905, Mrs. Meyer commenced an action in the Municipal Court of the City of New York to recover from the respondent \$250 which he agreed to repay to her in case no pardon was granted. He interposed a verified answer in that action, in which he alleged that he was an attorney and counselor at law, and that he was employed and acted as an attorney at law in the matter which was then, and for some time past had been, pending, and still was undetermined, and that the defendant had been paid by the plaintiff a sum for such services. Upon the trial of that action the defendant was called and examined as a witness, and testified that in 1903 the plaintiff brought \$300 to him and deposited the \$300 with him and engaged his services to secure the discharge of Meyer from State's Prison; that the understanding at the time of the deposit was that he was to use \$50 of the money for his services and keep it all in case her husband was discharged. Judgment was ordered in the Municipal Court for the plaintiff against the respondent for the sum of \$250, from which no appeal was ever perfected; but the plaintiff in that action was unable to collect the judgment. Subsequently these facts were laid before the Bar Association, when this proceeding was instituted. The respondent claims that of this \$300 he paid out \$75 to these two attorneys, but he does not deny that he appropriated the balance to his own use.

If, as he now claims, he was not retained as an attorney at law, but was a simple custodian of the money, it seems clear that he misappropriated to his own use money that was deposited with him for the specific purpose of procuring the services of an attorney to secure a pardon from the Governor, and that he committed perjury in the Municipal Court action. If he took the \$300 from this woman for his services as an attorney to procure a pardon for her husband, agreeing to return to her \$250 in case he was not successful, and immediately spent the \$250, refused to return the money on demand, and, after it had been decided that he was liable to repay it to her, still refused to pay it, he was guilty of misconduct which requires his disbarment.

It is quite clear that, under the circumstances thus disclosed, the respondent is not a proper person to be a member of the bar. His own testimony shows that he lacks both integrity and truthfulness, and with such a character he should not be continued as a member of the bar.

It follows that the report of the referee should be confirmed, and the respondent disbarred.

PATTERSON, P. J., and CLARKE and HOUGHTON, JJ., concur.

LAUGHLIN, J. (dissenting). The specific charge upon which the disbarment of the respondent is sought is that he converted to his own use the sum of \$250, which belonged to a client; but the facts with respect to the receipt and detention of the money and the proceedings on the part of the client to compel repayment are set forth. The learned referee in his report states briefly the facts he deems established by the evidence, and then cites *Matter of Charles Cohn*, (Sup.) 101 N. Y. Supp. 84, as presenting "a somewhat similar state of facts," and concludes as follows:

"Believing myself to be controlled by this decision, I have no option but to report as my opinion, upon the facts of this case, that the respondent should be disbarred."

I am of opinion that the two cases are clearly distinguishable on the facts. It clearly appeared not only that Cohn misappropriated his client's money, but that he intentionally concealed the facts from her by misrepresentations nearly six years, and, when his wrongdoing was discovered, he denied it, and claimed the right to retain a considerable part of the money in payment of an exorbitant fee charged to her, and neither made, nor offered to make, restitution, until a commitment for contempt of which he had been adjudged guilty was about to be executed. Moreover, in answer to the disbarment proceedings, Cohn asserted the false claim that he received the money for the purpose of investment, gave false testimony, and destroyed checks and check book, which would have been the best evidence. In the case at bar, there is nothing in the original transaction by which the client delivered the money to O'Sullivan to justify criticism or warrant suspicion of a design on his part to profit by it personally. Mrs. Meyer delivered the money to O'Sullivan on the 17th day of March, 1903,

and he, at the same time, without request or suggestion from her, delivered to her a receipt reciting the substance of the agreement under which he received it, as follows:

"March 17th, 1903.

"Received from Mrs. Emily Meyer three hundred dollars, to be used for legal services in procuring a discharge from State's Prison of her husband, Adolph Meyer; two hundred and fifty dollars to be returned in case said prisoner is not discharged.

Michael O'Sullivan."

This proceeding is based upon O'Sullivan's failure to repay the \$250. He at that time was a member of the bar, but held the office of deputy tax commissioner, and was not practicing his profession. Prior thereto, and in 1897 he held the office of fire marshal, and as such procured the arrest of the husband of Mrs. Meyer for arson. Meyer pleaded guilty, and the court imposed the maximum period of 20 years' imprisonment. Mrs. Meyer, according to her testimony, some five or six months or a year before paying the money to O'Sullivan, called on him at the instance of her husband, whom he had seen while visiting Sing Sing, and had offered to aid in obtaining a pardon, to sign an application for the pardon of her husband. She testified that he signed the application, and she took it to Attorney Coleman, who asked \$300 for his services in presenting it, "lose or gain," and later wrote her that he could not take the case for less than \$400; that she could not pay more than \$300, and she reported these facts to O'Sullivan, who suggested that she place the \$300 in his hands, and that he get a lawyer, and, after consulting with her brother, she and he called on O'Sullivan two days later and "made an agreement with him." Her only testimony, however, with respect to any other agreement, is that O'Sullivan said that he could get her husband out, and suggested that she "give him" the \$300 which Coleman at first wanted, and she "paid him the \$300" two days later, without anything further being said, and he gave her the receipt which the learned counselor for the petitioner concedes constitutes the agreement upon the violation of which professional conduct is predicated. Mrs. Meyer had many interviews with O'Sullivan concerning the progress that was being made with the application for the pardon of her husband, and finally, after he had informed her of the death of the first attorney employed, to whom, as she knew, he had paid \$50, and that he had withdrawn the matter from the hands of another attorney to whom, with her knowledge, he had paid \$25, and had taken personal charge of it and had presented the application and a petition, signed by from 30 to 100 people, to Governor Higgins, who had it under consideration, she demanded repayment of the \$250, and in 1905 brought an action against him in the Municipal Court for converting it, and obtained judgment on September 25, 1905, for the full amount which he has paid pending this proceeding, after, however, taking an appeal from the judgment.

It was understood at the outset that the respondent was to employ another attorney to help him, and that he was not to take an active part, owing to his connection with the prosecution of Meyer and to his official position. With the approval of his client, he employed one

Cherry, an attorney, to take active charge, and paid \$50 of the \$300 to him as a retainer during the same month that he received the money from her. Cherry died about one year thereafter, without having filed an application for a pardon, and the fruits of his labors, if any, could not be found or utilized. O'Sullivan then, according to his testimony, which stands uncontradicted, with the knowledge and approval of Mrs. Meyer, employed one Curtin, an attorney, and paid him \$25 as a retainer. In the fall of 1904, O'Sullivan was not satisfied with Curtin's progress in the matter, and he prepared an application for the pardon and a petition, and obtained many signatures, but concluded to defer presenting it until the newly elected Governor took office, and early in Governor Higgins' term he had the application and petition filed, and later on went personally to Albany and presented the matter to the Governor and to Pardon Clerk Joyce, and notified his client that it would receive executive attention after the executive action on legislation for the session of 1905 was finished. Shortly thereafter, and before the application had been acted upon by Gov. Higgins, she demanded repayment of the money and brought the action against him for conversion.

There was evidence before the Municipal Court—which was controverted, however, by the testimony of O'Sullivan—that he undertook to obtain the discharge of Meyer within eight months or to return the money, and this is doubtless the evidence upon which the court adjudged that he had converted the money. It is not, however, charged in this proceeding that he agreed to obtain the pardon within any particular time, and no evidence tending to show that he did was offered. Moreover, that theory of the case is expressly disclaimed in the points filed by the learned counsel prosecuting the charges. After the rendition of the judgment in the Municipal Court, and before this proceeding was instituted, the application for pardon was denied, or knowledge of its denial was then first acquired by O'Sullivan.

It appeared by the testimony of O'Sullivan, elicited on cross-examination, that, instead of holding the balance of the \$300 intact, he mingled it with his funds and used it for his own purposes. That would doubtless constitute, even in the circumstances of this case, professional misconduct; but it would not constitute conversion until a demand by the client for a return of the money and refusal to comply therewith. Moreover, the charge is not that he used it, but that he was guilty of conversion in failing to repay it to his client on demand. There was no demand upon the attorney for a return of the money after the application for a pardon was denied. The long delay in prosecuting the application for the pardon has not been satisfactorily explained. A proper sense of professional duty should have stirred the attorney to greater activity and diligence in executing the task which he undertook, and his failure in this regard deserves censure. It is to be borne in mind, however, that he is not charged with fraud in entering into the agreement, evidenced by the receipt, under which he received the money, and that was not rescinded, nor was his employment terminated, before he was sued in conversion. While the agreement stood unrescinded and without any demand or notice requiring him to perform

the services within a specified time, it is not clear that there could be any liability for conversion of the money, before denial of the application for pardon, excepting, of course, on the theory that he undertook to obtain the pardon within a specified time, as was alleged in the amended complaint in the Municipal Court.

It cannot be said, I think, in view of all the circumstances with respect to the employment of other attorneys, that such a long period of time had elapsed for the performance of the services that as matter of law he was obliged forthwith to return the money on demand. Nor do I understand that the attorney is here concluded by the judgment in the Municipal Court. That judgment could not, in my opinion, be sustained on the evidence presented here, owing to the absence of evidence that the attorney undertook to obtain the pardon within eight months, which is highly improbable and was fairly met by the receipt, which contains no such condition, by the original complaint in the Municipal Court from which it was omitted, and by the fact that her husband had still 16 years to serve, from which it may fairly be inferred that both he and his wife were quite as solicitous about this freedom for the remaining 15 years and 4 months, as for those 8 months. It may also be observed that the client, in her testimony in this proceeding, failed to state, as she did in narrating the conversations in the Municipal Court, that there was a limitation of eight months as the period within which the pardon was to be procured, and, on being specifically interrogated on that point, testified that nothing was said at or before the time the money was paid concerning the time within which the pardon was to be procured. An attorney may only be disbarred upon sufficient formal charges duly proved under the common-law rules of evidence, on a hearing of which he has had due notice, and the court is confined to the charges upon which he has been put upon trial. *In re Eldridge*, 82 N. Y. 161, 37 Am. Rep. 558; *In re An Attorney*, 83 N. Y. 164. A disbarment proceeding is penal in its nature, as it may deprive the attorney for life of earning a livelihood in a profession and calling to prepare for which he has spent much time and money, and to which he has been duly admitted (*Matter of An Attorney*, 1 Hun, 329), and upon that theory it has been held that the particular misconduct charged must be proved beyond a reasonable doubt (*In re Mashbir*, 44 App. Div. 632, 60 N. Y. Supp. 451); but doubtless that rule should be confined to a charge involving a crime. A judgment in a civil action is no evidence of the facts therein adjudicated against the defendant in a criminal prosecution for the reason, that the rule of reasonable doubt does not obtain in civil actions. 1 Freeman on Judgments, 319a; 2 Wharton on Evidence, §§ 776, 777; 2 Black on Judgments, § 529; *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646.

The judgment in the Municipal Court was recovered under the rule of preponderance of evidence, which obtains in civil actions even to recover a penalty, or involving criminal acts, with the qualification, as to acts constituting a crime, that, if they be susceptible of an innocent construction, the defendant must be given the benefit of that construction. *Kurtz v. Doerr*, 86 App. Div. 507, 83 N. Y. Supp. 736, affirmed 180 N. Y. 88, 72 N. E. 926, 105 Am. St. Rep. 716; *Serra v. Brooklyn*

Heights R. Co., 95 App. Div. 159, 88 N. Y. Supp. 500; Wood v. Wyeth, 106 App. Div. 24, 94 N. Y. Supp. 360. The judgment in the Municipal Court was admissible in this proceeding, for the effect upon the public of its recovery against the attorney is an item to be considered in determining whether he is a fit man to retain a license to practice. McCarthy's Case, 42 Mich. 71, 51 N. W. 963; Fairfield County Bar v. Taylor, 60 Conn. 11, 22 Atl. 441, 13 L. R. A. 767. It is quite clear, however, I think, that it is not conclusive upon the attorney, and that he is at liberty to explain it, and that it is our duty to determine upon all of the evidence presented here whether it has been clearly shown by a fair preponderance of the evidence that he is guilty of the charge of having converted the money. Matter of Darmstadt, 35 App. Div. 285, 55 N. Y. Supp. 22; 4 Cyc. 915.

There are some inconsistencies in the position and claims of the attorney from time to time, and in his testimony; but, as he is not now upon trial for them, they may only be taken into consideration in determining the punishment after his conviction of some charge upon which he is upon trial. I am of opinion that the specific charge of conversion should not be deemed sustained by the evidence, but it does not follow that the proceeding should be dismissed. Although conversion is charged, yet the facts relating to the entire conduct of the respondent with respect to this transaction are set forth, and professional misconduct is charged broadly thereon. There is no evidence of deception or dishonesty on the part of the attorney in his relations with his client; but for failing to preserve her money intact, and to exercise greater diligence in causing the presentation of the application for the pardon, and for failing to return the unused balance of the fund to her promptly upon learning that the application for the pardon had been denied, he should be disciplined by suspending him from practice for the period of six months.

MOTOR BOAT PUB. CO. v. MOTOR BOATING CO.

(Supreme Court, Special Term, New York County. December 6, 1907.)

1. TRADE-NAMES—INFRINGEMENT—TEMPORARY INJUNCTION.

Plaintiff, a publisher of a publication called the "Motor Boat," sought to restrain defendant from publishing a magazine called the "Motor Boating Magazine." The expression "Motor Boat" was a properly descriptive and generally accepted designation. The two publications were of the same dimensions, but the coloring and general design of the covers were so different that no one could mistake the one publication for the other. The circulars of defendant stated that its publication was new. The form of the subscription cards by both were in their general features common to a great many other business concerns. *Held*, that plaintiff was not entitled to a temporary injunction to restrain defendant during the pendency of the action from publishing or selling its magazine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 108.]

2. SAME.

A publisher of a publication called "Motor Boat" is not entitled to a temporary injunction to restrain a foreign corporation from publishing a magazine called "Motor Boating Magazine," on the ground that the

corporation has not complied with Corp. Laws, §§ 15, 16, 16a (Birdseye's Rev. St. [3d Ed.] pp. 727-729), because it had not obtained a certificate authorizing it to do business in the state.

Action by the Motor Boat Publishing Company against the Motor Boating Company. On motion for a temporary injunction. Denied.

Hugo H. Ritterbusch, for the motion.

Robert B. Gray (Rollin M. Morgan and Arthur L. Marvin, of counsel), opposed.

GIEGERICH, J. The plaintiff seeks to enjoin the defendant during the pendency of the action from publishing or selling a proposed magazine to bear the name, "Motor Boating," or any publication whatsoever bearing the name "Motor Boat" or "Motor Boating," or any name similar to or an imitation of the name "Motor Boat," and from doing any business in the state of New York because of its failure to comply with sections 15, 16, and 16a, Birdseye's Rev. St. (3d Ed.) pp. 727-729 of the corporation laws of the state of New York, in that being a foreign corporation, the defendant has not procured the necessary certificate to do business in this state.

The theory of the plaintiff's claim to the exclusive use of the expression "Motor Boat" in the title of any publication is based upon the fact that the plaintiff has used such title continuously since April, 1904. The opposing affidavits show that the expression "motor boat" to designate boats propelled by a motor had come into general use prior to the date when the plaintiff began its publication, and that some magazines previous to that date conducted a regular department under the title "The Motor Boat." Although this is contradicted by the replying affidavits, I think the evidence is in favor of the defendant on this issue, and it is apparent that whatever influence the plaintiff's publication may have had in promoting the use of the term "motor boat" in place of "power boat" or "automobile boat," or "auto boat," or any of the other terms first used to designate such craft, was only one of a number of contributing causes, and that the change took place at about the same time and owing to the same influence that brought about the general adoption of the similar expressions "motor cycle" and "motor car." In deciding the case, therefore, it must be taken as established that the expression "motor boat" is a properly descriptive and generally accepted designation.

Such being the fact, it is difficult to see what warrant the plaintiff or any one else would have for claiming such broad privileges with respect to the term. It is shown in the opposing affidavits that, where a title of the character in question is adopted, it is quite usual that two or three magazines with similar titles are published. For instance, "The Automobile," "Automobile Magazine," and "Automobile Topics" are three distinct publications in that line. Another illustration is found in the case of the engineering publications; there being an "Engineering Magazine," "Engineering News," "Engineering Record," "Engineering Review," and "Engineering Index," and others. The defendant announces that its intention is to add the word "magazine," making the name of its publication "Motor Boating Magazine." That

being done, I can see no serious danger that the public will be misled, and that the mail of the two publications will be confused, or that any other form of confusion will arise any more than is likely to happen in the case of publications in other lines of somewhat similar names, such as the ones instanced above.

In the present instance, the circulars and announcements sent out by the defendant company are entirely frank and plain, and, indeed, emphatic, in showing that the defendant's publication is an entirely new, one that is just being launched. With respect to the form of subscription cards of which complaint is made, it is shown satisfactorily that the form of card used by both companies is in its general features one common to a great many other business concerns. Keeping that fact in mind, it does not impress me that the card adopted by the defendant is unduly similar to that used by the plaintiff. So far as concerns the general appearance of the two publications, it is true that they are of the same dimensions; but it is also shown that those dimensions are common to many publications. The coloring and general design of the covers is so different that nobody could ever mistake the one publication for the other.

Coming now to the branch of the motion which seeks to enjoin the defendant from doing business on the ground that it has not obtained a certificate authorizing it to do business within the state, I have been unable, after such search as time has permitted me in the absence of citations in the briefs, to find any case in point. The only authority which seems to have dealt with the question at all is *American Tartar Co. v. Am. Tartar Co.*, 57 App. Div. 411, 68 N. Y. Supp. 236, where a foreign corporation, after doing business in this state for a considerable time without acquiring authority to transact business here, sought to restrain a domestic corporation subsequently organized which adopted the same name without knowledge of the existence of the foreign corporation. The court denied the motion, but nowhere in the opinion delivered was it intimated that the foreign corporation delinquent in the respect indicated was without any standing to claim the protection of our courts if it had presented a meritorious case in other respects; the decision being based upon the ground that the domestic company had proceeded in good faith and without knowledge of the prior existence of the foreign corporation. The statute in question, in section 15 thereof, provides the penalty, and a very severe one, for failure to secure authority to do business in this state, and, in the absence of decisions on the point, I am not disposed to go to the extreme which the plaintiff desires in this case.

The motion should be denied, with \$10 costs.

BAINBRIDGE et al. v. HARRIS et al.

(Supreme Court, Appellate Division, Second Department. December 5, 1907.)

PARTNERSHIP—DISSOLUTION—ACCOUNTING.

Evidence, in an action for an accounting between surviving partners and the representatives and legatees of the deceased partner, *held* sufficient to show that the interest of the deceased partner in the capital of the firm was only \$30,000.

Hooker, J., dissenting.

Appeal from Special Term, Kings County.

Action by Henry C. Bainbridge and others against Maria Louise Harris, executrix, and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Charles T. Bainbridge died in the year 1880. He was engaged with another in the business of manufacturing paper goods. Upon his death, and in that same year, his widow Hannah Maria Bainbridge, and two of his sons, Henry C. and Richard W., entered into copartnership to carry on the same business. The mother put in all of the capital, namely, the odds and ends of the father's business, and \$6,200 in cash. The interest of the partners in the capital and in the profits was fixed at 50 per cent. for the mother, 26 per cent. for one of the sons and 24 per cent. for the other. The partnership agreement was not in writing. The partnership continued to January 1, 1884, when they entered into a new partnership agreement in writing and dated that day. Its term was fixed at ten years. It stated the capital of each to be, that of the mother \$15,860.08, of Henry C. \$4,225.75 and of Richard W. \$3,671.37, the amounts to the credit of each shown by the firm's books at that time. It provided that she might draw \$3,000 and each of the sons \$2,000 a year as salaries; that at the end of every two years the salaries should be readjusted according to the condition of the business; that profits were to be divided one third to each at the end of each year, and losses borne in the same proportion; and that if the partnership should be wound up each partner should receive after payment of the debts the amount to his or her credit on the books, and one third of any sum remaining.

At the expiration of the said term of ten years, viz., on December 31, 1893, the partnership business continued without any change or new agreement. On January 1, 1895, the books exhibited the total amount to the credit of each partner to be, that of the mother \$28,987.54, of Henry C. \$24,638.86 and of Richard W. \$22,099.04, the increase being by credits from time to time of undrawn profits.

The said mother died testate on August 26, 1903, aged eighty-three years. The partnership had continued up to her death. She never took part in the management of the business but left it to her said two sons. This action is by her said two sons against her executor, her two surviving daughters, her other surviving son, the two children of a deceased son, the seven children of a deceased daughter, and the executors of the said daughter, comprising all of her heirs at law and next of kin, they all being the children and grandchildren of herself and her said deceased husband, Charles T. Bainbridge. By her will she left her estate to her children, and the children of her deceased children, share and share alike, per stirpes, except that the share of her daughter Lucy was to be at least \$10,000, and that she left nothing to her two sons, her partners, saying in her will that she made no provision for them for the reason that she had already provided for them by giving to each of them a sufficient interest in the said partnership business. The will was dated March 5, 1887, a codicil January 10, 1889, and a second codicil February 8, 1892. It was admitted by the plaintiffs on the trial that if the said written partnership continued up to the mother's death her share of capital then was at least \$60,000.

The complaint alleges that "at or about the end of the year 1895" the partners made an agreement "whereby the capital interest of Hannah Maria

Bainbridge therein" (in the copartnership) "was ascertained and agreed to be and was fixed at the sum of about \$30,000, while the remainder of the capital and assets of the said business was ascertained and agreed to belong to the two said plaintiffs Henry C. Bainbridge and Richard W. Bainbridge," and "that thereafter the capital interest of the said Hannah Maria Bainbridge in the said business and assets so long as the same might be continued by them as copartners should be limited to and continue at the sum of \$30,000, and her share of any profits made should be limited to the sum of \$2,500 a year"; excepting that for the year 1896 she should receive one third of the profits in addition to the said sum of \$2,500, after the said sons had each drawn for that year \$7,000 and for the year 1897 the same after they had each drawn \$9,000. The bill of particulars furnished by the plaintiffs states that the said contract was oral.

The prayer of the complaint is (in substance) that it be adjudged that the interest of the said mother in the said partnership assets is \$30,000 (and \$1,000 of undrawn profits), and that upon payment of the same to her executor by the plaintiffs the said copartnership assets, real and personal, be freed of all claim, trust or equity of her estate or of the defendants in or to the same.

The executrix of the said mother's will, her daughter Maria Louise, did not answer either as executrix or individually, nor did the other daughter Lucy Anna Bainbridge, nor the son Charles Edward Bainbridge. Only the children of the two deceased children (who were a son and a daughter), and the executor of the said deceased daughter, answered.

Argued before HIRSCHBERG, P. J., and JENKS, HOOKER, RICH, and GAYNOR, JJ.

Alfred A. Wheat (Gilbert H. Montague and William S. Woodhull, on the brief), for appellants Carleton Bainbridge and Sherman Bainbridge.

William Byrd (Robert L. Harrison, on the brief), for appellants John C. McKennie et al.

Albert G. McDonald, for respondents.

GAYNOR, J. The question of fact tried was what was the partnership agreement between the mother and her two sons: when she died in 1903. The partnership books showed that since 1895 her share of the capital remained constant at \$30,000, and that she received each year only \$2,500 as her share of the profits, all increase of capital and all the rests of the profits being meanwhile credited to her sons. This course of dealing among the partners would be controlling evidence of the status and interest of each in the absence of any other evidence. But she did not participate in the management of the business, but left it to her sons. It is therefore argued that the contents of the books did not bind her, as would otherwise have been the case. Against this it was shown that annual and monthly statements were regularly made out from the books and given to her showing the capital interest and profits of each as stated above. These statements were found among her papers after her death. Two of her daughters also testified that they had seen her read these statements, and that she had told them that her capital interest in the partnership was \$30,000 and her income therefrom \$2,500 a year, and were to remain so, by agreement with her said sons. All of this suffices to show that the books correctly showed the relation and interests of the partners, and that therefore the written partnership agreement made on January 1, 1884, to continue for ten years, and which continued for two

years longer, as the partnership books showed, had been superseded by a new arrangement at the beginning of 1896. The books showed that she had about \$30,000 to her credit at that time, that theretofore the profits had been divided equally among the partners, and that her capital, like that of her sons, had been increased almost every year by undrawn profits of the business placed to her credit. This course of business ceased at the end of 1895, and was succeeded by the course stated above. During the time the written partnership agreement was in operation, annual and monthly statements were given to her like those given to her after 1895. This series of statements for nineteen years, viz., from January 1, 1884, informed her fully of the changing interest of each partner in the capital and profits as shown by the books from time to time.

It was not unconscionable or unreasonable that at the age of seventy-three the mother should allow all future increase in the business to go to her two sons upon whose efforts it depended, and that she should be content in the retirement of her old age with over eight per cent. return on the capital which she had accumulated by the industry and fidelity of her sons and allowed to remain in the business. It was impossible because of her death for any direct oral evidence to be given by the sons of the making of the new arrangement, but the other evidence sufficed to enable the learned trial Judge to find that it was made.

There is a class of cases, i. e., of attempts to get the property of persons after their death by means of alleged oral agreements with them, which are looked upon with disfavor and suspicion by the courts, and against which there is a presumption at the outset, instead of their being approached, like other cases, with a neutral mind; but this case after all is hardly of it. And if it be deemed to be, such presumption was removed, and the case fairly proved. That the new arrangement was not put in writing is a fact to consider, but it is not controlling. The partnership agreement for the first three years, viz., from 1880 to 1884, was not in writing.

The judgment should be affirmed.

Judgment affirmed, with costs.

JENKS and RICH, JJ., concur. HOOKER, J., dissents. HIRSCHBERG, P. J., not voting.

THOMAS v. RODDY et al.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. BANKRUPTCY—ASSIGNMENTS—CONSTRUCTIVE FRAUD.

A transfer of property, made by a bankrupt within four months prior to the filing of a bankruptcy petition against him, is a constructive fraud on Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 8418], in that it interferes with the control of the bankrupt's property by the court of bankruptcy, and prevents the due operation of the act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 261-263.]

2. SAME—PRESUMPTION OF FRAUD—BANKRUPT'S INTENT.

Under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], avoiding transfers made within four months prior to the filing of a petition in bankruptcy, and vesting title to such property in the bankrupt's trustee for the benefit of creditors, transfers within such section are presumed to be fraudulent, regardless of the bankrupt's purpose or intent in making them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 252.]

3. SAME—PROPERTY FRAUDULENTLY TRANSFERRED—RIGHT OF TRUSTEE.

Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], avoids transfers made within four months prior to the filing of a petition in bankruptcy, and transfers title to the property to the bankrupt's trustee. Section 70 (30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), however, provides that the trustee shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt to all property transferred by him in fraud of his creditors, and authorizes the trustee to avoid any transfer which any creditor of the bankrupt might have avoided, and recover the property so transferred or its value, unless the transferee is a bona fide holder for value prior to the filing of the bankruptcy petition. *Held*, that the right of the trustee to all property of a bankrupt transferred by him in fraud of creditors is not restricted by section 67e to property transferred within the four-month period, but that the trustee is entitled to avoid any fraudulent conveyance which any creditor could avoid, and may recover any property which the creditor might acquire by any process taken by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 222.]

4. SAME.

Under Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], vesting a bankrupt's trustee with title to all property of the bankrupt transferred in fraud of creditors, and authorizing the trustee to avoid any transfer which any creditor of the bankrupt might have avoided, etc., a trustee may sue to set aside a fraudulent conveyance made by a bankrupt more than four months prior to the filing of a bankruptcy petition, without showing that some creditor of the bankrupt between the disposition of the property and the filing of the petition in bankruptcy had placed himself in a position to attack the fraudulent transfers by obtaining a judgment and issuing an execution and having the same returned unsatisfied.

5. SAME—RIGHTS OF CREDITORS—EFFECT.

The fact that creditors of a bankrupt had acquired a lien on property fraudulently transferred more than four months prior to the filing of the bankruptcy petition, and were entitled to sue notwithstanding the bankruptcy proceedings to set aside such fraudulent conveyance, did not deprive the bankrupt's trustee from maintaining a similar suit, especially where such creditors had not sued, and did not object to the proceedings by the trustee to which they were made parties defendant.

Scott, J., dissenting.

Appeal from Trial Term.

Action by Samuel B. Thomas, as trustee in bankruptcy of John S. Roddy, deceased, against John M. Roddy and others. From a judgment dismissing the complaint, and from an order denying a motion to set aside such dismissal, plaintiff appeals. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, HOUGHTON, and SCOTT, JJ.

Joseph M. Williams, for appellant.

Edward Russell, for respondents.

McLAUGHLIN, J. This action was brought by a trustee in bankruptcy to set aside certain transfers of property alleged to have been made by the bankrupt in fraud of creditors. The complaint alleges, in substance, the bankruptcy proceedings commenced in October, 1904; the discharge of the bankrupt, John S. Roddy, now deceased, in December of the same year; the appointment of the plaintiff as trustee in October, 1906; deficiency judgments recovered against Roddy in March, 1901, in two actions in favor of two of the present defendants, which judgments remain unsatisfied with the exception of a small sum paid on one of them; Roddy's conveyance in December, 1900—during the pendency of these two actions and while he was insolvent—of certain property, which is described, for the purpose and with the intent of defrauding his creditors, which fact was known to the grantees; the recovery of another judgment against Roddy, in favor of Sullivan, another defendant in this action, in August, 1903, which remains wholly unpaid; that Sullivan did not file proof of claim or appear in the bankruptcy proceeding, and had no notice or knowledge thereof; that there are debts of said bankrupt proved and unpaid amounting to upwards of \$3,000 above all assets which have come into the hands of the trustee, and that the debts of the bankrupt, as stated in the schedules, amount to \$4,000, above his assets, all or most of which indebtedness was incurred prior to December 17, 1900, the date of the alleged fraudulent conveyances. The judgment demanded is that the conveyances in question be declared void, the plaintiff be authorized to sell the real estate conveyed, and that an accounting be had of the rents, issues, and profits derived therefrom. At the opening of the trial, and before any testimony had been offered, the attorney for the representatives of the bankrupt, and certain other defendants, moved to dismiss the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. The motion was granted, and the plaintiff appeals from the judgment and order denying a motion to set aside the dismissal.

The dismissal of the complaint, as appears from the opinion of the learned justice who presided at the trial, was put upon the ground that the lien of the judgments set forth in the complaint survived the discharge in bankruptcy by virtue of the provisions of section 1268 of the Code of Civil Procedure, and that such judgment creditors are now in a position to enforce their judgments, either by a sale of the land, or by bringing an action in equity to have the transfers in question declared void; but that this right does not vest in the plaintiff—the trustee in bankruptcy—citing *Hillyer v. Le Roy*, 179 N. Y. 369, 72 N. E. 237, 103 Am. St. Rep. 919.

I am of the opinion that the court erred in dismissing the complaint, and that the reasons assigned are wholly inapplicable to the facts pleaded. Whether the complaint states a cause of action, of course, depends upon the construction to be put upon certain provisions of the bankruptcy act of July 1, 1898 (30 Stat. 544, c. 541 [U. S. Comp. St. 1901, p. 3418]). Under the act, an assignment or transfer of property, if made within four months prior to the filing of the petition, is a constructive fraud upon the bankruptcy act, in that it interferes with the

control of the debtor's estate by the court in bankruptcy, and prevents the due operation of the act itself. *Matter of Gutwillig* (D. C.) 90 Fed. 475; *West Co. v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098. It is provided in section 67e of the act that all conveyances, transfers, and assignments made within four months by a person so adjudged a bankrupt with intent to hinder, delay, and defraud creditors shall be null and void as against such creditors, except as to purchasers in good faith for a present fair consideration, and that the property so conveyed, transferred, or assigned shall be and remain a part of the assets and estate of the bankrupt, and shall pass to his trustee, whose duty it shall be to recover the same by legal proceedings or otherwise for the benefit of all the creditors. It matters not under this section, if the transfers were made within four months, what the purpose or intent of the assignor was. The transfers are presumed to be fraudulent, and can be set aside. It is quite apparent, therefore, that the complaint does not state a cause of action under section 67e, because none of the transfers sought to be attacked were made within four months of the time the petition in bankruptcy was filed; the allegation of the complaint being:

"That the debts of said bankrupt, as stated in the schedules, amount to \$4,000 over and above his assets, all of which indebtedness, or the greater part of which, was incurred prior to the 17th day of December, 1900."

If the plaintiff, therefore, can set aside these transfers, it must be under some other section, and this I think he can do under section 70, which provides:

"(a) The Trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors * * * shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt * * * to all * * * (4) Property transferred by him in fraud of his creditors. * * * (e) The trustee may avoid any transfer of the bankrupt of his property which any creditor of such bankrupt might have avoided and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. * * *

The trustee, by this provision of the act, is invested with the title of all property of the bankrupt transferred by him in fraud of creditors, unless his right in this respect is restricted, which I do not believe it is, by subdivision "e." The policy of the act is to secure an equal distribution of all property of the bankrupt among all his creditors. For that purpose, the trustee represents all the creditors, and may maintain an action to set aside any transfer which any creditor could or which any creditor might acquire by any process taken by him. In *re McNamara*, 2 Am. Bankr. Rep. 566; *Mueller v. Bruss*, 8 Am. Bankr. Rep. 442, 112 Wis. 406, 88 N. W. 229; *Sheldon v. Parker*, 11 Am. Bankr. Rep. 152, 66 Neb. 610, 92 N. W. 923; *Beasley v. Coggins*, 12 Am. Bankr. Rep. 355, 48 Fla. 215, 37 South. 213. Under the bankruptcy act of March 2, 1867 (14 Stat. 517, c. 176), which contained a provision to the effect that title to property fraudulently transferred vested in the trustee, it was held that the trustee could maintain an action to set aside such transfers, whether any individual creditor could have done so or not. *Platt v.*

Matthews (D. C.) 10 Fed. 280; In re Leland, 10 Blatchf. (U. S.) 503, Fed. Cas. No. 8,234. Judge Wallace, who delivered the opinion in the Matthews Case, concluded by saying:

"Numerous other authorities might be cited to sustain the position that an assignee may proceed to recover property transferred in fraud of creditors whether any creditor was in a position to attack the transfer or not, and that his title accrues by force of the act, and not through the rights of the creditor to assert the fraud."

The same view was entertained by the Court of Appeals in Southard v. Benner, 72 N. Y. 424. There the court had under consideration the construction to be put upon chapter 314, p. 506, Laws 1858, in connection with the bankruptcy act of 1867. The provisions of that act are somewhat similar to the one under consideration, in so far as relates to the maintenance of an action by a trustee, irrespective of the rights of individual creditors. The court, speaking through Judge Allen, said:

"Upon sound reason and the policy of the law, as well as the authorities quoted and others that might be referred to, there can be no doubt, we think, that the plaintiff as assignee has a right of action for property conveyed by the bankrupt in fraud of his creditors, although none of the creditors has acquired a specific lien. It is not such liens, or any particular interest in the property, or an interest for the benefit of any one creditor or class of creditors, that is vested in the assignee, but the entire property fraudulently transferred and for the benefit of all the creditors. The assignee takes title, not under any claim of right existing in the creditors, but under the statute, and that right he may assert by action, although no individual creditor, or all the creditors combined, could have a standing in court to challenge the conveyance."

Therefore it seems to me, even though it be held, as contended, that the complaint does not show that any of the creditors whose claims were filed in the bankruptcy proceedings were in a position to attack the transfers, nevertheless the trustee may do so. This must be so if the reasoning in the authorities cited be sound. To hold that a trustee cannot attack a fraudulent conveyance made by the bankrupt more than four months before the filing of the petition, without showing that some creditor had obtained a judgment and issued execution thereon, so that he could maintain a similar action, would be simply to provide an easy and convenient method for a dishonest debtor to dispose of his property. In that case, the debtor could fraudulently dispose of all his property more than four months before bankruptcy proceedings were instituted, and, unless some creditor—intermediate the disposition of the property and the filing of the petition in bankruptcy—had put himself in position to attack the fraudulent transfers by obtaining a judgment, issuing an execution and having the same returned unsatisfied, the trustee would be powerless to reach the property fraudulently disposed of.

But I think the complaint under consideration shows, or facts are stated from which an inference may be fairly drawn, that at least two of the creditors of the bankrupt who were in a position to attack the transfers at the time the petition was filed did file their claims in the bankruptcy court. Indeed, it is not claimed by counsel for the respondent but what such fact is to be inferred from the complaint,

because he states in his brief used upon the argument of the appeal that two of the judgments were proved in the bankruptcy proceeding. What he claims under the authority of *Hillyer v. Le Roy*, supra, is that, because these two judgment creditors had a right to attack the transfers, that deprived the trustee in bankruptcy of such right. In *Hillyer v. Le Roy*, supra, the plaintiffs, as judgment creditors, brought an action to set aside certain transfers alleged to have been made in fraud of creditors. After the commencement of the action, the firm was adjudged bankrupt, and discharged in bankruptcy proceedings. In a supplemental answer, this discharge was alleged as a bar to the action. All that the court held in affirming the judgment in favor of the plaintiffs, as I understand the opinion, was that they had acquired a lien by virtue of their judgment and the commencement of the action, which was not within the operation of the bankruptcy act, and they were at liberty to pursue any remedy they had for the enforcement of the lien, unfettered by the bankruptcy adjudication, and that the right to maintain an action to enforce the lien did not vest in the trustee in bankruptcy. Obviously this must be so, but it falls far short of holding that the trustee, even though certain creditors might have maintained the action, is deprived of doing so himself, and especially when such creditors have not commenced an action to enforce their lien, are made parties defendant to the one commenced by the trustee, and do not object to his proceeding. *Patten v. Carley*, 69 App. Div. 423, 74 N. Y. Supp. 993. The fact that a creditor has reduced his claim to judgment, which gives him a lien upon the bankrupt's property, does not prevent, if he sees fit to do so, his filing his claim in the bankruptcy proceeding. He is not obliged to embark in litigation for the purpose of enforcing his lien. He may waive that right, and take his chances with all the other creditors, and, if he does so, then the trustee is just as much obligated to bring an action to set aside a fraudulent transfer so far as he is concerned as he is as to the other creditors. The trustee represents all the creditors. His action is for the benefit of them all, but it is not necessary that all or any of them should be in a position to attack the transfers, or that the transfers should be fraudulent as to all. If fraudulent as to any, that is sufficient.

The judgment and order appealed from therefore must be reversed, and a new trial ordered, with costs to appellant to abide event.

PATTERSON, P. J., and INGRAHAM and HOUGHTON, JJ.,
concur. SCOTT, J., dissents.

CITY OF NEW YORK v. M. WINEBURGH ADVERTISING CO.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. INJUNCTION—SUBJECTS OF PROTECTION AND RELIEF—ENJOINING VIOLATION OF MUNICIPAL ORDINANCES—BUILDING REGULATIONS.

Before the enactment, in 1897, of the first Greater New York Charter, the erection of buildings in the city of New York was regulated by Laws 1892, p. 583, c. 275, § 42, by which authority was given to the department of buildings to institute any appropriate action or proceeding, at law or in

equity, to restrain or remove any building or structure attempted to be constructed in violation of the building law. By the first Greater New York Charter, Laws 1897, p. 224, c. 378, § 647, the several acts in force at the time of its passage, concerning the construction of buildings or structures in the city, were continued in full force and effect. It also provided that the municipal assembly should have power to establish a code of ordinances, to be known as the "Building Code," providing for all matters concerning the construction of buildings or structures, and that upon the adoption of such Code the other acts relating thereto should be repealed. In pursuance thereof, the common council, in 1899, adopted a Building Code, of which section 151 is in substantially the same language as section 42 of chapter 275, p. 583, Laws 1892. By Revised Charter 1901, Laws 1901, p. 179, c. 466, § 407, the Building Code, as it existed on January 1, 1902, and all then existing laws relating to the construction of buildings or structures within the city, were declared to be in force, and it was expressly enacted that no right of remedy of any character should be lost by reason of that chapter. *Held*, that under these statutes an injunction will lie to enforce sections of the Building Code relating to the erection of sky signs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 176.]

2. MUNICIPAL CORPORATIONS—ORDINANCES—"STRUCTURES."

First Greater New York Charter, Laws 1897, p. 224, c. 378, § 647, provided that the municipal assembly shall have power to establish a code of ordinances, known as the "Building Code," relating to the construction of buildings or structures erected in New York City. In pursuance of this section, the common council, in 1899, adopted a Building Code regulating the erection of buildings and structures. *Held*, that a sky sign erected on the roof of a building for the purpose of advertising is a "structure," within the meaning of the statutes and ordinances, and hence subject to control thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1333.]

3. CONSTITUTIONAL LAW—POLICE POWER—DETERMINATION OF QUESTIONS—POWER OF COURTS.

While it lies primarily within the discretion of a legislative body to determine what laws are appropriate and proper in the exercise of the police power of the state, the duty remains in the courts, when called upon, to scrutinize the measures sought to be enforced, to see whether they really fall within the limitations of the police power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 42.]

4. INJUNCTION—DEFENSES—ORDINANCES—VALIDITY—RIGHT TO QUESTION.

Where defendant, as required by New York Building Code, §§ 4, 144, filed plans and obtained a permit to erect a sky sign which was allowable under the Code, and then proceeded to erect a sign of a height not allowed by the Code, his permit, based upon such plans, furnished no authority for the erection of the sign, and in proceedings to enjoin the erection thereof he is in no position to attack the validity of the ordinance as a proper exercise of the police power, though he might have done so upon an application for a mandamus to compel the issuance of a permit for the erection of a sign not allowed by the Building Code, if the permit was refused.

Appeal from Special Term.

Action by the city of New York against M. Wineburgh Advertising Company to restrain the erection by the defendant of a sky sign. From an order granting a motion to continue a temporary injunction, defendant appeals. Affirmed.

This is an action in equity by the city of New York to restrain the construction by defendant of what is denominated as a "sky sign," erected up-

on the roof of a building in the city, and to compel the removal of so much of said sign as has already been erected. The defendant is a domestic corporation engaged in constructing and maintaining advertising signs. The sign, the erection of which is sought to be restrained, stands upon the roof of a modern fireproof brick and steel building, with a steel roof. The building fronts on East Twenty-Second street, and extends north about the middle of the block between Twenty-Second and Twenty-Third streets. The defendant has invested a very large amount of money in signs and leases of roof privileges, and has leased from the owner of the premises above described the privilege of erecting said sign thereon, agreeing to pay the rental of \$400 per annum, and holds a contract from which it can realize about \$400 per month from the use of said sign. The sign is what is termed a "skeleton sign," composed of angle irons, and is firmly bolted and clamped to the roof of the building. It is 44 feet long and 15 feet high; the bottom being 5 feet 6 inches above the roof of the building. The front wall or cornice of the building rises 9 feet 6 inches above the roof, so that, when completed, the top of the sign will rise 21 feet and 6 inches above the roof, and 11 feet above the front wall or cornice. The sign extends from the rear wall of the building at the east end diagonally across the roof, being at its nearest point about 40 or 50 feet back of said front wall or cornice. The defendant is charged with violating sections 4 and 144 of the Building Code of the City of New York.

Section 4 of that Code provides that, "before the erection, construction or alteration of any building or part of any building, structure or part of any structure, or wall," the owner, or lessee, or agent of either, or the architect or builder employed by said owner or lessee, shall file plans and specifications of the proposed work, and it is further provided that such work shall not be commenced or proceeded with until the plans and specifications so filed have been approved by said commissioner of buildings, after which such work must be constructed in accordance with said plans and specifications, and it is made the duty of the commissioner of buildings to approve or reject any plan filed with him within a reasonable time.

Section 144 provides, in part, as follows: "Any letter, word, model, sign, device or representation in the nature of an advertisement, announcement or direction, supported or attached wholly or in part, over or above any wall, building or structure, shall be deemed a 'sky sign.' Sky signs shall be constructed entirely of metal, including the uprights, supports and braces for same, and shall not be at any point over nine feet above the front wall or cornice of the building or structure to which they are attached, or by which they are supported. All fences, signs, bill boards and sky signs shall be erected entirely within the building line, and be properly secured, supported and braced, and shall be so constructed as not to be or become dangerous. Before the erection of any fence, sign, bill board or sky sign shall have been commenced, a permit for the erection of the same shall be obtained from the superintendent of buildings, having jurisdiction as provided in part 2 of section 4 of this Code."

The defendant in June, 1907, filed with the superintendent of buildings specifications and plans for the erection of a sky sign upon the building, upon which it is now proceeding to erect a sign. These plans and specifications indicated that it was intended to erect a sign 9 feet high and 50 feet long, so that at no point should said sign be over 9 feet above the front wall or cornice of said building. These plans and specifications were thereupon approved by said superintendent, and a permit issued for the erection of said sign in accordance with the plans and specifications thus filed and approved.

Argued before PATTERSON, P. J., and INGRAHAM, CLARKE, SCOTT, and LAMBERT, JJ.

Louis Marshall, for appellant.
Theodore Connolly, for respondent.

SCOTT, J. Before proceeding to discuss the question as to the validity of the "sky sign" ordinance, it is necessary to consider an objection raised by defendant to the form of action adopted by plaintiff. It is argued that an injunction will not lie to enforce a municipal ordinance. As a general rule, this is undoubtedly true (*Village of New Rochelle v. Lang*, 75 Hun, 608, 27 N. Y. Supp. 600; *City of Mount Vernon v. Seeley*, 74 App. Div. 50, 77 N. Y. Supp. 250), but the Legislature has the right to establish such a remedy, and we think that it has done so with reference to violations of the Building Code in the city of New York. Before the enactment, in 1897, of the first Greater New York Charter, the erection of buildings in the city of New York was regulated by statute. Chapter 275, p. 543, Laws 1892. By section 42 of that act authority was given to the department of buildings to institute any "appropriate action or proceeding at law or in equity to restrain, correct or remove" any building or structure attempted to be constructed in violation of the building law. This language seems to be sufficiently broad to warrant the institution of a suit in equity and the issuance of an injunction therein, whether restrictive or mandatory. By section 647 of the first Greater New York Charter (chapter 378, p. 224, Laws 1897), the several acts in force at the time of its passage, concerning, affecting, or relating to the construction, alteration, and removal of buildings or other structures included within the city of New York, as constituted by said charter (including the above-cited chapter 275, p. 543, Laws 1892), were continued in full force and effect, except as modified by said charter (as section 42, p. 583, of said chapter, Laws 1892, was not). It was further provided that the municipal assembly, created by the charter, should have power to establish and from time to time amend a code of ordinances to be known as the Building Code, "providing for all matters concerning, affecting or relating to the construction, alteration or removal of buildings or structures erected or to be erected in the city of New York." It was also provided that, upon the adoption of such a code, the several acts relating to that subject, and by the section continued in force, should cease to have any force and effect, and should be repealed. In pursuance of this section, the common council, in 1899, adopted a "Building Code." Section 151 of that Code is in substantially the same language as section 42 of chapter 275, p. 583, Laws 1892, including the provision for equitable relief. By section 407 of the Revised Charter of 1901 (chapter 466, p. 179, Laws 1901), the Building Code as it existed on the 1st day of January, 1902, "and all then existing laws affecting or relating to the construction, alteration or removal of buildings or other structures within the city of New York," were declared to be binding and in force in said city, and it was expressly enacted that:

"No right or remedy of any character shall be lost, or impaired or affected by reason of this chapter."

It may be conceded, as argued by the defendant, that a municipal assembly has no power to extend the jurisdiction of, or to confer jurisdiction upon, the Supreme Court, and, if the right to enjoin a violation of the building law rested only upon an ordinance of the com-

mon council, the point would be entitled to much consideration. It seems to be quite clear, however, that the Legislature, in authorizing the common council to adopt a Building Code, intended to confer authority upon the municipal body to do that which it had power to do, and that, when the Legislature provided that the building laws formerly in force should be repealed upon the adoption of a Building Code, it meant that those provisions of the Building Code, which it was within the power of the common council to adopt, should supersede and stand in the place of legislative acts covering the same field. If, therefore, the common council had no power to enact section 151 of the Building Code, purporting to provide a remedy by injunction, the section must be treated as if it had not been included in the Code at all, and consequently section 42, c. 275, p. 583, Laws 1892, embracing a subject not within the authority of the common council, and therefore not validly treated of by the Building Code, remained unrepealed. *People ex rel. Pumpysky v. Keating*, 168 N. Y. 390, 61 N. E. 637. This view is confirmed by the language quoted above from the revised charter of 1901, which continued in force not only the Building Code, but also all existing laws affecting the construction, alteration, and removal of buildings, appropriate language to continue in force such laws as were not superseded by the Building Code. So that whether section 42 of the act of 1892 was left unaffected by the Building Code, or section 151 of the Building Code was confirmed and ratified by the act of 1901, the right to prevent violations by injunction still continues. It is not necessary to hold, and we see no reason for holding, that the Legislature ever intended to abolish the speedy, orderly, and convenient remedy expressly provided by section 42 of the act of 1892, and our view in this regard is strengthened by the care with which the revised charter of 1901 preserved every right or remedy of every character. We are therefore of the opinion that this action will lie.

The appellant further insists that the regulation of sky signs by the Building Code was unauthorized, because the power given by the Legislature was confined to "matters concerning or relating to the construction, alteration or removal of buildings or structures erected or to be erected in the city of New York," and an ingenious argument is made, based upon the rule of construction *nocitur a sociis*, that by a structure as used in the charter is meant a construction in the nature of a building. It is insisted that such a sign as defendant has erected is not in the nature of a building, and therefore not within the statute, but that, if it be held to be of the nature of a building, the ordinance limiting its height was never validly adopted, because, by section 407 of the charter of 1901, the board of aldermen is forbidden to adopt any ordinance regulating and restricting the height of buildings, except after public hearings, and unless such ordinance had been approved beforehand by the board of estimate and apportionment. These arguments cannot prevail. It is our duty to read statutes according to the natural and most obvious import of their language, without resorting to subtle and forced construction, for the purpose of either limiting or extending their operation. *McCluskey v. Cromwell*, 11 N. Y. 593, 601; *Kemp v. D'Oench*, 111 N. Y. 359, 18 N. E. 862. Accord-

ing to the generally accepted meaning of the terms, while a "building" is always a "structure," yet many things may be termed "structures" which are not "buildings." *Chaffee v. Union Dry Dock Co.*, 68 App. Div. 578, 73 N. Y. Supp. 908; *Wingert v. Krakauer*, 76 App. Div. 34, 78 N. Y. Supp. 664. And in numerous cases in the state the term "structure" has been specifically applied to billboards. *City of Rochester v. West*, 29 App. Div. 125, 51 N. Y. Supp. 482; *Gunning System v. Buffalo*, 75 App. Div. 31, 77 N. Y. Supp. 987; *Buskirk v. O. J. Gude Co.*, 115 App. Div. 330, 100 N. Y. Supp. 777. It needs but to read the expert description of defendant's sign, and to glance at its photograph, to conclude that it is essentially a "structure." It is equally apparent that this particular structure is not a building, within any sense of that word.

We are thus brought to defendant's main contention, which is that the ordinance is unreasonable and oppressive, and therefore void. If the ordinance is to be sustained at all, it must be because it falls within that inherent power of sovereignty which is known as the police power, meaning thereby the power of the state to preserve and promote the public welfare by prohibiting things hurtful to good order, and health, morals, and welfare of the people, and to establish such rules and regulations for the conduct of all persons and the use and management of all property as may be conducive to the public interest. The existence of this power is universally recognized, although, from its very nature, it is impossible to precisely define its extent and limitation. To justify an act or ordinance which in any degree interferes with the liberty of the individual, or with the full enjoyment by him of his property, it must appear by reasonable intendment that it is calculated, intended, convenient, and appropriate to conserve the public health, welfare, comfort, or morals, and, while it lies primarily within the discretion of the enacting body to determine what laws are appropriate and proper for that purpose, yet the duty remains in the courts, when called upon, to scrutinize the measures sought to be enforced, to see whether they really fall within the limitations of the police power. *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

It is charged against the "sky sign" ordinance that it is unreasonable, in that it fixes arbitrarily and inflexibly a limit of nine feet upon the height of such signs, without regard to the method of their construction or the height of the buildings upon which they are to be placed. And it is further insisted that it is apparent upon the face of the ordinance that it was not adopted for the purpose of promoting the public health, comfort, or welfare, and is not calculated to achieve that purpose; that the prohibition does not extend to structures generally erected upon roofs, but only to structures intended to be used for a particular, and perfectly legal purpose, so that the identical structure would be legal and authorized, if not used as a means of advertising, and become illegal and unauthorized if devoted to advertising uses. We fully recognize the force of these objections, and find much support for them in judicial expressions. *People v. Green*, 85 App. Div. 400, 83 N. Y. Supp. 460; *Crawford v. City of Topeka*, 51 Kan. 760, 33 Pac. 476, 20 L. R. A. 692, 37 Am. St. Rep. 323; *City of Chicago v. Gunning System*, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A.

230. We do not, however, consider it necessary to pass upon these objections at this time, for the defendant has not yet placed itself in a position to raise them. It is perfectly well settled that it is competent for the Legislature, or a municipality acting under its authorization, to regulate the construction and erection of billboards and signs, and to provide that they are not to be erected, even upon private property, except upon approved plans, and after the issuance of a license or permit by the appropriate authority. Such reserved power is strictly analogous to, and indeed identical with, that which justifies the enactment of all urban building laws and codes. *City of Rochester v. West*, 29 App. Div. 125, 51 N. Y. Supp. 482, affirmed 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659; *Gunning System v. City of Buffalo*, 75 App. Div. 31, 77 N. Y. Supp. 987; *City of Passiac v. Patterson Bill Posting A. and S. Painting Co.*, 71 N. J. Law, 75, 58 Atl. 343.

Under section 4 and 144 of the New York City Building Code, it was incumbent upon the defendant, before it could lawfully erect such a structure as it has erected, to file plans and specifications therefor with the superintendent of buildings, and obtain a permit for such erection. To this extent the ordinance is undoubtedly valid, and with it the defendant has not complied. It is true that it appears to have filed plans and obtained a permit to erect a sign, but not the sign which it has proceeded to erect. Its plans showed a structure not more than 9 feet high, and hence within the limitations of the ordinance. Such a permit, based upon such misleading plans, furnished no authority for the erection of a sign 15 feet high, and the defendant is no better position than if it had applied for and obtained no permit whatever. The plaintiff is undoubtedly right in contending that the defendant could not lawfully erect the sign without applying for and procuring the prescribed permit. *People ex rel. Lodes v. Department of Health*, 117 App. Div. 856, 103 N. Y. Supp. 275; *City of New York v. Burleson Co.*, 89 App. Div. 222, 85 N. Y. Supp. 763. If plans had been filed for the precise structure which plaintiff has erected, and a permit had been refused upon the ground that the structure, being a "sky sign," was proposed to be built over nine feet high, the validity of the ordinance might have been tested upon an application for a mandamus to compel the issuance of a permit.

For the reasons stated, the injunction was properly granted, and the order appealed from must be affirmed, with \$10 costs and disbursements. All concur; CLARKE, J., in result.

CITY OF NEW YORK v. O. J. GUDE CO.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. MUNICIPAL CORPORATIONS—POLICE POWER—BUILDING REGULATIONS—PERMITS—MANDAMUS.

The fact that a municipal ordinance, regulating the height of sky signs, is unreasonable and void, does not justify the erection of any height of sky sign without the permit required for a sky sign by the ordinance; but a party may apply for a permit, asking that the superintendent of build-

ings determine whether or not the proposed sky sign is properly constructed, and may enforce the performance of that duty by mandamus.

2. SAME—ENFORCEMENT OF REGULATIONS—SUMMARY PROCEEDINGS—STATUTORY PROVISIONS.

Consolidation Act, Laws 1882, p. 140, c. 410, § 506, as amended by Laws 1892, p. 583, c. 275, § 42, authorizes the superintendent of buildings to institute any appropriate action or proceeding at law or in equity to restrain the erection of any building or structure in violation of the provisions of the title. Building Code of City of New York, § 151, re-enacts this provision, using its identical language. *Held*, that section 506 of the Consolidation Act is still in force, and that under it the superintendent of buildings is authorized to institute any appropriate action or proceeding at law or in equity to restrain the erection of any building or structure not complying with any of the provisions of the Building Code; but it does not authorize the court to require a structure to be removed, on a petition of the superintendent of buildings, by an order based on an affidavit that the structure has been erected in violation of the Building Code, without giving opportunity to meet the testimony except by affidavit.

Clarke, J., dissenting.

Appeal from Special Term.

Proceedings in the matter of the application of the city of New York against the O. J. Gude Company for a summary order requiring defendant to remove certain signs. From an order directing defendant to remove the signs, it appeals. *Reversed*.

Argued before PATTERSON, P. J., and INGRAHAM, CLARKE, SCOTT, and LAMBERT, JJ.

Julius M. Mayer, for appellant.

Theodore Connolly, for respondent.

INGRAHAM, J. The court by a summary order has required the appellant, the O. J. Gude Company, to remove certain signs upon private property located on the corner of Broadway and Forty-Second street in the city of New York under the provisions of certain ordinances of the city of New York, being part of the Building Code. This order was granted on the application of the city of New York based upon a petition verified by the superintendent of buildings. This petitioner alleges that the Municipal Assembly of the city of New York established a code of ordinances known as the "Building Code," which regulated the construction, alteration, or removal of buildings or structures erected or to be erected in the city of New York, which took effect on the 23d of December, 1899, and was afterwards incorporated as chapter 15 of the Code of Ordinances of the city of New York, which was approved by the mayor on December 1, 1906. The petition further alleges that the O. J. Gude Company was the owner of a certain structure located on the top of the building on the southwest corner of Broadway and Forty-Second street, in the city of New York; that on the 25th of March, 1907, the said O. J. Gude Company erected and constructed and maintains on the top of the said building the said structure, which is of metal, 40 feet long, and 28 feet high above the front wall or cornice of said building; that the said sign is a device or representation in the nature of an advertisement or announcement, and is a sky sign, within section 144 of the Building Code, and was erected and constructed in violation of the provisions

of section 4 of the Building Code, and in violation of section 144 of the said Building Code, in the following particulars: (1) That it was constructed without submitting a plan of the proposed work to the superintendent of buildings, and without the approval by said superintendent of buildings of any specifications or plans; (2) that before the erection of said sign no permit was obtained from the superintendent of buildings for the erection thereof; (3) that the said sign has been erected and constructed to the height of over 9 feet over the front wall and cornice of the above-described building to which it is attached and by which it is supported, to wit, 28 feet above the front wall and cornice of said building, in direct violation of section 144 of said Building Code. It is further alleged that the superintendent of buildings issued an order requiring the O. J. Gude Company to remove the said sign, which order was duly served upon the said Gude Company, but which was not complied with.

In answer to this application, the O. J. Gude Company submitted affidavits, from which it appeared that this sign was erected upon the roof of the building under an agreement with the owner or lessee of the building, is constructed entirely of metal, and is in all respects safe and erected in accordance with the provisions of the Building Code, except that in reference to the height above the top of the building.

The structure complained of is undoubtedly a "sky sign," within section 144 of the Building Code. The restrictions upon the erection of these sky signs are that they shall be constructed entirely of metal, including the uprights, supports and braces for the same, and shall not be at any point over nine feet above the front wall or cornice of the front wall or building to which they are attached or by which they are supported; that they shall be entirely within the building line and be properly secured, supported, and braced, and shall be so constructed as not to be or become dangerous, with the further provision that, before they are erected, a permit shall be obtained from the superintendent of buildings. It is conceded in this case that no application for a permit to the superintendent of buildings was made, nor was such permit obtained. It was proper that plans for such a structure should be submitted to the public officials, so that it could be ascertained whether or not a structure of this kind erected upon the top of a building was properly constructed and securely fastened to the building so as to prevent danger of its being blown into the street, or so constructed as not to embarrass firemen in the event of a fire in a building to which the structure was attached, or in an adjoining building, and generally to determine whether the structure was such as would not endanger the public or the adjoining buildings. The excuse offered by the appellant for not applying for this permit from the superintendent of buildings was that it understood that the superintendent of buildings had no jurisdiction to grant a permit for signs extending over nine feet above the cornice of the building. But assuming that to be true, and assuming the regulation as to the height of these sky signs to be invalid, that did not justify any one in constructing any kind of a structure that he pleased without a permit, as required by the Building Code, so that, as this structure was erected without submitting the plans to the superintendent of buildings and obtaining a permit from

him, it was an unauthorized and illegal structure. If the provision as to the height of these sky signs was invalid, the appellant could have applied for a permit asking that the superintendent should determine whether or not the sky sign was constructed in such a manner as to protect the public and comply with the ordinance in other respects, and could have enforced the performance of that duty by mandamus.

The objection, however, is made that this proceeding, which is an application to the Special Term of the Supreme Court for a summary order requiring the appellant to remove this sign, was not authorized. This proceeding is instituted under section 506 of the Consolidation Act (chapter 410, page 140, of the Laws of 1882, as amended by section 42, c. 275, p. 583, of the Laws of 1892), which authorizes the superintendent of buildings to "institute any appropriate action or proceeding, at law or in equity, * * * to restrain or correct the erection or alteration of or to require the removal of, or to prevent the occupation or use of the building or structure erected, constructed or altered, in violation of or not in compliance with any of the provisions of this title." Section 151 of the present Building Code reenacts this provision, using that identical language.

I agree with Mr. Justice Scott, in the case of *City of New York v. M. Wineburgh Advertising Company* (decided herewith) 107 N. Y. Supp. 478, that section 506 of the Consolidation Act is still in force, and that under it the superintendent of buildings was authorized to institute any appropriate action or proceeding, at law or in equity, to restrain or correct the erection or alteration of, or to require the removal of, or to prevent the occupation or use of, the building or structure erected, constructed, or altered in violation of, or not in compliance with, any of the provisions of the Building Code. But the question is: What was intended by the words "any appropriate action or proceeding, at law or in equity." Civil rights are enforced in courts either by actions or certain special proceedings, both of which are regulated by the Code of Civil Procedure. The right of a person against whom a claim is made, either at law or in equity, to be confronted by the witnesses against him, to have a right to cross-examine them, and to introduce evidence on his own behalf, is carefully preserved both by the Constitution and the Codes of Procedure as to the authorized actions and special proceedings, and in an action the right to this investigation before either a judge or a jury is assured by the Constitution to any person against whom a claim is made. The ordinary meaning which would be given to the phrase "appropriate action or proceeding" would be to authorize the superintendent of buildings to adopt any of the recognized actions or proceedings, either at law or in equity, for the enforcement of the provisions of the Building Code. It certainly cannot be supposed that the Legislature, by this general language, intended to reverse all of the statutory rules in relation to the enforcement of claims against individuals, by allowing the superintendent of buildings to institute an entirely new proceeding, by which rights to property of great value should be determined in a summary way upon affidavit, without the safeguards which have been found to be necessary in the disposition of questions of facts of affording an opportunity to cross-

examine the witnesses and introduce testimony subject to the common-law rules of evidence. If this power is presumed to have been lodged in the superintendent of buildings, the owner of any building, notwithstanding its character or cost, may be compelled to remove it by a summary order of the court at Special Term, based upon an affidavit that the building has been erected in violation of some of the provisions of the Building Code, without opportunity of cross-examining the witnesses relied on to prove such violation, or without an opportunity of fairly meeting the testimony, except by affidavit. Experience has demonstrated that a trial by affidavit is an extremely unsatisfactory way of disposing of questions of fact. Assuming that there would be no constitutional objections to depriving a person of his property in such a summary manner—a question which I think at least is open to serious doubt—the authority to institute such a proceeding should not be inferred from language which is perfectly consistent with the intention to authorize the superintendent to institute one of the recognized legal proceedings by which civil rights are enforced or protected. That the usual action for an injunction is amply sufficient to protect the rights of the public is apparent, as at any time the court by a temporary injunction, in such an action, can prohibit the violation of any of the provisions of the Building Code, and by final judgment, where the rights of the parties can be protected, can require the building erected in violation of it to be removed. No necessity exists for the institution of such a summary proceeding, and there is nothing in the statute, as I read it, which authorizes it.

In relation to the question as to the validity of this restriction, when applied only to advertising signs, and not to a structure to be used for any other purpose, I do not think anything more is required than has been said by Mr. Justice Scott in the case of *City of New York v. M. Wineburgh Advertising Company* (decided herewith), 107 N. Y. Supp. 478. My views upon this question were expressed in the case of *People v. Green*, 85 App. Div. 400, 83 N. Y. Supp. 460, and were concurred in by a majority of the court. As I think this proceeding was unauthorized, I am in favor of reversing the order appealed from on that ground only, leaving the other questions to be finally determined when they are properly presented.

The order appealed from should therefore be reversed, with \$10 costs and disbursements, and the application denied, with \$10 costs.

PATTERSON, P. J., and LAMBERT and SCOTT, JJ., concur.
CLARKE, J., dissents.

SCOTT, J. (concurring). I find myself constrained, although reluctantly, to concur with Mr. Justice INGRAHAM in the view that no legal authority can be found for the summary proceeding instituted by the city of New York in this matter, notwithstanding such proceedings have been resorted to for many years, and, so far as I can ascertain, have never before been seriously questioned. I cannot escape the conclusion, however, that section 506 of the Consolidation Act (Laws 1882, p. 140, c. 410), as amended by section 42 of chapter

275, p. 583 of the Laws of 1892, which I consider to be still in force (City of New York v. Wineburgh Advertising Co. [decided herewith] 107 N. Y. Supp. 478), authorizes, as "appropriate" proceedings, only such actions and special proceedings as are provided for by the Code of Civil Procedure, and does not authorize such a summary proceeding as the present.

The section quoted does, however, in plain terms, authorize a temporary injunction, which I think may be either restrictive or mandatory, and which should issue without hesitation where the facts are perfectly clear, or are, as in the present case, undisputed. Such a case would be presented where the structure complained of was imminently dangerous, or where it is one requiring a permit for its erection, but has been or is being erected without an attempt to secure such a permit. Such unlawful structures are prohibited under the police power of the state, and in such cases summary measures, when authorized by the Legislature, have always been sustained, and the right of trial by jury does not attach to them. *Heister v. Board of Health*, 37 N. Y. 669.

• KOBBE CO. v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. December 3, 1907.)

Appeal from Special Term.

Action for injunction by the Kobbe Company against the city of New York. From an order denying a motion for injunction pendente lite, plaintiff appeals. Affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, CLARKE, SCOTT, and LAMBERT, JJ.

Myer Nussbaum, for appellant.

Theodore Connolly, for respondent.

SCOTT, J. This appeal presents substantially the same questions which are presented by the appeal in *City of New York v. M. Wineburgh Advertising Company* (decided herewith) 107 N. Y. Supp. 478, and the same considerations which require the affirmance of the order in that case call for the affirmance of the order appealed from in this. The plaintiff filed, with the department of buildings, plans and specifications providing for the erection of a "sky sign" nine feet high, and received a permit from the superintendent of buildings for the erection of such a sign. It has proceeded to erect a sign about 27 feet high. For such a sign it has filed no plans and received no permit.

The order must be affirmed, with \$10 costs and disbursements.

PATTERSON, P. J., and INGRAHAM and LAMBERT, JJ., concur. CLARKE, J., concurs in result.

(122 App. Div. 608.)

UNITED STATES CASUALTY CO. v. JAMIESON.

(Supreme Court, Appellate Division, First Department. December 8, 1907.)

1. PLEADING—BILL OF PARTICULARS—APPLICATION BEFORE ISSUE JOINED.

In an action to recover advances alleged to have been made by plaintiff to defendant in excess of commissions to which he and his subagents were entitled, and for money loaned, defendant was not entitled to a bill of particulars after the action was commenced, but before issue was joined, since he is presumed to know the amount alleged to have been paid him, and the commissions earned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 977.]

2. SAME—ANSWER—DENIALS—STATUTES.

When defendant has not the necessary information to answer the complaint, he may interpose an answer denying that he has any knowledge or information sufficient to form a belief as to the truth of the allegations of the complaint, and under Code Civ. Proc. § 500, this puts plaintiff to his proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 245-248.]

Appeal from Special Term.

Action by the United States Casualty Company against Harry D. Jamieson to recover certain advances made to defendant, and for money loaned. From an order granting a motion for a bill of particulars, plaintiff appeals. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, HOUGHTON, and SCOTT, JJ.

Carl Schurz Petrasch, for appellant.

James Taylor Lewis, for respondent.

McLAUGHLIN, J. This action is brought to recover certain advances alleged to have been made by plaintiff to defendant in excess of commissions to which he and his subagents were entitled, and also upon a separate cause of action for money loaned. After the action had been commenced—but before issue was joined—the defendant moved for a bill of particulars. The affidavit upon which the motion was principally based was to the effect that the allegations of the complaint set forth, in gross, various sums of money, in large amounts, which had been advanced; that the defendant had never been permitted to examine the books of the plaintiff or given a statement of the sums advanced; that he was unable to answer the complaint intelligently and with safety to his interest; and that he could not properly defend the action without a detailed statement. The plaintiff, in opposition, submitted affidavits to the effect that the plaintiff had advanced certain amounts of money each week to defendant, and obtained receipts from him showing that the money was advanced on account of the commissions, and that monthly statements were rendered to him.

A bill of particulars is not ordered—except under very extraordinary circumstances—prior to the joining of issue, and this for the obvious reason that a party has no necessity for a bill of particulars until he disputes the plaintiff's claim. Not a single fact is here stated which would justify the order. The defendant knows, or ought to

know, whether or not he received the amounts alleged to have been paid him for the time stated; he also knows, or ought to know, the commissions earned by him, as well as by his subagents. If he knows these facts, then he is in a position to interpose an answer; if he has not the necessary information, then he can interpose an answer denying that he has any knowledge or information sufficient to form a belief as to the truth of the allegations of the complaint, and this puts the plaintiff to his proof. Code Civ. Proc. § 500. Substantially all the defendant claims is that he does not know whether the plaintiff's claim is correct or not, and a bill of particulars, under such circumstances, will not be ordered—certainly not before issue is joined. *Hicks v. Eggleston*, 95 App. Div. 162, 88 N. Y. Supp. 528; *McClellan v. Duncombe*, 26 App. Div. 353, 49 N. Y. Supp. 679; *American Credit Indemnity Co. v. Bondy*, 17 App. Div. 328, 45 N. Y. Supp. 267; *Morrill v. Kazis*, 8 App. Div. 304, 40 N. Y. Supp. 954.

The order appealed from, therefore, must be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs. All concur.

MARKS V. EMIGRANT INDUSTRIAL SAVINGS BANK.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. ADMINISTRATORS—FOREIGN APPOINTMENT.

F., having been a resident of Brooklyn prior to 1895, some time in that year entered a hospital in Jersey City, and remained there until August, 1896, when he returned to Brooklyn for a visit, and then disappeared leaving certain savings bankbooks, one of which showed a deposit in defendant bank, located in New York, with the managers of the hospital. In 1905, an administrator was appointed for F.'s estate in New Jersey, under New Jersey Act March 7, 1797, as amended by Act March 28, 1895 (P. L. p. 751), authorizing administration on the estates of absentees for a period of seven years. *Held*, that as there was no occasion for administration for the preservation of an abandoned estate in New Jersey, there being no property belonging to F. in that state, and there being no finding that F. was dead in fact, such administration did not entitle the administrator or his assignee to receive the deposits.

2. SAME—PAYMENT TO ADMINISTRATOR—FACT OF DEATH.

While a state under its police power may provide for administration on the estate of an absentee under proper safeguards for the protection of his interests in case of his return, payment to an administrator of such absentee, who is not in fact dead, is no defense as against him or his legal representatives.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 15-16.]

3. SAME—PROOF OF FACT—LETTERS OF ADMINISTRATION.

Letters of administration on the estate of an alleged deceased person do not establish even prima facie the fact of death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 15-16.]

4. SAME—EVIDENCE—SUFFICIENCY.

Where a savings bank depositor left the country and disappeared, the court, after the expiration of a sufficient time, could find that he was dead in fact, and could grant letters of administration on his estate.

Action by Morris B. Marks against the Emigrant Industrial Savings Bank. A verdict was directed in favor of plaintiff, and defend-

ant's motion for a new trial on exceptions was directed to be heard in the first instance at the Appellate Division. Verdict set aside, and motion granted.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAUGHLIN, HOUGHTON, and LAMBERT, JJ.

Frederick S. Fisher, for plaintiff.

Richard O'Gorman, for defendant.

HOUGHTON, J. Prior to the year 1895 Patrick Flanagan was a resident of Brooklyn in this state. Some time in that year he went to Jersey City in the state of New Jersey, and shortly thereafter entered St. Francis Hospital in that city, in which he remained apparently until August, 1896, when he returned to Brooklyn, where he visited a brother for a short time, and disappeared, none of his relatives having heard from or of him thereafter. Upon leaving the hospital he left in the custody of the managers three savings bank books, one of which was issued by the defendant.

In 1905 Joseph Flanagan, a nephew of Patrick, presented to the surrogate of the county of Hudson, the county in which Jersey City is situated, a petition, praying that letters of administration of the goods, chattels, and credits of Patrick Flanagan, presumptively dead, should be issued to him or some proper person. Notice by publication, according to the New Jersey statute, was given, and the proceeding resulted, as is stated by the certificate, in the granting of "administration of the goods and chattels, rights, and credits which were of Patrick Flanagan (presumed under an act entitled 'An act declaring when the death of persons absenting themselves shall be presumed,' passed March 7, 1797, as amended March 28, 1895, P. L. 1895, p. 751, to be dead), late of the county of Hudson, who died intestate," to the petitioner and another.

The proceeding for the appointment of administrators disclosed no property in the state of New Jersey belonging to the alleged deceased, his property consisting wholly of money in three savings banks shown to be located in the city of New York in this state.

In 1881 Patrick Flanagan had deposited with the defendant \$2,096, only a portion of the interest on which he had withdrawn from time to time, his last withdrawal of \$20, being on December 10, 1895. One of the conditions upon which the deposit was made was that, upon the decease of the depositor, the amount to the credit of the deceased should be paid to his legal representatives. After their appointment, the administrators presented copies of the proceedings of the Surrogate's Court of New Jersey on their appointment, together with the bankbook, to the defendant, and demanded payment to themselves of the deposit which Patrick Flanagan had made. The defendant declined to pay, on the ground that the copies of the proceedings in the Surrogate's Court were not properly exemplified, and, further, that the papers did not show on their face that Patrick Flanagan was dead, and that such a payment would be no protection against a demand by Patrick if he should chance to be living. Thereupon the administrators assigned their claim to the plaintiff, who brought this action

against defendant, which resulted in a direction of verdict in his favor, and a direction that the defendant's exceptions be heard in the first instance before this court.

We think the defendant's exceptions were well taken, and that the direction of a verdict in favor of plaintiff was erroneous, and that a new trial must be granted.

The proceeding had in the Surrogate's Court of New Jersey did not determine that Patrick Flanagan was dead, and the letters of administration issued therein were so issued because he was presumed to be dead under a statute of that state, providing that, when a person shall remain beyond sea or absent himself from that state, or from his last known place of residence, or conceal himself for seven years successively, he shall be presumed to be dead. Patrick Flanagan left no property in the state of New Jersey when he departed therefrom. Such property as he had was in the state of New York. The pass-book was not property. It was a mere evidence of indebtedness against a resident of this state. That the book happened to be there is immaterial. *Lavin v. Emigrant Industrial Savings Bank* (C. C.) 1 Fed. 641, 18 Blatchf. 1. There was no occasion, therefore, for the granting of letters of administration for the preservation of an abandoned estate.

By virtue of its police power a state has the right to enact a law for administration on the assets of an absentee, creating proper safeguards for the protection of his interests in case of his return. *Cunnius v. Reading School District*, 198 U. S. 458, 25 Sup. Ct. 721, 49 L. Ed. 1125. In *Roderigas v. East River Savings Institution*, 63 N. Y. 460, 20 Am. Rep. 555, it was held that payment to an administrator of the estate of a person judicially determined to be dead, but who in fact was alive, was good as against such person or his legal representatives. This case was expressly overruled in *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896, as violating the fourteenth amendment of the Constitution of the United States, in that it deprived a person of his property without due process of law; and it has been expressly declared to be no longer the law of this state. *Matter of Killan's Estate*, 172 N. Y. 547, 557, 65 N. E. 561, 63 L. R. A. 95. The plaintiff insists that the letters of administration prove a legal death. They do not purport to show a finding of actual death, and even if they did they would not be proof of that fact. Proof of the probate of a will or the granting of letters of administration do not establish, even *prima facie*, the fact of death. *Carroll v. Carroll*, 60 N. Y. 121, 19 Am. Rep. 144. It is urged that *Scott v. McNeal*, *supra*, does not apply, because the person in that case who was presumed to be dead, and upon whose estate administration had been granted, was in fact alive and demanding restoration of his property. The principle however is the same. The contract of the defendant with Patrick Flanagan was that it would repay to him his deposit, and hold itself in readiness so to do as long as he should live, and pay only to his representatives on his decease. His actual decease has not been established. Title to the deposit held by defendant has not been transferred from him to the administrators by due process of law, and hence they could not assign it to the plaintiff. Payment to the administrators or

their assignee would not protect the defendant from a repayment to Patrick Flanagan if he should be alive and hereafter demand it.

In addition, there is very grave doubt whether the New Jersey court ever had jurisdiction to grant letters of administration of any kind. Patrick Flanagan left no property in that state, for the bank books were not property, and he did not die there. He was a resident of Brooklyn in this state, and went from there to the Jersey City Hospital, and on his discharge from that institution came back to Brooklyn, from which place he disappeared. Whatever property he left behind him was in this state, and it might well be said that if any administration should be granted because he had abandoned his estate, temporary letters should be issued in this state under the provisions of section 2670 of the Code of Civil Procedure. Of course the money on deposit with defendant does not belong to it, and there will come a time when it can be found as a fact that Patrick Flanagan is actually dead, and the money, if he does not in the meantime draw it, can be paid to those entitled.

On the proofs appearing in the record, however, we are of the opinion that the present action cannot be maintained, and that the direction of a verdict against defendant was error, and that it should be set aside and a new trial granted, with costs to the defendant to abide the event. All concur.

BARRON v. FEIST.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. JUDGMENT—VACATION—EQUITY.

Plaintiff alleged that he had previously sued defendant in the Municipal Court, and that it was stipulated that the question whether defendant's answer contained a defense should be submitted to the justice, and, if it did, he should send the case to another justice for trial, otherwise he should render judgment for plaintiff; that he determined that the answer did state a defense, and, contrary to the stipulation, rendered judgment for defendant more than 14 days after submission, in violation of Municipal Court Act, § 230 (Laws 1902, p. 1557, c. 580), without a trial of the issues, and that the time to appeal had expired. *Held*, that the complaint did not state a cause of action to set the judgment aside in equity, under the rule that a judgment can be so attacked only on grounds which either could not have been made available to the complaining party at law, or which he was prevented from setting up by fraud, accident, or the wrongful act of the opposite party without negligence or fault on his part.

2. APPEAL—JUDGMENTS APPEALABLE.

Under Municipal Court Act (Laws 1902, p. 1578, c. 580) § 310, giving the right of appeal from the Municipal Court to the Appellate Term of the Supreme Court, a Municipal Court judgment is appealable, though the objection is that it was rendered without jurisdiction.

[*Ed. Note.*—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 81-87.]

3. JUDGMENT—VACATION—COMPLAINT—DEMURRER.

Where a complaint in equity to set aside a judgment showed on its face that plaintiff had had an adequate remedy at law by appeal, but had lost it by his negligence in failing to avail himself thereof within the time prescribed, the complaint was demurrable.

Appeal from Special Term, New York County.

Action by Ted S. Barron against Leo Feist. From an interlocutory judgment overruling a demurrer to plaintiff's amended complaint for want of facts, defendant appeals. Reversed.

See 101 N. Y. Supp. 72.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, HOUGHTON, and SCOTT, JJ.

A. S. Gilbert, for appellant.

Alfred B. Nathan, for respondent.

HOUGHTON, J. The amended complaint alleges that in November, 1905, the plaintiff brought an action in the Municipal Court of the city of New York, to which the defendant interposed an answer, and that upon such action coming on for trial the parties entered into a stipulation that they would submit to the justice the question as to whether or not the defendant's answer contained any defense, and that if the justice decided that it did not then judgment was to be entered for plaintiff, but that if he decided that it did contain a defense the action was to be sent to another justice for trial. That thereafter, and on the 27th day of January, 1906, the justice decided that the answer did contain a defense, and instead of sending the case to another justice of the Municipal Court for trial, in accordance with the stipulation, by inadvertence and mistake he rendered a judgment dismissing plaintiff's complaint, with costs amounting to \$22.41, which judgment was entered on that day. The complaint further alleges that such judgment was void because in violation of the stipulation, and because it was rendered more than 14 days after its submission to the justice, in violation of section 230 of the Municipal Court Act (Laws 1902, p. 1557, c. 580), and without a trial of the issues, and that the time to appeal therefrom has passed, and that plaintiff has no adequate remedy at law to relieve himself from such judgment, and that defendant threatens to collect the same, and asks that such judgment be declared invalid and void, and be set aside and defendant restrained from enforcing the same.

To this complaint the defendant interposed a demurrer that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled.

The learned trial court in holding that the complaint stated a good cause of action evidently relied upon an obiter statement in *Lackner v. American Clothing Co.*, 112 App. Div. 458, 98 N. Y. Supp. 376. In that case a justice of the Municipal Court had rendered a judgment irrespective of a tender paid into court, inadvertently overlooking that fact. The judgment should have gone for the defendant, but was given to the plaintiff. In holding that the various motions which had been made were ineffectual to relieve the defendant, the learned judge writing the opinion, at its close, remarked that the defendant was not without remedy, for an equity action would lie to give appropriate relief. The record in that case may have contained facts not disclosed in the opinion, but with the broad proposition that an equity action is maintainable to set aside a judgment inadvertently or mistakenly en-

tered by the court without the procurement of the opposite party, we cannot agree. From necessity, in preserving the stability of judgments and insuring that they shall be reviewed only in the manner prescribed by law, the ground upon which a judgment may be impeached in an equity action is very narrow. The rule is that impeachment of a judgment can be had only upon grounds which either could not have been made available to the complaining party at law, or which he was prevented from setting up by fraud, accident, or the wrongful act of the other party without any negligence or fault on his part. *Vilas v. Jones*, 1 N. Y. 274, 281; *Smith v. Nelson*, 62 N. Y. 286; *Reich v. Cochran*, 105 App. Div. 542, 94 N. Y. Supp. 404; *Merrifield v. Bell*, 60 Hun, 576, 14 N. Y. Supp. 322.

The complaint does not allege that the defendant, by fraud or any other means, induced the municipal justice to enter the judgment. On the contrary, it alleges that the judgment as entered was void, in that it was not rendered by the justice within 14 days after the submission of the case to him, in accordance with the provisions of section 230 of the Municipal Court Act, which section provides that judgment in that court, when not upon a verdict, must be rendered within such time. Section 310 of the Municipal Court Act gives the right of appeal from the Municipal Court to the Appellate Term of the Supreme Court. Although an inferior court has rendered a judgment without jurisdiction, the appellate court may so far act as to reverse the judgment for want of such jurisdiction. *McMahon v. Rauhr*, 47 N. Y. 67; *Catlin v. Rundell*, 1 App. Div. 157, 37 N. Y. Supp. 979.

It is not alleged that the plaintiff in this action was prevented by any act of the defendant from appealing from the judgment entered against him. It appears upon the face of the complaint, therefore, that he had an adequate remedy at law by appeal of which, by his own negligence, he did not avail himself. The complaint is not aided by the allegation that the judgment was entered contrary to the stipulation, or without a trial, for the reason that it appears clearly that the plaintiff could have rid himself of it by an appeal to the Appellate Term on the ground that it was rendered more than 14 days after its submission.

The respondent makes the point that whether or not plaintiff has an adequate remedy at law can only be raised by answer, and that a demurrer is not available for that purpose. This is true where that fact does not appear on the face of the complaint. That point is not involved on this appeal, however. The question is not whether plaintiff now has any adequate remedy at law, but whether he did have an adequate remedy at law to rid himself of the judgment, and failed to avail himself of it. If he did have such remedy he should have pursued it, and not having done so no action will lie in equity. Of course, a demurrer lies to a complaint on the ground that it fails to state facts sufficient to constitute a cause of action in equity as well as at law. *Black v. Vanderbilt*, 70 App. Div. 16, 74 N. Y. Supp. 1095.

The interlocutory judgment overruling the demurrer should be reversed, with costs, and the demurrer sustained, with costs, with leave to the plaintiff to amend within 20 days, on payment of costs in this court and in the court below. All concur.

WILNER v. INDEPENDENT ORDER AHAWAS ISRAEL.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

COSTS—PAYMENT—STAY OF SUBSEQUENT ACTION.

Under Code Civ. Proc. § 779, providing that where the costs of a motion in an action are directed to be paid, all proceedings on the part of the party required to pay the same are stayed without further direction of the court until payment thereof, where an action is dismissed on failure of plaintiff to appear and costs are taxed against him, a subsequent action between the same parties on the same cause of action will be stayed until such costs are paid, though the attorney alleges, on information and belief, that plaintiff is pecuniarily unable to pay the costs of the former action, no other excuse for nonpayment being made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Costs, §§ 1048–1060.]

Appeal from Special Term.

Action by Rachel Wilner against the Independent Order Ahawas Israel. From an order denying a motion to stay proceedings, defendant appeals. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, HOUGHTON, and SCOTT, JJ.

Alfred B. Jaworower, for appellant.

McLAUGHLIN, J. The plaintiff brought an action in the Municipal Court of the city of New York against the defendant to recover the sum of \$500. Issue was joined, but when the action came on for trial plaintiff did not appear, and the complaint was dismissed on defendant's motion, with \$32.41 costs. No motion was made, so far as appears, to open the default, nor were the costs paid. Subsequently this action was brought to recover upon the same cause of action. Thereupon defendant moved to stay the prosecution of this action until the costs of the prior action were paid. The motion was denied and defendant appeals.

Where the costs of a motion in an action are directed to be paid, all proceedings on the part of the party required to pay the same—except to review or vacate the order—are stayed without further direction of the court, until the payment thereof. Code Civ. Proc. § 779. This court has held that the same rule should be applied to the payment of costs in an action where another action is commenced between the same parties to recover upon the same cause of action. *Ingrasso v. Baltimore & Ohio R. R. Co.*, 105 App. Div. 494, 94 N. Y. Supp. 177. This seems to be the general rule (*Cuyler v. Vanderwerk*, 1 Johns. Cas. 247; *Perkins v. Hinman*, 19 Johns. 237; *Edwards v. Ninth Ave. R. R. Co.*, 22 How. Prac. 444; *Richards v. White*, 27 How. Prac. 155; *Spaulding v. American Wood Board Co.*, 58 App. Div. 315, 68 N. Y. Supp. 945; *Barton v. Speis*, 73 N. Y. 133), and it will be enforced unless special facts are presented which indicate that an exception ought to be made. The fact that a person is pecuniarily unable to pay the costs of the prior action is not an excuse sufficient to bring the case within the exception. The reason for this rule is a wholesome one. It has for its basis the fact that, where a party has successfully defend-

ed a prior action, he ought not to be put to the trouble and expense of defending another action predicated upon the same cause of action, until he has been paid the costs awarded to him by the court in the action first commenced. Provision is made in the statute how a person who is pecuniarily unable to prosecute an action may do so as a poor person. Here, it does not appear, except by an allegation of the plaintiff's attorney, which is made upon information and belief, that the plaintiff is pecuniarily unable to pay the costs of the former action. No affidavit is presented, nor is any excuse given by her why she has not paid such costs.

The order appealed from, therefore, must be reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs. All concur.

(122 App. Div. 505.)

CUMMINGS v. YATES & PORTERFIELD TRADING CO.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

CORPORATIONS—STOCKHOLDERS—COMPELLING ACTION BY CORPORATION—SUFFICIENCY OF COMPLAINT.

A complaint in an action by a stockholder, on behalf of the corporation for breach of contract by a promoter, alleged that the promoter entered into an agreement with a partnership which was to be incorporated, whereby a certain number of shares of stock in the proposed corporation were to be turned over by the partners to the corporation and a certain number to the promoter, in consideration of which the promoter was to sell 500 shares of stock of the corporation. It was also alleged that the stock was transferred per agreement, and that the promoter sold 100 shares of the stock but no more, by reason of which the corporation became insolvent. *Held*, that the complaint did not fail to state a cause of action in not alleging that the contract was made for the benefit of the proposed corporation, or that the corporation after its formation ratified or assumed it, since those facts could be inferred from the complaint as framed.

McLaughlin and Ingraham, JJ., dissenting.

Appeal from Special Term.

Action by William H. Cummings, suing, etc., against the Yates & Porterfield Trading Company and another. From an interlocutory judgment overruling a demurrer to the complaint, defendant company appeals. Affirmed.

Argued before PATTERSON, P. J., and McLAUGHLIN, INGRAHAM, HOUGHTON, and SCOTT, JJ.

Horace Comfort, for appellant.

Robert B. Austin, for respondent.

PATTERSON, P. J. The defendant, impleaded with one James N. Brown, demurred to the complaint in this action, on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and from the interlocutory judgment entered upon the decision of the Court at Special Term this appeal is taken.

It is alleged in the complaint that the plaintiff, who is a stockholder of the defendant corporation, sues on behalf of himself and others

similarly situated, and that such defendant is a foreign corporation organized under the laws of the state of New Jersey; that the plaintiff was the owner and holder in his own right of 10 shares of the preferred stock of that corporation, which was organized in February, 1900, for the purpose of acquiring the business and good will of a copartnership carried on under the firm name and style of Yates & Porterfield. It is further alleged that the corporation took over and acquired the going business of the copartnership, and issued to the members thereof its entire authorized capital stock consisting of 2,000 shares of preferred, and 2,000 shares of common, stock. It is also alleged that the defendant James N. Brown was the promoter of the defendant corporation, and as such promoter entered into an agreement with the persons constituting the copartnership of Yates & Porterfield, whereby he (Brown) agreed with the members of that firm that, in consideration of the said copartnership transferring and assigning to the defendant corporation 1,130 shares of the preferred stock, and of transferring and assigning to the defendant James N. Brown 1,020 shares of the common stock and 50 shares of the preferred stock of the corporation, and of the payment of \$1,000 in cash to the defendant Brown, he would sell and dispose of at par at least 500 shares of the 1,130 shares of the preferred stock of the defendant corporation which was to be transferred to the defendant corporation as aforesaid. The complaint then proceeds to allege that Yates & Porterfield, on the organization of the corporation, assigned and transferred to the defendant corporation 1,130 shares of the preferred stock, and in compliance with the terms and conditions of its agreement with Brown it transferred to him 1,020 shares of the common stock and 50 shares of the preferred stock, and paid to him the sum of \$1,000 in cash; that Brown sold, pursuant to the agreement, 100 shares of the 1,130 shares, and has not sold the remaining 400 shares to be sold pursuant to said agreement. The names of the directors of the corporation are then set forth in the complaint, and it is alleged that the plaintiff has made a demand upon each of the aforesaid directors that they cause the defendant corporation to bring an action against Brown to recover damages for his failure to carry out his contract to sell the preferred stock, and that a majority of the directors have refused to comply with such demand; that the corporation is now in the course of liquidation, and in an insolvent condition, and that such insolvent condition has been brought about by the failure of the defendant Brown to carry out the aforesaid contract. Judgment is demanded that the corporation recover the damages which it and the stockholders have sustained by reason of the matters set forth in the complaint, and that Brown be adjudged and decreed to pay to the defendant corporation such damages when they may be ascertained.

The gist of the objection of the demurring defendant to the complaint is that the Yates & Porterfield Company has no cause of action against the defendant Brown, because the complaint does not contain an allegation that the contract was made for the benefit of the proposed corporation, or that the corporation after its formation ratified or assumed it. The requisites of a complaint in an action

against directors for corporate mismanagement are stated in the case of *Kavanaugh v. Commonwealth Trust Co.*, 181 N. Y. 121, 73 N. E. 562, and they are (1) the cause of action in favor of the corporation, which should be stated in exactly the same manner and with the same detail of facts as would be proper in case the corporation had brought the action; (2) the facts which entitle the plaintiff to maintain the action in place of the corporation. The second requirement is abundantly satisfied by the allegations of the complaint in this action, and the particular question now presented for consideration is whether a cause of action in favor of the corporation has been stated in the manner and with such detail of facts as would be proper in case the corporation itself brought the action. I think the allegations above recited, and the legitimate inferences which flow therefrom, show that the corporation might maintain an action against the defendant Brown. He was, according to the complaint, the promoter of the corporation. He caused it to be organized, and the duty and obligation assumed by him, as to the 500 shares, inured directly to the benefit of the corporation to be formed. For a consideration moving to himself, and which he received, he agreed to sell for the benefit of the corporation 500 shares of its preferred stock, viz., shares transferred to and held by it. It is evident that that agreement was not for the benefit of the copartnership of Yates & Porterfield, whose business was to be and was transferred to the corporation. It was the stock belonging to the corporation that was to be sold. The purpose of the sale was to furnish money to the corporation, and Brown's agreement was partially performed when 100 shares were sold. The inference clearly is that that sale was for the corporation. There was an adoption by the corporation of the contract made by the promoter, and a partial performance of the obligation which the promoter assumed. I think there can be no doubt that the corporation in such circumstances—the contract having been made for its benefit and evidently to supply it with money—could have maintained its action against Brown for failure to fulfill his agreement, which was made as a part of the scheme attending the organization of the corporation. Such being the case, and it being sufficiently shown that the corporation refused to enforce a contract which was *prima facie* enforceable, and from which benefits would accrue to the stockholders of that corporation, I am of the opinion that the action was well brought. I have not overlooked the possible suggestion that the demurring defendant is not in a position to assail this complaint, and that the objection would be available only to the defendant Brown, but as that suggestion has not been made by the respondent, it is not regarded as requiring especial consideration, the complaint being good as against both defendants.

The interlocutory judgment overruling the demurrer should be affirmed with costs, with leave to the defendant to withdraw the demurrer on payment of costs, and to answer over within 20 days after service of a copy of the order to be entered on this decision.

HOUGHTON and SCOTT, JJ., concur.

McLAUGHLIN, J. (dissenting). This action was brought against the Yates & Porterfield Trading Company, a foreign corporation, and one Brown, to recover damages from the latter for the breach of a contract entered into between him and a copartnership by the name of Yates & Porterfield. The corporation demurred to the complaint upon the ground that it did not state facts, so far as it was concerned, sufficient to constitute a cause of action. The demurrer was overruled, and the corporation has appealed.

The complaint alleges the formation of the corporation under the laws of the state of New Jersey; that the plaintiff is a stockholder and brings the action on behalf of himself and all others similarly situated; that the corporation was organized for the purpose of acquiring the business and good will of a copartnership carried on under the firm name and style of Yates & Porterfield in the city and state of New York and elsewhere, and, upon its incorporation, it took over and acquired the going business of that firm, for which it issued its entire capital stock, consisting of 2,000 shares of preferred, and 2,000 shares of common, stock, of the par value of \$100 per share; that the defendant Brown was instrumental in organizing the corporation, and entered into an agreement with the members of the copartnership of Yates & Porterfield, by which he promised and agreed with them that, in consideration of their transferring and assigning to the corporation 1,130 shares of the preferred stock, and transferring and assigning to him 1,020 shares of the common stock, and 50 shares of the preferred stock, and of the payment of \$1,000 in cash, he would sell and dispose of at par at least 500 of the 1,130 shares of the preferred stock to be transferred to the corporation; that the members of such copartnership performed their part of the agreement, and that Brown failed to perform in that he only sold 100 of the 500 shares of stock which he agreed to sell; that, by reason of his failure to carry out his contract, the corporation has been rendered insolvent; that the plaintiff has requested the directors to bring an action in the name of the corporation against Brown, which they have failed and neglected to do; and the judgment demanded is that the corporation recover the damages which it and the stockholders have sustained by reason of Brown's failure to perform.

Conceding, as it must be for the purpose of determining the validity of the complaint, the truth of the facts stated, as well as such facts as may reasonably and fairly be inferred from them, I do not think a cause of action is stated against the corporation. It is not alleged, nor is there anything in the complaint from which it can be inferred, that the contract between Brown and the members of the copartnership of Yates & Porterfield was made for the benefit of the corporation which was thereafter to be formed, or that the contract was assigned to the corporation after it was formed, or that it then, or at any other time, ratified or adopted the contract. It is to be presumed that the corporation received full value for the stock which it issued. The fact that the firm of Yates & Porterfield, under an arrangement with Brown, saw fit to give to the corporation some of their stock, which Brown in violation of his agreement did not sell, in no way gave the corporation a cause of action against him. The stock was,

doubtless, given to the corporation by the members of the copartnership of Yates & Porterfield, because they believed it would enhance the value of the balance of the stock which they held, and they may have a cause of action for damages against Brown, but that question is not before us. Brown has never agreed with the corporation to do anything for it, nor has it ever agreed that he could sell at least 500 shares of the stock held by it at par. A valid contract presupposes the meeting of minds of the contracting parties. A fair test of whether this complaint states a cause of action against the corporation is this: Suppose Brown had sued the corporation to compel it to deliver to him for sale at par the 400 shares of its stock which he had not sold; could it be seriously contended such an action, upon the facts here set out, could be maintained? Or suppose the stock could have been sold for more than par; would the corporation have been justified in turning it over to Brown at par? I think each question must be answered in the negative.

I think this demurrer should also have been sustained upon another ground. There is no allegation in the complaint to the effect that the corporation itself had a right to or could have maintained the action in this state, and if it could not then the directors properly refused to bring the action. The General Corporation Law (Laws 1892, pp. 1805, 1806, c. 687) provides that no foreign stock corporation, other than a moneyed corporation, shall do business in the state of New York, without having first procured from the Secretary of State a certificate that it has complied with all the requirements of law to authorize it to do business in the state (sections 15, 16); and section 181 of the Tax Law, Laws 1896, p. 856, c. 908, provides that no action shall be maintained or recovery had in any of the courts in this state, by such foreign corporation, without first obtaining a receipt for the license fee required to be paid. This corporation, according to the allegations of the complaint, was formed for the purpose of taking over and conducting the business which the firm of Yates & Porterfield carried on in this state, at least in part. Before the corporation could do business in this state, it had to obtain the certificate authorizing it to transact such business, and, for its failure in this respect, it was prohibited from maintaining an action in the courts of the state. The complaint, therefore, should contain an allegation to the effect that the corporation itself could have maintained the action against the defendant Brown. If it could not, the directors, obviously, were justified in refusing to bring the action.

The complaint in an action of this character should state the facts showing a cause of action in favor of the corporation in exactly the same manner, and with the same detail, as would be proper in case the corporation itself had brought the action. *Kavanaugh v. Commonwealth Trust Co.*, 181 N. Y. 121, 73 N. E. 562. This court has held that, unless it appears in the complaint in an action brought by a foreign corporation that it has obtained the certificate referred to in section 15 of the General Corporation Law, facts are not stated sufficient to constitute a cause of action. *Halsey v. Henry Jewett Dramatic Co.*, 114 App. Div. 420, 99 N. Y. Supp. 1122; *Welsbach Co. v. Norwich Gas & El. Co.*, 96 App. Div. 52, 89 N. Y. Supp. 284,

affirmed 180 N. Y. 533, 72 N. E. 1152; *Emmerich Co. v. Sloane*, 46 Misc. Rep. 513, 95 N. Y. Supp. 39, affirmed 108 App. Div. 330, 95 N. Y. Supp. 39, on opinion of court at Special Term. Had the corporation itself, therefore, brought the action upon the facts stated in this complaint, a cause of action would not have been stated.

The views thus expressed are not in conflict with what is said in *South Bay Co. v. Howey*, 113 App. Div. 382, 98 N. Y. Supp. 909, and *Portland Co. v. The Hall & Grant Construction Co.* (argued at the October term and not yet officially reported) 106 N. Y. Supp. 649. What was held in the former case was that inasmuch as it did not appear in the complaint of a foreign corporation, suing in this state, that it was a stock corporation, it was error to dismiss the complaint because it did not contain an allegation that the corporation was authorized to do business in this state, the presumption being that the corporation had a right to sue in this state, and none but foreign stock corporations came within the prohibition of the statute. In the latter case it was held that the Trial Court erred in admitting proof of the fact that plaintiff was a foreign stock corporation, in the absence of an allegation in the pleadings to that effect, and, after receiving such proof, dismissing the complaint on that ground.

I am unable, for the foregoing reasons, to concur in the opinion of Mr. Justice PATTERSON. I think the judgment appealed from should be reversed, and the demurrer sustained, with leave to plaintiff to serve an amended complaint, on payment of the costs in this court and in the court below.

INGRAHAM, J., concurs.

GEOGHEGAN v. UNION RY. CO. OF NEW YORK CITY.

(Supreme Court, Appellate Division, First Department. December 6, 1907.

STREET RAILROADS—COLLISIONS WITH VEHICLES—NEGLIGENCE—EVIDENCE—QUESTIONS FOR JURY.

In an action for personal injuries sustained in a collision between a street car and plaintiff's wagon, whether defendant was negligent, and whether plaintiff in driving south on the north-bound track exercised due care, *held*, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 251, 253, 255-257.]

Appeal from Term, New York County.

Action by John J. Geoghegan against the Union Railway Company of New York City. From a judgment for defendant on dismissal of the complaint, plaintiff appeals. Reversed, and new trial granted.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAUGHLIN, HOUGHTON, and LAMBERT, JJ.

Stephen C. Baldwin, for appellant.

Joseph F. Daly, for respondent.

HOUGHTON, J. The plaintiff in the nighttime was driving in a baker's cart, southerly on Webster avenue in the city of New York.

Shortly before the accident there had been a fall of snow, which had melted and frozen, making the roadway slippery. At the sides and between defendant's tracks the road was rough and icy as the result of sweeping the snow therefrom. To obtain a better footing for his horses, plaintiff had taken defendant's south-bound track, and when at about 182d street a car came up behind him, and to permit it to pass he pulled over to the north-bound track. He had proceeded but a short distance on that track when he observed a car coming towards him from the south, and, as he testifies, he immediately endeavored to drive back upon the south-bound track. He had to use care that his horses did not fall, and before he succeeded in clearing the track the car struck the flank of the near horse and the wagon, throwing him therefrom, and inflicting the injuries for which he complains. A lighted lantern was attached to the front part of the top of the wagon, and the motorman, called by the plaintiff, testified that his car was going at the rate of about eight miles an hour. The trial resulted in a nonsuit from which the plaintiff appeals.

We are of the opinion that the facts testified to by the plaintiff and his witnesses made it proper for the jury to determine whether or not defendant was guilty of negligence, and whether the plaintiff, under the circumstances, exercised due care. It is true that the plaintiff was at the time of the accident on the wrong track, and on a track which the defendant's motorman had no reason to expect he would be approaching. The condition of the roadway, however, in the minds of the jury, may have been such as to excuse plaintiff in driving where he did, and also in not sooner leaving the north-bound track after he discovered the approaching car. So, also, they might have said that in view of the lighted lantern on plaintiff's wagon, aided by the headlight of the car, the motorman, in the exercise of reasonable care, should have discovered plaintiff's vehicle sooner than he did, or, in view of the moderate speed of the car, have sooner stopped it, or have made greater effort so to do.

The plaintiff made a prima facie case, and had the right to have a jury pass upon the facts for or against him, and the nonsuit was improper; and the judgment must be reversed, and a new trial granted, with costs to the appellant to abide the event. All concur.

VAN KANNEL REVOLVING DOOR CO. v. SLOANE et al.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. MECHANICS' LIENS—DEFENSE—PAYMENT TO CONTRACTOR.

Plaintiff's complaint to enforce a mechanic's lien as against the contractor and owner having been dismissed, plaintiff appealed, in so far as the judgment affected the contractor, and after his time to appeal as to the owner had expired, the owner paid to the contractor the balance due, which was more than sufficient to satisfy plaintiff's claim. *Held*, that such payment, notwithstanding a reversal of the judgment as to the contractor, constituted a defense to plaintiff's claim of lien against the contractor, unless the money paid was impressed with a trust, or was intended to take the place of the property against which the lien was asserted, the property improved being the basis of the lien as provided by Lien Law, Laws 1897, p. 516, c. 418, § 3.

2. DEPOSITS IN COURT—RIGHT TO REQUIRE.

Where, after a subcontractor's complaint to enforce a mechanic's lien had been dismissed, he appealed only as to the contractor, and after his time to appeal as to the owner had expired the latter paid the amount due to the contractor, the court, after reversal of the judgment as to the contractor, had no power to order him to pay into court an amount sufficient to satisfy plaintiff's claim, where the right to the money and the existence of a lien are disputed.

Houghton, J., dissenting.

Appeal from Special Term.

Action by the Van Kannel Revolving Door Company against W. & J. Sloane, impleaded with others. From an order directing payment into court of a specified sum of money, defendant Sloane appeals. Reversed.

See 104 N. Y. Supp. 653.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, HOUGHTON, and SCOTT, JJ.

Selden Bacon, for appellant.

Hector M. Hitchings, for respondent.

McLAUGHLIN, J. This action was brought to foreclose a mechanic's lien upon certain real estate in the city of New York, of which the defendant Astor is the owner. He had a contract with the appellant for the performance of certain work on a building erected upon the real estate. The plaintiff was a subcontractor under the appellant. At the time of the filing of the notice of lien and of the commencement of this action, Astor owed Sloane, under its contract, a sum in excess of the plaintiff's alleged lien, and which, in the answer interposed by him, he alleged he was holding because of the alleged lien of the plaintiff, and that he could not safely pay this amount to any one until the respective rights of all the parties to the action were adjudicated and settled.

The action was subsequently tried, and the complaint as to all of the defendants dismissed upon the merits. The plaintiff appealed as to Sloane, but not from the judgment dismissing the complaint against Astor. After the time had expired within which an appeal could have been taken against Astor, he paid to Sloane the amount due it under the contract. The judgment, in so far as it related to Sloane, was reversed and a new trial ordered. 119 App. Div. 214, 104 N. Y. Supp. 653. The facts which were developed at the trial are set forth at length in the opinion which was delivered by Mr. Justice Lambert, writing for a majority of the court, reversing the judgment. They were substantially the same as those set out in the papers used on the motion, which resulted in the order here appealed from, and therefore it is not necessary to again state them. In the opinion he said:

"As we view the law applicable to the facts appearing in the appeal book herein, a reversal of the judgment would be unavailing to the appellant. The foundation of this action is the lien upon the 'real property improved or to be improved and upon such improvement.' Lien Law, Laws 1897, p. 516, c. 418, § 3. This foundation has been taken away by the judgment dismissing the complaint upon the merits as against the owner of the real property, and now made conclusive by reason of the expiration of the time within

which an appeal might have been taken as of right. Before the argument of this appeal, however, a motion was made by the respondent upon notice to dismiss the appeal herein. From the record there disclosed it appears that the owner, Mr. Astor, after the time to take an appeal as to him had expired, and under some alleged stipulated right, paid the balance of the contract price of construction of the building in question to the general contractor [Sloane], and it may be that upon a trial of the case it will be shown that the money payment was to be held as a substitute for the 'real property improved,' to abide the event of the action, or that it was paid and received under such circumstances that it became impressed with a trust available to the payment."

After the judgment had been reversed by this court, the plaintiff made a motion to be relieved from the stipulation referred to, and to compel Sloane to pay into court an amount sufficient to fully indemnify it for the principal of the lien, with interest and costs. The motion was granted, and Sloane was directed to pay into court the sum of \$10,500, "said sum to take the place of the land covered by the plaintiff's lien." Sloane appeals from the order, except in so far as it relates to relieving the plaintiff from the stipulation.

I know of no possible theory upon which this order can be sustained. It is, to say the least, somewhat startling that the court can, simply by its own fiat, direct a party to pay a sum of money into court to take the place of an alleged lien, where the right to the money and the existence of the lien are disputed facts, to be determined upon the trial of an action brought for that purpose, and especially so in view of what this court determined on the appeal from the judgment. A majority of this court, in the opinion delivered, intimated that a reversal would be unavailing unless it could be shown—not on a motion but at the trial—that the money which was paid was to take the place and be a substitute for the real property against which the lien had been filed. There is not a suggestion in the moving papers that the money was paid by Astor, or received by Sloane, with this understanding, or that any facts exist showing, or tending to show, that the money paid was impressed with a trust for the plaintiff. The plaintiff's right to maintain the action is predicated upon the fact that he has a valid lien on the real estate. The judgment dismissing the complaint as to the owner of the real estate conclusively established that he did not have a valid lien. This being so, he cannot possibly succeed as against the defendant Sloane without showing facts from which the court can see that the money paid was impressed with a trust for its benefit, and whether it was impressed with such trust or not must be determined at the trial, and the court has no power, in advance of that, to summarily direct Sloane to pay into court a sum sufficient, if a recovery be had, to pay the same, together with interest and costs of this action.

The order, therefore, so far as appealed from, must be reversed, with \$10 costs and disbursements, and the motion to that extent denied, with \$10 costs. All concur, except HOUGHTON, J., who dissents.

VAN KANNEL REVOLVING DOOR CO. v. SLOANE et al.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. PLEADING—SUPPLEMENTAL ANSWER—LEAVE TO SERVE.

Code Civ. Proc. § 544, provides that on application of either party the court in a proper case must permit him to make a supplemental pleading, alleging material facts which occurred after his former pleading, etc. *Held*, that where in a suit to enforce a mechanic's lien the complaint was dismissed on the merits, whereupon plaintiff appealed from the judgment in so far as it affected the original contractor, but not as to the owner, and the judgment was reversed, the contractor was entitled to leave to file a supplemental answer alleging the trial and dismissal as to the owner, plaintiff's failure to appeal therefrom, and that after the time to appeal had expired the owner paid the balance due to the contractor.

2. MECHANICS' LIENS—DEFENSES.

Where, in a suit by a subcontractor to enforce a mechanic's lien, plaintiff only appealed from a judgment dismissing his complaint in so far as it affected the original contractor, and after the time to appeal had expired as to the owner he paid the contractor the balance due, such facts constituted a defense to plaintiff's claim for a lien against the contractor, in the absence of proof that the money so paid was impressed with a trust, and was intended to take the place of the lien on the land.

Patterson, P. J., and Houghton, J., dissenting.

Appeal from Special Term.

Action by the Van Kannel Revolving Door Company against W. & J. Sloane, impleaded with others. From an order denying the motion of defendant Sloane for leave to serve a supplemental answer (104 N. Y. Supp. 653), it appeals. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, HOUGHTON, and SCOTT, JJ.

Selden Bacon, for appellant.

Hector M. Hitchings, for respondent.

McLAUGHLIN, J. This appeal is from an order denying a motion for leave to serve a supplemental answer, and was argued with the appeal from the order directing Sloane to pay into court a certain sum of money.

The facts involved on both appeals are substantially the same. After the reversal of the judgment in so far as the same related to the defendant Sloane, it applied to the court for leave to serve a supplemental answer, setting up specifically the fact that the action had been tried, and resulted in a judgment dismissing the complaint as to Astor; plaintiff's failure to appeal therefrom; and the subsequent payment by Astor to Sloane of its claim. Provision is made in section 544 of the Code of Civil Procedure for the serving of a supplemental pleading. This section provides that upon the application of either party the court may, and in a proper case must, upon such terms as are just, permit him to make a supplemental complaint, answer, or reply, alleging material facts which occurred after his former pleading, or of which he was ignorant when it was made. The facts which were sought to be set up in the supplemental answer

occurred subsequent to the service of the original answer. They were material and necessary to be alleged in order to enable Sloane to prove them. The facts proposed to be set out in the supplemental answer will, under our former decision, constitute a valid defense to the plaintiff's claim, unless it can show that when the payment was made the money was impressed with a trust, and was intended to take the place of the lien on the land. Indeed, I do not see how the plaintiff is in a position, without serving a supplemental complaint, to maintain the action, it having, by failing to appeal from the judgment against Astor, relinquished its lien upon the land. But however this may be, the defendant Sloane, as it seems to me, has an absolute right to have its answer put in such shape as will enable it to prove facts which will constitute a perfect defense to the action, unless the plaintiff can establish that by reason of the existence of other facts such defense ought not to prevail.

The order appealed from, therefore, should be reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs. All concur, except PATTERSON, P. J., and HOUGHTON, J., who dissent.

JONES v. SABIN.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. APPEAL—JUDGMENTS APPEALABLE.

A judgment of dismissal rendered pursuant to Code Civ. Proc. § 8277, authorizing a dismissal of the complaint on plaintiff failing to comply with an order requiring him to give an additional undertaking, is not appealable, within section 1346, authorizing appeals from judgments rendered on a trial by referee or court or on verdict of a jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 717-723.]

2. SAME.

On appeal from a nonappealable judgment, the court cannot review orders specified in the notice of appeal, notwithstanding Code Civ. Proc. § 1316, providing that an appeal from a final judgment brings up for review intermediate orders specified in the notice of appeal; the appeal referred to being one from a judgment that is appealable.

3. SAME—RIGHT OF APPEAL—STATUTES.

The right of appeal is statutory, and can only be taken from such judgment as the statute authorizes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 3, 4.]

4. SAME.

The words "either before or after trial," in Code Civ. Proc. § 1206, providing that a final judgment dismissing the complaint "either before or after trial" does not prevent a new action, etc., refer to the dismissal of the complaint and the rendering of a judgment thereon, in an action brought on for trial, either on issues of law or of fact, and either before evidence is taken or afterwards, and such a judgment is final and appealable under section 1346, defining what judgments are appealable.

5. SAME—NOTICE OF APPEAL.

A notice of appeal from a judgment, which asks for a review of specified orders only by virtue of the appeal from the judgment, cannot be con-

strued as a direct appeal from the orders; and where the appeal is unauthorized, the orders cannot be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2147.]

6. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY—DISMISSAL OF ACTION—COUNTERCLAIM.

Where no affirmative relief was obtained or asked for by defendant on a counterclaim, when he applied for judgment of dismissal of the complaint, because of the failure of plaintiff to give an additional undertaking, as required by order of the court, the dismissal of the complaint did not violate any of plaintiff's property rights under Const. U. S. Amend. 14.

Appeal from Special Term, New York County.

Action by G. Edwin Jones against Harriet G. Sabin. From a judgment dismissing the complaint for failure of plaintiff to file an additional undertaking, he appeals. Dismissed.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAUGHLIN, HOUGHTON, and LAMBERT, JJ.

James C. Lenney, for appellant.

Theodore S. Rumney, Jr., for respondent.

HOUGHTON, J. The plaintiff brought action upon contract against the defendant, a nonresident, and obtained a warrant of attachment, and levied upon certain moneys in bank belonging to defendant. The defendant desired a release of the moneys from the levy of the attachment, and filed an undertaking releasing them. Instead of obtaining an order releasing the levy on such undertaking, her attorneys presented to plaintiff's attorneys a stipulation for "discharging the attachment" according to an annexed order, which order not only provided for a discharge of the levy but vacated the attachment itself. On the signing of the stipulation by the attorneys for both parties, the defendant entered the order, and shortly thereafter discovered her own mistake in providing in the order that the attachment be vacated whereas she desired simply the discharge of the levy thereunder, and made a motion to be relieved from that part of the order vacating the attachment, which motion was granted and the attachment thus restored with the levy discharged. Thereupon the defendant moved that the plaintiff be compelled to give additional security on his attachment, and that motion was granted, requiring plaintiff to give an additional undertaking of \$3,000. This undertaking plaintiff failed to give, whereupon defendant moved under the provisions of section 3277 of the Code of Civil Procedure for judgment dismissing plaintiff's complaint, with costs, which motion was granted, and such judgment entered. By his notice of appeal the plaintiff states that he appeals from this judgment, giving its date and place of entry, and states that on such appeal he will bring up for review the various orders above enumerated.

Section 3277 of the Code specifically prescribes that on failure to comply with the order for an additional undertaking on the part of plaintiff the defendant may apply for judgment as upon a motion. We are of the opinion that a judgment so entered is not appealable to this court, and that it not being appealable this court has no power

to review the various orders mentioned in plaintiff's notice of appeal.

Section 1346 of the Code prescribes from what judgments an appeal may be taken to this court, and they are judgments rendered upon a trial by a referee or by the court without a jury, and those rendered upon the verdict of a jury. The judgment against plaintiff was not rendered upon a trial, and does not come within the provision permitting an appeal. It is more analogous to a judgment by default, in which the remedy is to move to open the default and appeal from the order denying it, *Hawkins v. Smith*, 91 Hun, 299, 36 N. Y. Supp. 333. It is true that section 1316 provides that an appeal taken from a final judgment brings up for review an interlocutory judgment, or an intermediate order, which is specified in the notice of appeal, and necessarily affects the final judgment; but it is manifest that the appeal referred to must be one taken from a judgment that is appealable. The right of appeal is a statutory one, and can only be taken from such judgments as the statute authorizes. *Garczynski v. Russell*, 75 Hun, 512, 27 N. Y. Supp. 461.

Section 1209, which provides that a final judgment dismissing the complaint either before or after a trial does not prevent a new action for the same cause, unless it expressly declares, or it appears by the judgment roll, that it is rendered upon the merits, does not help the situation. The words "either before or after a trial" refer to the dismissing of a complaint, and the rendering of judgment thereon in an action which is brought on for trial either upon issues of law or of fact, and either before evidence is taken or after it shall have been taken. Such a judgment would be a final judgment and one appealable under the provisions of section 1346. Nor can plaintiff's notice of appeal be construed as a direct appeal from the various orders mentioned in it. There is no statement that the various orders are appealed from, and they are asked to be reviewed only by virtue of the appeal from the judgment. This appeal being unauthorized, the review of the orders must fall with it. If we felt authorized to do so, we should be inclined to grant the plaintiff some relief. The judgment entered, however, is not a bar to another action which plaintiff can bring if he sees fit.

It is urged that because defendant's answer set up a counterclaim the dismissal of plaintiff's complaint is in violation of his property rights under the Fourteenth Amendment of the federal Constitution. No affirmative relief was obtained or asked for by the defendant upon her counterclaim when she applied for judgment of dismissal of plaintiff's complaint. The situation is unlike that in *Sibley v. Sibley*, 76 App. Div. 132, 78 N. Y. Supp. 743, and *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215, upon which plaintiff relies. In those cases a party's pleading was stricken out, and the action continued and affirmative relief given against him.

The appeal must be dismissed, but under the circumstances without costs. All concur.

UNITED MERCHANTS' REALTY & IMPROVEMENT CO. v. ROTH.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. LANDLORD AND TENANT—OPTION TO TREAT TENANT AS HOLDING OVER.

The option to hold a tenant to a new lease, by reason of his holding over his agreed term, is available only to him who holds to the tenant the conventional relation of landlord, and who is entitled under the lease by which the tenant holds to the reversion of his term.

2. SAME.

The option to hold a tenant to a new lease, by reason of his holding over his agreed term, is unassignable, unless by a conveyance of the reversion, effected only by an overlapping lease or the transfer of the fee.

3. SAME.

Where an owner, after executing a lease to a lessee for a specified term, executed a second lease to a third person for a fixed term, beginning at the expiration of the first lease, the third person could not elect to treat the lessee in the first lease as tenant, by reason of his holding over his agreed term.

4. SAME.

An owner made a lease for a specified term, and subsequently made a lease to a third person for a term to begin at the expiration of the first lease. The lessee before the end of his term requested the third person to allow him to continue to occupy the premises. The third person refused, and informed the lessee that if he should hold over after the term the third person would elect to hold him as tenant for one year from the termination of his lease. The lessee held over after the expiration of his term. *Held*, that though the leases did not of themselves create, as between the lessee and the third person, either privity of estate or contract, the facts established a contract on the part of the lessee to hold for a year, and created the conventional relation of landlord and tenant, authorizing the third person to recover rent from the lessee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 40.]

5. SAME.

A valid lease may be made to begin in futuro.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 217.]

Clarke, J., dissenting in part.

Appeal from Special Term.

Action by the United Merchants' Realty & Improvement Company against Max J. Roth. From an interlocutory judgment (103 N. Y. Supp. 1112), overruling a demurrer to the complaint, defendant appeals. Affirmed in part, and reversed in part.

Argued before PATTERSON, P. J., and INGRAHAM, CLARKE, SCOTT, and LAMBERT, JJ.

Mullan, Cobb & Mitchell (George V. Mullan, of counsel), for appellant.

Solomon N. Stroock (Henry L. Moss, on the brief), for respondent.

SCOTT, J. The defendant appeals from an interlocutory judgment overruling its demurrer to the complaint.

The plaintiff seeks to recover rent for certain premises in the city of New York for the months of May, June, July, August, and September, 1906. As to each month the complaint is drawn in two counts,

one alleging a tenancy by hold over, and the other alleging an express contract of hiring. The facts upon which plaintiff bases his claim are that on or about April 6, 1904, Henry Gerken, then the owner of the building, leased to the defendant Roth the first and second floors and basement of said building for the term of two years from May 1, 1904, at the yearly rent of \$2,800 payable monthly in advance. Defendant went into possession of the premises under a lease. Afterwards Gerken leased to plaintiff the same premises for a period of five years beginning May 1, 1906. It thus appears that Gerken leased the premises to defendant until May 1, 1906, and to plaintiff for a term beginning on that date, and that plaintiff and defendant thus acquired successive leases of the same premises. Defendant was under an obligation to quit and surrender the premises on May 1, 1906, and plaintiff was entitled to take possession thereof on the same day. The defendant did not quit and surrender the premises on the day his lease expired, but remained in possession after that date. By the first five causes of action stated in the complaint, plaintiff attempts to hold defendant as a hold over, alleging that "the said defendant continued and remained in possession and occupancy of the said premises without the consent of the plaintiff, and the plaintiff thereupon duly elected to hold the defendant as tenant of the said premises for another year, commencing the 1st day of May, 1906, and upon the same terms and at the same rent payable as was in and by said lease provided, of all of which defendant had due and timely notice." It is quite clear that the relation of landlord and tenant was not established between plaintiff and defendant by the execution by the owner of a lease to plaintiff for a term commencing on the expiration of defendant's term. Under that lease the sole right acquired by plaintiff as against defendant was to maintain ejectment, or perhaps summary proceedings, to obtain possession of the demised premises. As between plaintiff and defendant neither privity of estate nor privity of contract was established by Gerken's lease to plaintiff. It is well settled that the option to hold a tenant to a new lease by reason of his having held over his agreed term is one available only to him who holds to the tenant the conventional relation of landlord and who is entitled, under the lease by which the tenant holds, to the reversion of his term. This right or option is by its very nature unassignable, unless by a conveyance of the reversion. The lease from Gerken to plaintiff did not convey the reversion of defendant's term, but a new term beginning on the expiration of the former one. A conveyance of the reversion of defendant's term could be effected only by an overlapping lease, or the transfer of the fee. The plaintiff's allegation, therefore, in each of his first five causes of action that Gerken assigned to him from and after May 1, 1906 (the date of its expiration), "the said lease and all his rights in and to the same," must be disregarded as an attempt to plead a legal result that could not have followed from the execution of a lease for a term commencing on May 1, 1906. As to the first five causes of action, therefore, by which it is attempted to plead a technical hold over, the demurrer was well taken and should be sustained.

The remaining causes of action rest upon a different foundation. In each of them, after alleging the ownership of Gerken, the lease to defendant, and the subsequent lease to plaintiff, the pleader proceeds as follows:

"That before the 1st day of May, 1906, defendant requested plaintiff herein to permit and allow him to continue to occupy and use said premises on and after May 1, 1906, the time at which his said lease of the premises expired, but plaintiff refused to so consent, and informed the defendant that plaintiff would not permit or allow him to continue to use and occupy said premises on and after May 1, 1906, and further informed him that if he, defendant, should continue to use or occupy said premises on and after May 1, 1906, or should remain over his term, which expired May 1, 1906, that plaintiff herein would elect to hold him as a tenant of said premises for one year from May 1, 1906, and would consider, interpret, and regard his remaining over after May 1, 1906, and the continued use and occupancy of said premises by defendant on and after May 1, 1906, as a consent, agreement, and contract on the part of said defendant to occupy and lease said premises from plaintiff for one year from May 1, 1906, upon the same terms and at the same rent per annum as was in and by said lease between defendant and said Gerken provided for."

These facts are sufficient to establish a contract upon the part of defendant to hold the premises as tenant for the term and at the rent specified. *Despard v. Walbridge*, 15 N. Y. 374; *Coit v. Planer*, 51 N. Y. 647; *Preston v. Hawley*, 139 N. Y. 296, 34 N. E. 906. The defendant insists that a claim for rent under such a state of facts can only arise when the conventional relation of landlord and tenant is shown to exist. If by this is meant that the relation must have existed before the notice of intention to hold the tenant is given, the contention cannot be upheld. It is undoubtedly true that the leases for successive terms by the owner to defendant and plaintiff did not of themselves create, as between them, either privity of estate or privity of contract, nor did the lease to plaintiff convey to it the reversion of defendant's term. But the lease to plaintiff did convey to it the absolute right to the use and enjoyment of the premises after May 1, 1906, and the defendant's right to use and enjoy them ended on that day. So far as the right to possession on and after that day was concerned, the plaintiff stood in the owner's shoes. Under such circumstances any transaction between the parties which indicates that the outgoing tenant's continued occupancy after the expiration of his term followed upon an express or implied agreement to hold as tenant of the incoming lessee will serve as the foundation of a claim for rent for the use and occupancy of the premises. Such agreement, whether express or implied, establishes the conventional relation of landlord and tenant as to the new term; for as was said in *Collyer v. Collyer*, 113 N. Y. 442, 448, 21 N. E. 114, 116, "the possession and beneficial enjoyment of real property with the permission of the owner is ordinarily sufficient to sustain an action upon an implied agreement for use and occupation." The point is well illustrated by the case of *Preston v. Hawley*, which went twice to the Court of Appeals. On the first appeal plaintiff simply proved that he had acquired title to the premises from defendant, that defendant remained in possession of the premises, and that plaintiff frequently demanded rent for the use and occupation of the premises which defendant refused to

pay. Plaintiff relied solely upon his ownership and right of possession and the continued use and occupation by defendant, and proved nothing from which an agreement to pay rent could be inferred. It was held that the relation of landlord and tenant had not been created by the facts then shown; that plaintiff was not entitled to a recovery as for rent, but only to his action for ejectment with an accounting for mesne profits. 101 N. Y. 586, 5 N. E. 770. Upon the second appeal, in addition to the foregoing facts, the plaintiff showed that after the sale defendant requested that he might be permitted to continue in use and occupancy of the premises; that, while no specific agreement was made to that effect, or rent agreed upon, he did in fact continue in occupation; and that when rent was demanded he never repudiated his obligation to pay rent, merely objecting to the amount demanded. It was held that these facts were sufficient to establish a contract to occupy the premises as tenant and to pay rent therefor, and that that contract created the conventional relation of landlord and tenant necessary to maintain an action for use and occupation. 139 N. Y. 296, 34 N. E. 906. The present case should be considered, so far as concerns the last five counts in the complaint, without regard to the lease from Gerken to defendant, for that lease adds nothing to the rights either of plaintiff or defendant. The plaintiff succeeded to none of the landlord's rights under it, and the defendant acquired no right under it to hold over his term.

The whole question turns upon the plaintiff's right to possession of the premises on and after May 1, 1906, the defendant's request that he be allowed to remain in possession after that date, and the reply thereto by plaintiff followed by the fact that defendant did remain. It is perfectly well settled, of course, that a valid lease may be made to begin in futuro. Consequently Gerken's lease to plaintiff was valid and entitled plaintiff to the term to begin on May 1, 1906. It was also competent for plaintiff and defendant to agree for a lease to begin on May 1, 1906, when defendant's right to possession under his lease from Gerken would terminate and plaintiff's right to possession would accrue. The last five counts in the complaint set forth such a contract, and under it the relation of landlord and tenant was established between plaintiff and defendant from and after May 1, 1906. As to the last five counts in the complaint the demurrer was therefore rightly overruled.

The judgment appealed from will therefore be reversed as to the first, second, third, fourth, and fifth causes of action set forth in the complaint, and the demurrer sustained as to them, and the judgment will be affirmed as to the sixth, seventh, eighth, ninth, and tenth causes of action, without costs in this court, with leave to defendant to withdraw his demurrer to said last causes of action, and to answer as to them within 20 days upon payment of the costs awarded in the court below. All concur, except CLARKE, J., who dissents in part.

GUARDIAN TRUST CO. OF NEW YORK V. PEABODY.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. GUARANTY—CONTRACT—CONSTRUCTION.

While the contract of a guarantor should be fairly construed according to the reasonable rules for the interpretation of contracts, yet, when the subject of the contract is finally ascertained, he has the right to a strict construction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, § 28.]

2. SAME.

Parties to a contract of guaranty can specify particularly the thing guaranteed, and when they have done this courts have no right to say that something else amounted to the same thing, and that what was done did not injure the guarantor, and thereby make a new contract on which to hold him liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, § 28.]

3. PRINCIPAL AND SURETY—DISCHARGE OF SURETY.

Injury to a surety is not the test of his release, particularly when the contract of suretyship is specific.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, § 135.]

4. GUARANTY—CONSTRUCTION—DESCRIPTION OF NOTES GUARANTEED—PRINTED AND WRITTEN CLAUSES IN NOTES.

By an agreement signed by plaintiff and a corporation and individuals interested in it, termed "subscribers," plaintiff agreed to make loans, not exceeding a specified amount, to the corporation, on its notes payable to its own order and indorsed by it, to mature within one year with privilege of renewal, secured by deposit of its capital stock, the corporation to make also certain cash deposits to form a sinking fund; and the subscribers guaranteed to plaintiff payment of any unpaid balance of the notes. Instead of the notes provided for, plaintiff took general collateral notes, payable to plaintiff's order, printed portions of which pledged the collateral for payment of the note and any other indebtedness of the corporation, and required, in case of depreciation, a payment or additional security, in default of which the note should become due, but which also contained, written into a blank, the words "subject to agreement," etc. Plaintiff loaned to the corporation, besides the amount agreed, additional sums, for part of which the same collateral was pledged, without reference to the agreement. *Held*, that the subscribers were not liable for an unpaid balance of the notes, as the notes given were not of the character and form prescribed by the agreement, even if the agreement be regarded as read into the notes by the written words referring to it, and as prevailing over the printed portions.

McLaughlin and Laughlin, JJ., dissenting.

Appeal from Special Term, New York County.

Action by the Guardian Trust Company of New York against Stephen Peabody. From a judgment for defendant, rendered on the report of a referee dismissing the complaint on the merits, plaintiff appeals. Affirmed.

Argued before, PATTERSON, P. J., and McLAUGHLIN, LAUGHLIN, HOUGHTON, and LAMBERT, JJ.

Henry D. Hotchkiss, for appellant.

H. Snowden Marshall, for respondent.

HOUGHTON, J. Several men of whom the defendant was one were interested in the Yetman Transmitting Typewriter Company

which was in need of funds for the prosecution of its business. Negotiations were had with the plaintiff for the furnishing of such necessary money. These negotiations resulted in a written agreement, signed by the plaintiff, the typewriter company, and the individuals who were termed "Subscribers," which, after reciting that the typewriter company desired to secure a loan not exceeding \$80,000 to be used as working capital, and to hypothecate all of its capital stock amounting to \$500,000, par value, as collateral therefor, and that the plaintiff proposed to make such loan for the period of one year, with the privilege of renewal for an additional period of six months, and that the subscribers proposed to underwrite and guarantee the payment of the balance unpaid in proportion to the sums set opposite their names, provides, in substance, that the typewriter company should make, execute, and deliver to the plaintiff its negotiable promissory notes, and upon the delivery of the first of such notes all the collateral security should be deposited for such note and all subsequent ones; and, beginning with the discount of the first note, the typewriter company should deposit with the plaintiff \$20 in cash for every machine sold by it, which deposit should form a sinking fund for the payment of interest on the notes and such part of the principal as it might become sufficient to pay; and that upon failure by the typewriter company to make such deposit the plaintiff might refuse to advance any more moneys, and declare all notes then held by it due and payable, and on failure of the company to pay such notes the plaintiff might sell the collateral and apply the proceeds thereto; and in case the notes were paid a portion of the collateral was to be retained by the plaintiff for its services, and a part delivered to the subscribers and the remainder to Charles E. Yetman. Each subscriber guaranteed to the plaintiff the payment of such amount of the unpaid balance of the notes as his subscription bore to the whole.

The provision that the typewriter company should give its negotiable promissory notes was that they should be as provided in paragraph 3 of the agreement, which reads as follows:

"3. As required and called for by the typewriter company, the trust company [plaintiff] agrees to lend the typewriter company upon its promissory notes, payable to its own order, and indorsed by it, such sums of money as the said typewriter company may require for working capital and other corporate purposes, not exceeding in the aggregate the sum of eighty thousand dollars. Said notes shall bear interest at the rate of six per cent. per annum, payable every three months, or so near thereto as possible, and all the notes shall mature within one year from the date of the first note. The typewriter company shall have the privilege to renew such amounts as may remain unpaid at the end of said year for an additional period of six months."

On the second day after the execution of the agreement, the typewriter company presented the collateral, and the plaintiff loaned to it \$10,000. Instead of taking the note of the typewriter company payable to its own order and indorsed by it, the plaintiff took a general collateral note, payable to itself (Guardian Trust Company), filled in as to date, time of payment, amount and rate of interest, upon the usual printed blank, which printed portion pledged the collateral for payment of the note and any other indebtedness of the typewriter

company, and provided that, in case the collateral should depreciate, a payment should forthwith be made, or additional security furnished, in default of which the note should forthwith become due. The blank in the printed note left for the description of the collateral was filled in as follows:

“5000 shares Yetman Typewriter Co., subject to agreement between Yetman Transmitting Typewriter Co. Guardian Trust Co. and several subscribers dated October 31, 1904.”

Advancements were made from time to time and similar notes taken, until the plaintiff had advanced to the typewriter company the full \$80,000. The plaintiff also loaned the typewriter company \$23,000, in addition for \$10,000 of which the same collateral was pledged without reference, however to the agreement of October 31, 1904. The typewriter company paid only a small portion of the \$80,000, and defendant's proportion of the unpaid balance was \$9,828.27.

This action is brought to recover such latter sum, and the trial before the referee resulted in a dismissal of the complaint upon the merits, and from such judgment the plaintiff appeals. Counsel for plaintiff very frankly concedes that the plaintiff has no claim against the sureties if the agreement of October 31st, by proper and necessary interpretation, provides for the giving by the typewriter company of a negotiable promissory note for each loan obtained. The position of the plaintiff is that although a negotiable promissory note is nominated in the agreement, still taking the agreement as a whole, in view of its provisions for renewal of the notes and the providing of a sinking fund for their payment, negotiable notes were not in fact provided for, and that the words “subject to agreement,” written into the blank of the note which was taken, relate to the terms of payment of the note as well as to the pledging of the collateral, and that the agreement itself is thus read into the note, and that this part of the agreement being written the balance of the note which was printed should be disregarded, on the principle that where written and printed portions of a contract are inconsistent the writing should prevail, and that making the plaintiff the payee of the notes was so immaterial a variation as to do no harm. In our opinion the contract of October 31st is too specific as to the form and character of the note to be taken to permit us to relieve the plaintiff from its unfortunate oversight in not taking the note which the defendant and his associates guaranteed the payment of.

The agreement appears to have been very carefully drawn, and each provision is separately numbered. The first subdivision provides that the typewriter company shall give its negotiable promissory notes, and specifically refers to the third subdivision which specifies their form. It was notes of the prescribed character and form which the defendant and his associates guaranteed. Their guaranty was not a general one to pay the indebtedness of the typewriter company incurred with plaintiff in any form to the extent of \$80,000. Nor did they guarantee the payment of a note which should contain in the body of it all of the agreement which they entered into, as would be

the case if the words "subject to agreement" were read into the note and the printed part of the one taken eliminated.

While the contract of a guarantor should be fairly construed according to the reasonable rules for the interpretation of contracts, when the subject of the contract is finally ascertained, he has the right to a strict construction. Parties to a contract of guaranty can specify particularly the thing guaranteed, and when they have done this courts have no right to say that something else amounted to the same thing, and that what was done did not hurt the guarantor, and thereby make a new contract upon which to hold him liable.

There is some difference of opinion in this court as to whether the words "subject to agreement" relate to the terms of payment of the note as well as to the collateral pledged. But assuming that they relate to the terms of payment, then the effect is to read the contract into the note, and when we do that we do not have a note such as the defendant guaranteed the payment of. Such a note would be subject to construction and possible dispute. The defendant contracted as to one not open to construction, the precise form of which he specified. It is difficult to see how the defendant was injured. All of the notes fell due on the same day, and on default all would become past due paper. It is possible that the defendant and his associates, if they learned that the typewriter company was not paying in the \$20 on the sale of each machine, might have gone to the plaintiff, and asked it to declare the notes due for that reason, and paid them, and thus have become entitled to possession of the notes with the collateral. It is true that the notes would have then been past-due paper, but they would not have so appeared upon their face. Being payable to the typewriter company, they would not have required the plaintiff's indorsement or transfer by it, as did the notes given. Injury, however, is not the test of release of a surety, particularly when the contract of suretyship is specific. If the notes stand in the form taken by the plaintiff, without modification or elimination by the terms of the agreement, of course they do not conform to the contract of guaranty. They require for transfer the indorsement of the plaintiff, and, in express terms, subject the collateral to any indebtedness of the typewriter company beyond the \$80,000 stipulated, and give the right to demand additional security in case of depreciation, and to declare the same due in case it is not furnished.

We are impressed with the equitable character of the plaintiff's claim, for the defendant, together with his associates, have obtained desired aid to their corporation at plaintiff's expense. In our view of the law, however, we see no way to relieve the plaintiff from the consequence of its oversight in not taking the notes agreed upon, or its possible overcaution in taking a note which overreached the agreement.

The judgment must be affirmed, with costs.

PATTERSON, P. J., and LAMBERT, J., concur.

McLAUGHLIN, J. (dissenting). I am unable to agree with the other members of the court that the judgment appealed from should be affirmed. I am of the opinion that the written agreement signed by

the plaintiff, the typewriter company, and the subscribers should be read into the notes, and as I understand the opinion of Mr. Justice HOUGHTON he has reached the same conclusion. If this be done, then the words "subject to agreement," etc., relate not only to the deposit of shares of stock, but to every provision of the notes. The written words in the notes, referring to the agreement, were entirely unpunctuated, and were in the only available space in the printed form used, and it would be a forced and ungrammatical construction to hold that reference might be made to the agreement as regards the deposit of shares, but for no other purpose. If it be true, as the referee seemed to think, that the words "subject to agreement," etc., were susceptible of different meanings, then he was correct in admitting parol evidence to show the meaning in which the words were used. *Kitching v. Brown*, 180 N. Y. 414, 73 N. E. 241, 70 L. R. A. 742; *Evansville National Bank v. Kaufmann*, 93 N. Y. 273, 45 Am. Rep. 204; *Springsteen v. Samson*, 32 N. Y. 703; *Solomon Tobacco Co. v. Cohen*, 95 App. Div. 297, 88 N. Y. Supp. 641. The evidence thus admitted showed beyond question that the intention of the parties was to make every provision in the notes subject to the agreement, and that these words were inserted for that purpose. If the agreement be thus read into the notes for the purpose stated, then the question presented, by applying well-settled rules, is not difficult of solution. Where a printed form of contract is used, written words therein will prevail over the printed words, if there be provisions which are repugnant, irreconcilable, or inconsistent. *Kratzenstein v. Western Assur. Co.*, 116 N. Y. 54, 22 N. E. 221, 5 L. R. A. 799; *Clark v. Woodruff*, 83 N. Y. 518; *Collins v. Knuth*, 51 App. Div. 188, 64 N. Y. Supp. 549. As was said in *Clark v. Woodruff*, supra:

"The language of printed blanks is easily assumed to be appropriate, without careful examination, while the written words more safely and more nearly indicate the intention of the contracting parties."

In the present case, when the first loan was made, no form of note had been prepared, so that the printed form of collateral note used by the trust company was adopted, and the words "subject to agreement," etc., written in. If I am correct in the conclusion that these words had the effect of incorporating in the notes the entire agreement, then the printed provisions of the notes, repugnant to or inconsistent with the terms of the agreement, may be disregarded. The effect of this is not, as the respondent contends, to make the notes payable to the typewriter company and indorsed by it, but to identify them as those given under the agreement, though not in the exact form provided. But it is suggested that, if the agreement be read into the notes in the manner and with the effect indicated, the result would be that they would be nonnegotiable, and that the agreement provided for negotiable notes. It is true that in the first paragraph of the agreement the typewriter company agreed to make "its negotiable promissory notes as provided in paragraph 3 of this agreement," but it is evident from paragraph 3 and the other provisions of the agreement that the notes were to be nonnegotiable. Paragraph 3 does not refer to the notes as negotiable, and provides that the typewriter company might renew such amounts

as remained unpaid at the end of the year for an additional six months. Paragraph 4 provides that the typewriter company should deposit with the trust company \$20 for each machine sold by it, to be kept in a special sinking fund account held as security for the notes. When and as this fund amounted to \$2,000, it was to be applied to the payment of interest then due on all the notes and the remainder to the principal of the earliest note then unpaid. If these deposits were not made, the trust company might declare all the notes to be then due, and demand and receive payment. These provisions, and some others, indicate that negotiable notes were not contemplated in the agreement. In *Roblee v. Union Stockyards Nat. Bank*, 69 Neb. 180, 95 N. W. 61, the Supreme Court of Nebraska had occasion to pass upon the negotiability of a note under somewhat similar conditions. In that case the note was secured by a mortgage of cows, and one of the provisions was that the mortgagor should deliver the milk from the cows to the mortgagee, who was to apply the proceeds of the butter derived therefrom to the payment of the note. The court held that this rendered the note non-negotiable, and the reference in that note to the mortgage was by no means as clear as the reference to the agreement in the present case. Here, it is conceded, as it must be, that the trust company could not have negotiated the notes, even if they had been in the precise form provided in the agreement. It might have declared them due, and, after payment by the guarantors, have turned them over to them.

If it be true that the agreement should be read into the notes and that rendered them nonnegotiable, then but a single question remains as to whether the fact that the notes were made payable to the trust company instead of the typewriter company and indorsed by it was such a variance as to discharge the guarantors. It is unquestionably true that contract of a guarantor is strictissimi juris, and that a variance is not to be tested by the effect on the guarantor. It must, however, be something more than form. It must go to the substance of the contract, either as to the guarantor or the principal. A variance which does not alter the obligation of the principal, or increase the liability of the guarantor, will not discharge the latter. *Western New York Life Ins. Co. v. Clinton*, 66 N. Y. 326; *Kingsbury v. Westfall*, 61 N. Y. 356; *American Copper Co. v. Lowther*, 38 App. Div. 134, 56 N. Y. Supp. 538, affirmed 165 N. Y. 625, 59 N. E. 1118; *Standard Underground Cable Co. v. Stone*, 35 App. Div. 62, 54 N. Y. Supp. 383.

In *American Copper Co. v. Lowther*, supra, the plaintiff agreed to advance \$25,000 in cash to the Fairfield Copper Company—the latter giving a bond, payment of which was guaranteed by the defendants. One Wood had theretofore advanced \$3,000 to the copper company in anticipation of this loan. He was indebted to the plaintiff in an amount in excess of this sum, and with the consent of the copper company the plaintiff credited him with \$3,000 on his debt to it as part of the \$25,000 advanced. It was held that, although the terms of the guaranty agreement and the recitals in the bond provided that the whole amount was to be advanced in cash, the guarantors were not released. In disposing of the question, the court said:

"If the Fairfield Company had received from plaintiff on November 26, 1894, its check for \$3,000, which that company had at once delivered to Wood in payment of his debt, even a guarantor would admit that the transaction was an advance of money such as would satisfy this contract. But this was the same thing in substance. It was not even in point of fact a modification of the agreement between the principal parties, but the contract they made was carried out. * * * We think, therefore, that there was no modification of the contract of the principals, and that the defendants as guarantors are liable."

The variance of the case now before us as to form of the notes is equally inconsequential. Whether the typewriter company made its notes payable to its own order and indorsed them, or whether it made them payable to the trust company, is not of the slightest importance, because its obligation and that of the guarantors was precisely the same. *Madison Square Bank v. Pierce*, 137 N. Y. 444, 33 N. E. 557, 20 L. R. A. 335, 33 Am. St. Rep. 751. In legal effect, therefore, there was no modification of the agreement; the variance was in a mere matter of form. It is true the notes, as made, would require the indorsement of the trust company to transfer them, while if they had been made payable to the typewriter company and indorsed by it they could be given to the guarantors without further indorsement. But the objection that the trust company, under such circumstances, might have refused to indorse them "without recourse" or otherwise, so as to transfer title to the guarantors, is of no weight whatever. If they had been in the other form the trust company might equally as well have refused to give them up. The obligation assumed by the typewriter company is precisely the same in either case, and it is that obligation which the guarantors undertook to guarantee. As to that the contract has not been varied in the slightest degree. This being so, the guarantors are liable. Their liability has neither been increased nor diminished in any particular. They are in precisely the same position they would have been if the notes had been payable to and indorsed by their principal.

In conclusion it is to be observed that whether the words "subject to agreement," etc., relate, as I think they do, to every provision of the notes, they certainly relate to the deposit of the shares of stock—as to this we are all agreed—which means that such shares were to be held in accordance with the agreement, and subject to it. This disposes of one of the contentions of the respondent, and one of the objections to the form of the notes stated in the prevailing opinion, which is that, by the subsequent printed provisions of the notes, the shares could be held as security for the loans made by the trust company in excess of \$80,000. The agreement specifically provides that the shares should be deposited to secure loans not in excess of \$80,000. The claim then that the trust company could hold these shares as security for loans by it to the typewriter company in excess of that amount, aggregating over \$20,000, is wholly unfounded. Not more than \$80,000 could be advanced under the agreement, it is true, but there is no provision that further agreements for further advances might not be made, nor can one be implied. If the typewriter company had borrowed the further amounts from other parties, pledging its equities in the stock as security for payment, no one would seri-

ously contend that this constituted a violation of the agreement, and, if it could borrow from third parties, it could borrow from the trust company.

The judgment appealed from should be reversed, and a new trial ordered before another referee, with costs to appellant to abide event.

LAUGHLIN, J., concurs.

BULL et al. v. GUARDIAN TRUST CO. OF NEW YORK.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

Appeal from Special Term, New York County.

Action by William L. Bull and others, trading under the name of Edward Sweet & Co., against the Guardian Trust Company of New York. From a judgment for plaintiffs entered on the report of a referee, defendant appeals. Affirmed.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAUGHLIN, HOUGHTON, and LAMBERT, JJ.

Henry D. Hotchkiss, for appellant.

H. Snowden Marshall, for respondents.

HOUGHTON, J. Judgment affirmed on the opinion in Guardian Trust Company of New York v. Peabody (decided herewith) 107 N. Y. Supp. 515.

Judgment affirmed, with costs.

PATTERSON, P. J., and LAMBERT, J., concur; McLAUGHLIN and LAUGHLIN, JJ., dissent.

McLAUGHLIN, J. (dissenting). I think the judgment should be reversed and a new trial ordered, for the reasons stated in my opinion in Guardian Trust Company of New York v. Peabody (decided herewith) 107 N. Y. Supp. 515.

McAULIFFE v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

STREET RAILROADS—INJURIES TO PERSONS ON TRACK—SUFFICIENCY OF EVIDENCE.

Evidence in an action for the death of plaintiff's intestate who was run down by a street railway car held to show that intestate was negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 248-250.]

Appeal from Trial Term.

Action by Elizabeth McAuliffe, as administratrix, etc., of Thomas McAuliffe, deceased, against the New York City Railway Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Judgment and order reversed, and new trial ordered.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

B. H. Ames, for appellant.

W. J. Burke, for respondent.

SCOTT, J. The defendant appeals from a judgment entered upon a verdict in favor of plaintiff, who sues for damages resulting from the death of her husband. The plaintiff's husband, a young man about 32 years of age, was in the employ of defendant, but not as a conductor or motorman. He was killed at about 8 o'clock in the evening of December 2, 1903. He and a companion O'Connor, with whom he had spent a couple of hours, walked to a spot on the southerly side of Twenty-Third street, about the center of the block. The elevated railroad runs through Twenty-Third street at this point, having stations on both sides of the street about midway between First and Second avenues. The deceased and O'Connor stood for a few minutes, engaged in conversation, on the south curb, and then the deceased started to cross to the north side of the street, with a view of taking an uptown train on the elevated railway. His companion remained standing on the south curb, and is the plaintiff's sole witness as to the accident. He testified that defendant's east-bound track was seven or eight feet away from the point where he and deceased had been standing; that, after the deceased left him, he stood watching him; that, when deceased came out toward the car tracks, witness saw a car brightly lighted, coming along the east-bound track; that, when he saw it, it was 10 or 12 feet from McAuliffe; that McAuliffe walked straight ahead without stopping, started across the track ahead of the car, and was hit just as he was getting off the track. Upon this evidence the complaint should have been dismissed. So far as appears, the deceased had abundant opportunity to see the car, which was well lighted, and the street was unobstructed. He left the curb to cross the street, had only seven or eight feet to go before reaching the track, and the car was so near him that, before he had been able to get across, it was within a few feet of him. There seems to be no other conclusion than that McAuliffe heedlessly or recklessly walked directly in front of the car. The testimony offered in behalf of defendant did not strengthen the plaintiff's case. The motorman testified that he saw McAuliffe leave the curb to cross the street, and that the car was then 25 or 30 feet from the point of the accident. He says he did everything possible to stop the car, and that when McAuliffe stepped on the track, the car was five or six feet away from him. This is not inconsistent with O'Connor's testimony. A bystander testified that he was standing on the north side of the street, and saw McAuliffe walk in front of the car. There was practically no conflict in the evidence; and it is apparent on reading it that not only did it fail to show an absence of negligence on the part of the deceased, but, on the contrary, indicates very clearly the presence of such negligence.

The judgment and order must be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

WILSON & BAILLIE MFG. CO. v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

TRIAL—DIRECTING VERDICT.

Where the court directs a verdict for plaintiff, without submitting anything to the jury, so that Code Civ. Proc. § 1187, providing that on a special verdict the court may direct a general verdict, does not apply, and the verdict is not directed "subject to the opinion of the court," so that section 1185, providing that in such case the court can set aside the verdict and direct a judgment, does not apply, it cannot, after the trial has closed and the jury been discharged, set aside the verdict, and direct one for defendant; but it can merely set it aside and grant a new trial.

Appeal from Trial Term.

Action by the Wilson & Baillie Manufacturing Company against the city of New York. From an order setting aside a verdict directed for plaintiff, and directing a verdict for defendant, and from the judgment entered thereon plaintiff appeals. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAUGHLIN, HOUGHTON, and LAMBERT, JJ.

L. Lafin Kellogg, for appellant.

Theodore Connolly, for respondent.

McLAUGHLIN, J. This action was tried on the 12th and 13th of March, 1907. At the conclusion of the trial, the learned justice sitting at Trial Term directed a verdict in favor of the plaintiff for \$8,179.90, and denied defendant's request to go to the jury. Thereupon the defendant moved to set aside the verdict, which motion was entertained, and on the 4th of April following the verdict was set aside and a verdict directed for defendant.

The trial had closed, and the jury been discharged, and it is difficult to see, under such circumstances, how the court could direct a verdict for the defendant. The learned justice did not direct the jury to render a verdict "subject to the opinion of the court" as he might have done under section 1185 of the Code of Civil Procedure. Had he done so, then he could at the same term have set aside the verdict and directed a judgment—not a verdict—to be entered for either party, with like effect and in like manner as if such direction had been given at the trial. Nor is this view in any way in conflict with the case called to our attention upon the argument. *Williams v. City of New York*, 118 App. Div. 756, 104 N. Y. Supp. 14. There defendant moved for the direction of a verdict upon certain grounds. The court reserved decision upon that motion, stating that he did so under section 1187 of the Code, and sent the case to the jury to pass solely upon the question of damages. The jury found a verdict in favor of the plaintiff, which was subsequently set aside, and a verdict directed for defendant. This section of the Code gave the learned justice the right to reserve his decision until the damages had been assessed. It provides, among other things, that:

"After the jury shall have rendered a special verdict upon such submission, or shall have assessed the damage, the court may then pass upon the

motion to non suit or direct such general verdict as either party may be entitled to."

Here the court did not submit anything to the jury, so that section 1187 does not apply. He did not direct the jury to render a verdict subject to the opinion of the court, and therefore section 1185 does not apply. I know of no authority for the practice here adopted. It, in effect, deprived the plaintiff of the right to make a request to go to the jury, inasmuch as there was no occasion at the close of the trial to make such request as the verdict was directed in its favor. When a verdict was directed for the defendant, the jury was discharged, and therefore a request would have been unavailing. A motion having been made to set aside the verdict, the learned justice had the power to grant that motion and order a new trial, and this, I think, is all that could be done.

Other questions were discussed upon the argument of the appeal, which went to the merits of the action; but, inasmuch as there must be a new trial, it does not seem to be advisable to attempt to pass upon them at this time.

The judgment and order appealed from are reversed, and a new trial ordered, with costs and disbursements to the appellant to abide the event of the action. All concur.

(122 App. Div. 521.)

SCHALK v. COMMERCIAL TWINE CO.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

MASTER AND SERVANT—INJURIES TO SERVANT—PLACE FOR WORK—EVIDENCE.

In an action for injuries to plaintiff's scalp, caused by her hair having been caught in certain machinery at which she was employed to work by defendant, evidence examined and *held* not to sustain a verdict for plaintiff based on alleged negligence of defendant in permitting the floor about the machinery to be in an oily condition, which caused plaintiff to slip, thereby bringing about the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 954-977.]

Appeal from Trial Term.

Action by Minnie Schalk, an infant, by Jacob Schalk, her guardian ad litem, against the Commercial Twine Company. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, HOUGHTON, and SCOTT, JJ.

Frederick Hulse, for appellant.

Clarence M. Lewis, for respondent.

PATTERSON, P. J. This judgment must be reversed, for the reason that the verdict of the jury in favor of the plaintiff was against the weight of evidence. The plaintiff was employed to work at a machine in the factory of the defendant, and on the date charged in the complaint, while so at work, her hair was caught in the machinery, and she sustained injuries to the scalp of a more or less serious nature.

The theory of her case is that, while walking near the machinery, she slipped upon the floor at a point near the machinery, and that the slipping was caused by the presence of oil on the floor, which the defendant had negligently permitted to accumulate and remain there. The issue of fact was as to the condition of the floor and as to oil being upon it. To maintain that issue, the plaintiff testified in her own behalf.

There were no spectators of the accident, but the plaintiff testified that the floor near the machine was saturated with oil; that it had previously been kept clean until two weeks before she was hurt, and that for two weeks prior to the accident nothing at all was done to the floor. The machinery was in motion as she was passing by it. On the other hand, and in denial of this alleged condition of the floor, there were many witnesses produced by the defendant who testified that on the day and at the time the accident happened to the plaintiff there was no oil on the floor. One of the witnesses, Perry, was working on the floor where the accident happened at the time it occurred, and he testified that he heard the plaintiff scream; that he was 30 feet away from her; that he took her hair out of the machine in which it had become entangled, and that he observed the condition of the floor at the time of the accident, and that it was not oily. The witness Daly testified that he was present on the floor on that day, that he was oiling machinery; that his attention was attracted to the accident; that he had oiled the plaintiff's machine himself a half hour before, and that at that time he observed the condition of the floor, and that it was not oily or slippery. Another witness, Kate Cooper, testified that she was at work; that the day before the accident she worked on the machine next to that on which the plaintiff worked, and that there was no oil on the floor. Annie Buttner testified that, although not working there, she was about 30 feet away from the plaintiff when the accident happened; that she had been at the plaintiff's machine about half an hour before the accident, and that she observed the condition of the floor, and that there was no oil on it. Another working girl, Lizzie Riordan, testified that she was working at the factory when the accident happened to the plaintiff; that she went around the plaintiff's machine during the dinner hour; that she never saw any oil drip on the floor, and that the floor was not slippery. All these witnesses testified that they never hear of any one slipping on the floor. Another witness, Agnes Donahue, testified that she was employed by the defendant at the time the accident occurred; that she went to the plaintiff's machine during the dinner hour, but did not see any oil on the floor. She testified:

"I tell you with so much certainty that the floor was clean at that time, because I was taking things away from the floor and put them in baskets and sent them downstairs. The floor was clean when I was looking at it. The floor was clean. There was no dirt on it. There were no oil stains around the floor. There was not oil on the floor at all. The floor did not give evidence at that time of oil that at any time had been saturated upon the floor. The boards were dry—absolutely dry."

Mamie Tumulty testified that she asked the plaintiff how the accident occurred, and that the response was that the plaintiff was stoop-

ing down oiling the spindle, and her hair was caught in the flyers. This witness swore that the floor was not oily, as did also another witness, Martha Barnes, who testified that before the accident she saw the plaintiff picking waste from the machinery, that there was no oil on the floor, and that it was not slippery.

None of these witnesses is impeached in any way; and, inasmuch as the imputed negligence of the defendant is the maintenance of a slippery floor, and that is assigned as the cause of the accident, and the great preponderance of unimpeached testimony is that the alleged cause of the accident did not exist, it necessarily follows that the judgment and order must be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

TIERNEY v. FITZPATRICK.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. TRUSTS—CREATION—EXPRESS TRUSTS—DEPOSIT IN BANK.

A deposit made in a bank by one person in his own name for another is merely a "tentative" trust, and is revocable at will, unless the depositor completes the gift by some unequivocal act during his lifetime, or dies before the beneficiary, without revocation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 44.]

2. SAME—ENFORCEMENT OF TRUST—ACTIONS—EVIDENCE.

In an action to recover money deposited in a bank by deceased in trust for plaintiff, and withdrawn by deceased before his death, evidence held insufficient to show a change of a tentative trust into an irrevocable one, entitling plaintiff to the money.

Laughlin, J., dissenting.

Appeal from Trial Term.

Action by Frank L. Tierney against Mary Fitzpatrick, executrix. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

A. Gruber, for appellant.

L. H. Hall, for respondent.

SCOTT, J. The plaintiff appeals from a judgment entered upon a verdict in favor of the defendant. The case presented is one of a so-called "savings bank trust," and arises upon the following facts: On February 25, 1898, Launcelot J. Tierney, the father of plaintiff, had a deposit account in the Broadway Savings Bank, which then amounted to \$3,060, being \$60 in excess of the amount permitted to be deposited in one account (section 113, c. 689, p. 1895, Laws 1892). The secretary of the bank thereupon advised him to open an account for his wife, or in trust for one of his children, so as to reduce his account to an amount upon which interest could be allowed. Tierney thereupon opened an account entitled "Launcelot J. Tierney, in trust for Frank Tierney"; withdrew the surplus \$60 from his own account, and deposited that sum with other moneys, aggregating in

all \$199, to the credit of the new account. He made other deposits from time to time of his own money until the total account aggregated, on July 4, 1904, \$3,114. On July 21, 1904, he drew out the surplus of \$114, and on October 14, 1904, he drew out the remaining \$3,000, thus closing the account. The bankbook thereafter remained in the custody of the bank. On November 14, 1904, he died. This action is against his executrix to recover the \$3,114, drawn out by the deceased during his lifetime. Both parties recognize the controlling force of the carefully formulated rule laid down in *Totten v. Lattan*, 179 N. Y. 112-125, 71 N. E. 748, 752, 70 L. R. A. 711, as follows:

"A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook, or notice to the beneficiary. In case the depositor dies before the beneficiary, without revocation or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor."

It will be observed that, under this rule, the deposit by any person in his own name in trust for another is termed a "tentative" trust, and is said to be revocable at will. It can be made irrevocable, or absolute, only in one of two ways: First, by some unequivocal act or declaration by the depositor in his lifetime; or, second, by the death of the depositor before the beneficiary, without revocation, or some decisive act or declaration of disaffirmance. The fact of withdrawal was a decisive act of disaffirmance, and the plaintiff was forced to fall back upon the first alternative, and to attempt to show that the tentative trust became irrevocable during the lifetime of the depositor by "some unequivocal act or declaration." To do this, evidence was given for the purpose of showing both the delivery of the passbook and declaration of the depositor. The plaintiff himself, of course, could not testify as to any personal transaction with his father, but the plaintiff's wife was called to prove the gift of the bankbook. She testified that her father-in-law visited her home every day, or nearly so. That in the spring of 1898 he brought the passbook to the house, and said to her husband (the plaintiff): "Here, Frank, here is the book. I have started an account in the bank, so if anything would happen to me you have something to fall back upon, knowing that you have rheumatism." That thereupon the book was put in a safe in plaintiff's house. That the deceased would take it out frequently and take it away with him for a day or more at a time—presumably to make a new deposit, or have the interest written up—and would then return it to the safe in plaintiff's house. It does not appear that deceased ever asked permission to retake the book into his possession, and the fair inference from the witness' testimony is that he took it when he chose, exercising the domination over it consistent only with a continuation of his ownership and control. We do not think that this was such a giving of the book to the beneficiary as was meant by the Court of Appeals, when it spoke of the gift of a bankbook as an unequivocal act, which would change the character of the trust

from a tentative one to an irrevocable one. The declarations relied on are the ones quoted above—to his son when the account was first opened, and certain alleged declarations to strangers. The witness Gray testified that deceased said to him in 1900, 1901, or 1902 that “he had placed money in the bank for Frank, as Frank was not well, he was troubled with rheumatism, and that he had money in the bank for Frank,” and at the same time he showed witness the bankbook. The witness Cronin testified that in 1902 or 1903 deceased told him that he had put money in the bank in Frank’s name, and said: “I will tell you one thing, Tim, I have fixed Frank in case of my death, that he will be perfectly independent, if anything should happen to him with the rheumatism to keep him away from his plumbing business.” The witness Edgerton said that deceased said to him in 1900 or 1901 that when he died he would leave his son Frank in first-class circumstances—that he had money deposited in the Broadway Bank, to be kept in trust for his son Frank. It is significant that all these declarations, including the one to his son, amounted merely to a statement that money had been deposited in trust for Frank, and that it was the present intention of the depositor that Frank should have the money after his death. In no case were there used words indicating an intention to give Frank any interest in the fund in presenti.

In our view, to establish the “unequivocal act or declaration,” referred to by the Court of Appeals, as necessary to transfer a tentative trust into an irrevocable one, there must be something more than a declaration of intention that the cestui que trust shall have the property after the death of the depositor. Such a declaration, by its very terms, negatives the idea that any present interest in, or right to, the deposit is to pass to the cestui que trust during the depositor’s life, and is entirely consistent with a reservation by the depositor of the right to deal with the fund during his lifetime. In our opinion, on the plaintiff’s own evidence, a verdict should have been directed for defendant, and it is therefore unnecessary to consider the exceptions to the charge.

Judgment and order affirmed, with costs.

PATTERSON, P. J., and INGRAHAM and CLARKE, JJ., concur.

LAUGHLIN, J. (dissenting). I am of opinion that there was a fair question of fact for the consideration of the jury, and that errors prejudicial to the plaintiff were committed upon the trial. The opening of the account constituted a tentative trust merely, revocable at will, but if the testator subsequently delivered the passbook to the plaintiff, who was the beneficiary, then the trust became irrevocable, and while the bank was probably justified under its rules in allowing the depositor to withdraw the fund on presentation of the passbook, without knowledge of its delivery to the plaintiff, yet that does not relieve the estate of the testator from liability for his appropriation of the fund to his own use. There was not only evidence of the delivery of the passbook to the plaintiff, but there was other evidence

of admissions and declarations by the testator tending to show that he had established the trust for the benefit of the plaintiff.

At the request of counsel for the defendant, the court specifically instructed the jury that the fact that the testator drew out the money deposited in the account and used it for his own purposes was "a circumstance to be taken into consideration" by the jury "in determining the question as to whether or not he intended to create a trust in favor of Frank Tierney." To this instruction counsel for the plaintiff duly excepted. In *Mabie v. Dailey*, 95 N. Y. 206, the Court of Appeals, in a similar case, unanimously held that the withdrawal of the fund by the depositor thereof "is not legitimate evidence that he did not intend, when the deposits were made, to create a beneficial trust for the beneficiaries named. If the withdrawal was with intent on his part to ignore the trust and to convert the money to his own use, it might be competent evidence of a change of purpose, but it throws no light on the original transaction," and sustained a direction of a verdict in favor of the plaintiff against the estate of the depositor. That case is cited without disapproval in *Matter of Totten*, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711, which, as I read it, was not intended to overrule any of the decisions on this subject, for the learned judge writing for the court says that, in laying down the rule quoted in the prevailing opinion, the court was "guided by the principles established by our former decisions." It is unnecessary to consider the other alleged errors, for this alone, in my opinion, requires a reversal.

(122 App. Div. 590.)

BOHAN v. METROPOLITAN EXPRESS CO.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

MASTER AND SERVANT—INJURIES TO THIRD PERSONS—RELATION OF PARTIES.

An express company hired an automobile from another corporation for the purpose of delivering packages, and the former corporation employed the chauffeur, whose sole duty it was to operate the vehicle, he being accompanied by servant of the express company who delivered the packages. After the packages had been delivered the vehicle returned to the express company's office, where the chauffeur informed the person in charge that there was some trouble with the machinery, and the chauffeur then left in the vehicle, either to take it to the corporation's office or to go for his lunch, and on his way ran over plaintiff's intestate. *Held*, that the express company was not liable, as the chauffeur was not its servant at the time of the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1210, 1213, 1215.]

Appeal from Trial Term.

Action by Charles Bohan, as administrator, etc., against the Metropolitan Express Company. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Argued before PATTERSON, P. J., and McLAUGHLIN, INGRAHAM, HOUGHTON, and SCOTT, JJ.

Arthur K. Wing, for appellant.

Terence J. McManus, for respondent.

McLAUGHLIN, J. This action was brought to recover damages for the death of plaintiff's intestate alleged to have been caused by the negligence of the defendant. There is little or no dispute as to the material facts involved. The plaintiff's intestate, an infant about 14 months old, was being wheeled in a baby carriage along the easterly sidewalk on West End avenue between Sixty-Ninth and Seventieth streets in the city of New York, when an automobile express wagon, upon which appeared defendant's name, going in a southerly direction on West End avenue, turned to the east into Sixty-Ninth street. After it had turned into that street, instead of continuing in an easterly direction, it turned in a circle, and finally ran onto the sidewalk, and struck the carriage in which plaintiff's intestate was riding, and she was thrown out and killed. At the conclusion of the trial the jury rendered a verdict in favor of the plaintiff for \$1,000, and from the judgment entered thereon, and from an order denying a motion for a new trial, defendant appeals.

The defendant hired from the New York Transportation Company, either by the month or day, just which does not clearly appear in the present case, electric vehicles for the purpose of delivering express packages. The transportation company employed the chauffeurs for these vehicles, whose sole duty was to operate them. They had nothing to do with the putting of the parcels into the vehicles, or of thereafter delivering them. After the packages were put into the vehicles a servant of the express company would go with the chauffeur and make the deliveries. The vehicle which caused the death of plaintiff's intestate was one of those thus hired. It was registered with the Secretary of the State of New York by the transportation company as owner. The chauffeur in charge was employed by the transportation company, wore one of its uniforms, and had upon his clothing one of its badges. On the morning of the accident the chauffeur went to the station of the transportation company at Forty-Ninth street and Eighth avenue and there took the vehicle to the office of the defendant at Broadway and Seventy-Ninth street. It was then loaded with express packages by the express company's servants, one of whom got onto the seat with the chauffeur and directed him where to go. After all of the packages had been delivered they returned to the express company's office, and the chauffeur then informed the person there in charge that there was some trouble with the vehicle; that the brake did not work right, and he thereupon started, leaving the servant of the express company at the office, either to go back to the transportation company's office to have the vehicle repaired, or else to go for his lunch, just which does not clearly appear, but the determination of that question, in view of the conclusion I have reached, is of no importance.

The question presented depends primarily for its determination upon whether at the time of the accident the chauffeur was a servant of the express company or of the transportation company. If a servant of the latter, obviously there can be no recovery against the defendant. *Maximilian v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468. The doctrine of respondeat superior, whereby the negligence of the servant may be imputed to the master, is based upon his right to select and discharge his servants and control and direct them while in his employ. This

doctrine, however, has recently been extended in certain instances to apply to cases where servants employed and paid by one person are engaged in the business of and under the direction and control of another, though he have no right of selection or power to discharge. It has been held in several cases that servants thus employed may become ad hoc the servants of the latter, and this even though he does not employ and cannot discharge them. *Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. 381, 19 L. R. A. 285; *Higgins v. Western Union Tel. Co.*, 156 N. Y. 75, 50 N. E. 500, 66 Am. St. Rep. 537; *Baldwin v. Abraham*, 57 App. Div. 67, 67 N. Y. Supp. 1079, affirmed 171 N. Y. 677, 64 N. E. 1118; *Howard v. Ludwig*, 171 N. Y. 507, 64 N. E. 172. In *Baldwin v. Abraham*, supra, the defendants were proprietors of a large department store in Brooklyn, and were owners of several vans which they used throughout the year in delivering their goods to purchasers. These vans were found to be insufficient for the holiday trade, and they accordingly hired additional vans for the two weeks immediately preceding Christmas Day. Under the arrangement by which they hired the additional vans, the owners agreed to furnish for each van a driver and helper, and to be responsible for the delivery of the goods intrusted to them and for the prompt and safe return of collections of money made. The accident occurred by reason of the negligence of the driver of one of the vans, who was, at that time, actually engaged in delivering goods which had been intrusted to him. It was held that a verdict in favor of the plaintiff should be sustained; that it could not be said, as matter of law, that the driver of the van was not the servant of the defendants at the time the accident occurred. In *Howard v. Ludwig*, supra, the defendants were engaged in the furniture business in the city of New York, and had made an arrangement with an express company by which it furnished a truck, with horses and a driver, to make their Staten Island deliveries. What the terms of the arrangement were was a fact which was sharply contested at the trial. The court held that if, as claimed by defendants, the contract was that the express company was to deliver all the goods sold by the defendants on Staten Island each week, for \$30, and to be responsible for the goods, if lost, then the defendants would not be liable. But if, instead thereof, as claimed by the plaintiff, the arrangement was that the defendants should pay \$30 a week for the team, truck, and driver, and they took charge of the delivery of the goods, sending the team to Staten Island or around New York making deliveries, as the exigency of their business required, then the relation of master and servant was created between them, and the driver and they became liable for his negligent act, and that the testimony at the trial was such that it was necessary for the jury to determine what the terms of the agreement were; and it having found in favor of the plaintiff, the judgment should be affirmed.

In the present case, if the accident had actually occurred while the express packages were being delivered, it might be that the defendant would be liable under the rule laid down in the last two cases, but even then it might be doubtful, inasmuch as the chauffeur had nothing whatever to do with the handling of the goods of the defendant or making collections. All he did was to obey the directions as to where

he should take the vehicle. *Lewis v. L. I. R. R. Co.*, 162 N. Y. 52, 56 N. E. 548; *Johnson v. N. A. S. N. Co.*, 132 N. Y. 576, 30 N. E. 505. But, as we have already seen, at the time of the accident he had delivered all the packages for the defendant, and was not then engaged in doing any work for it. He was then either taking the vehicle to the transportation company's office to have it repaired, or else was engaged in his personal business, and in neither case can it be said that he was acting as the servant of the defendant or engaged in its business. The defendant did not own the vehicle, had no right to inspect it, or give directions as to repairs. Under such circumstances I know of no rule of law under which defendant can be held liable. When the chauffeur left the defendant's office for the purpose of going back to the transportation company's office to have the vehicle repaired, or to get his lunch, he ceased to be the servant of the express company, because he was not then engaged in doing its business, and for his negligence in operating the vehicle, while thus engaged, the express company is not liable.

There is another ground which calls for a reversal of the judgment. The complaint alleges that the accident happened, and the death of the intestate "was caused, by the negligence and carelessness of the defendant and its said agent (the chauffeur) in failing to properly operate and manage said motor vehicle." There is absolutely no evidence which shows, or tends to show, that the chauffeur was negligent in this respect. He had had several years' experience in operating electric vehicles, and no claim is made that he was incompetent. It does not appear that at the time the accident occurred the vehicle was being run at an unlawful rate of speed. According to the testimony of the chauffeur, which is uncontradicted, the accident occurred because the steering gear of the vehicle locked and the controller froze, and by reason of that fact he was unable either to change the direction of it or shut off the power until too late to prevent the accident, although he made every effort to do so. When he found that he could not shut off the power, he attempted to pull out the plug which gave the contact and to shut off the power in this way, but the plug was hot, and he could not get it out until after the accident had occurred. The direct and proximate cause of the accident, therefore, was the defect in the vehicle, and if this were due to any one's negligence, it was that of the transportation company, who alone was responsible for its condition, and not the defendant or the chauffeur. The chauffeur, as we have already seen, complained to the defendant of the condition of the vehicle, and was about to take it back for the purpose of having it repaired. It was owned by the transportation company, was furnished to the defendant for a specific purpose, and it had no authority to determine whether repairs should be made or to make repairs.

The judgment and order appealed from therefore must be reversed, and a new trial ordered, with costs to appellant to abide event.

INGRAHAM and SCOTT, JJ., concur. HOUGHTON, J., concurs on last ground only. PATTERSON, P. J., concurs in result.

(122 App. Div. 546.)

HAWKES et al. v. CLAFFY et al.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. ABATEMENT AND REVIVAL—DEATH OF ONE OF PLAINTIFFS.

In an action by two plaintiffs on behalf of themselves and all other persons who were creditors of defendant, one of the plaintiffs died after service of the answer. The surviving plaintiff moved to mark the case off the calendar, but defendant insisted that it should be tried, and when the case was called for trial plaintiff did not appear, whereupon the complaint was dismissed, and judgment entered. The action was to enforce separate claims of the plaintiffs and other creditors. *Held*, that under Code Civ. Proc. § 758, the cause of action of the surviving plaintiff survived so that it was not error to proceed with the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, § 315.]

2. JUDGMENT—VACATION—PERSONS ENTITLED.

While the dismissal of the complaint did not affect the right of the personal representative of the deceased plaintiff to move to revive the action as to him, neither the surviving plaintiff nor plaintiffs' attorney were entitled to move for a vacation of the judgment on the ground that it had been entered against a deceased person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 722, 723.]

Appeal from Special Term.

Action by Quayle W. Hawkes and another against Joseph H. Claffy and others. Appeals from an order denying a motion to vacate a judgment dismissing the complaint on the ground that the judgment was entered after the death of one of the plaintiffs. Appeal on behalf of the deceased plaintiff dismissed, and on the appeal by the surviving plaintiff order affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Charles H. Stoddard, for appellants.

Frank M. Avery, for respondents.

INGRAHAM, J. This action was commenced by two plaintiffs on behalf of themselves and all other persons who were creditors of the defendant John W. Kingston who had furnished labor or material towards the erection of a building upon certain premises described in the complaint. The answer was served on the 17th of January, 1907, and thereafter and on the 28th day of March, 1907, the plaintiff Hawkes died. After the death of Hawkes the action appeared upon the calendar of the Special Term, when it was suggested in open court that one of the plaintiffs was dead. The other plaintiff appeared for the purpose of moving to mark the case off. The defendant insisted that the case should be tried, whereupon the case was marked ready for trial. When the case was called for trial the plaintiff did not appear, and on motion of the defendants' attorney the complaint was dismissed, and an order was filed dismissing the complaint upon which judgment was entered. Although the complaint is not a part of the record, it would appear that the action was to enforce separate claims of the plaintiffs, and the claims of the other creditors of the defendant

Kingston. By the death of one plaintiff the action abated as to him. His death, however, did not interfere with the enforcement of the cause of action as to the other plaintiff or the other creditors who could have proceeded with the trial entering upon the record a statement that one of the plaintiffs had died. It was not error for the court to proceed with the trial; and while it is quite clear that a dismissal of the complaint would not affect the right of the personal representative of the deceased plaintiff to move to revive the action as to him, as no such application has been made, there is no one in a position by motion or by appeal to move to vacate the judgment. The plaintiffs' attorney cannot appear and prosecute this appeal on behalf of the deceased until the action is revived by his personal representatives, and no error was committed in dismissing the complaint as to the surviving plaintiff. It appeared by the notice of appeal that both plaintiffs appealed from the order denying the motion to vacate the judgment. The dead plaintiff certainly could not appeal, and the judgment dismissing the complaint as to the surviving plaintiff was not irregular or void. The cause of action—to enforce the right of Goodfellow—was unaffected by the death of Hawkes, and neither the presence of Hawkes nor his representatives affected the right of Goodfellow to proceed with the action and obtain such judgment as he was entitled to. Therefore, under section 758 of the Code, the entire cause of action of Goodfellow survived, notwithstanding the death of his coplaintiff. If this judgment is in effect against a dead man, it is void as to him, but the surviving plaintiff is not in a position to move on behalf of the deceased plaintiff. Nothing prevents the representatives of the deceased person from moving to revive the action in their favor, or making such other application as is necessary to protect their rights.

The appeal taken on behalf of the deceased plaintiff must be dismissed, and on the appeal taken on behalf of the surviving plaintiff the order is affirmed, with \$10 costs and disbursements. All concur.

(122 App. Div. 556.)

CITY REAL ESTATE CO. v. KING et al.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

PLEADING—MOTIONS—STRIKING IRRELEVANT MATTER.

A complaint alleged that one of defendants executed to plaintiff a bond, secured by mortgage on real estate, and thereafter conveyed the realty to the other defendant, and agreed with the grantee to pay the bond, but that default had been made in payment and a judgment was sought against the grantor defendant, and it was prayed that in case execution should be returned unsatisfied as to any portion of the debt the premises in question might be sold, etc. *Held*, that an objection that the complaint joined an action at law on the bond and one in equity for foreclosure could not be raised by a motion to strike as irrelevant the allegations as to the agreement between defendants.

Appeal from Special Term.

Action by the City Real Estate Company against William F. King and another. Appeal by plaintiff and defendant Martha K. King from

an order striking out as irrelevant certain allegations of the complaint. Reversed, and defendants' appeal dismissed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Strong & Cadwalader (Edward E. Sprague, of counsel), for appellant City Real Estate Company.

Huntington, Rhinelander & Seymour (David B. Ogden, of counsel), for appellant King.

Harris, Corwin, Gunnison & Meyers (John H. Corwin, of counsel), for respondent King.

CLARKE, J. The complaint alleges in substance that on or about the 15th day of October, 1901, the defendant, William F. King, executed and delivered his certain bond in the penal sum of \$100,000, with the condition thereunder written that if said William F. King should well and truly pay or cause to be paid the just and full sum of \$50,000 on the 15th day of November, 1904, and the interest thereon to be computed from the 15th day of October, 1901, at the rate of $4\frac{1}{2}$ per cent. per annum and to be paid semiannually on the first days of April and October in every year until the said principal sum should be fully paid, then the said bond to be void, otherwise to remain in full force and effect; that in order to secure payment of the said sum the said William F. King executed and delivered as collateral security for the payment of the said indebtedness an indenture of mortgage upon certain described real estate bearing even date with the said bond and conditioned for the payment of said sum of money mentioned in the condition of said bond, and the interest thereon at the time and in the manner mentioned in the said condition; that subsequent to the execution and delivery of the said bond and mortgage, and on or about the 30th day of December, 1902, said defendant William F. King duly executed and delivered to the defendant Martha K. King his certain deed whereby the said William F. King granted and released unto the defendant Martha K. King all and certain the said described mortgaged premises, subject only to all covenants and restrictions contained in former deeds of said premises, and in and by the said deed of conveyance the said William F. King did covenant with the said Martha K. King that the said premises were free from incumbrances, except said restrictions, and that he, the said William F. King, would execute or procure any further necessary assurances of the title to the said premises, and would forever warrant the title to the said premises, which said deed was duly recorded; that simultaneously with the delivery of the said deed said William F. King did, for a good and valuable consideration, agree with the said defendant Martha K. King that he would pay the bond hereinbefore set forth secured by the above-mentioned mortgage covering the premises so conveyed as aforesaid, to the end that the said defendant Martha K. King should have, hold, and enjoy the said premises free and clear of the incumbrance of the said mortgage; that the defendant William F. King has made default in payment of his said bond which became due and payable

on the 15th day of October, 1904, and that there is now due upon the said bond the sum of \$50,000 with interest from 1906 to be computed at the rate of $4\frac{1}{2}$ per cent. per annum; that no other action has been brought to recover the said mortgage debt or any part thereof; that the defendant William F. King is primarily liable for the payment of the said bond; and that by reason of his covenants and agreements hereinabove alleged with the said defendant Martha K. King she is entitled to have the remedies of the plaintiff upon the personal obligations of the defendant William F. King exhausted before resort should be had to the lien of said mortgage upon her said real estate.

Plaintiff prayed for judgment in the first instance against the defendant William F. King for the said sum of \$50,000, with interest, and that the plaintiff have execution therefor, and that in case such execution should be returned in whole or in part unsatisfied the premises described might be decreed to be sold according to law and the moneys arising from said sale be brought into court; that the plaintiff be paid the amount remaining due from said bond and mortgage, with interest and costs; that the defendants and all persons claiming under them or either of them be barred and foreclosed of all right, title, interest, claim, lien, or equity of redemption of and to the said premises and every part thereof; and that the plaintiff have such other and further relief as shall be just and equitable.

The complaint, therefore, attempts to set up a cause of action to recover upon a bond, and, upon failure of collection of the amount due upon said bond, to foreclose the mortgage given as collateral security to secure the payment of the sum due upon said bond. From the allegations which set forth the conveyance to the defendant Martha K. King of the property covered by the mortgage subsequent to the execution and delivery of the bond and mortgage, together with the agreement of William F. King with Martha K. King that he would pay the bond secured by the mortgage to the end that Martha K. King should have, hold, and enjoy the said premises free and clear of incumbrance of said mortgage, it is clear that the object of the plaintiff is to first obtain the payment of the amount due upon the bond. In that event the defendant Martha K. King would hold the property freed from the obligation of said mortgage; and, second, that it is only upon a failure to collect from the bond that a foreclosure of the mortgage is prayed.

The defendant William F. King, claiming that an action at law upon the bond and an action in equity to foreclose the mortgage could not be joined in one action, and, as the complaint contained all the allegations necessary in an action of foreclosure, the action was in fact in equity for a foreclosure, moved to strike out the allegations of the complaint referring to the stipulations and agreements between William F. King and Martha K. King as irrelevant. The learned court at Special Term granted the said motion, and from the order entered thereon plaintiff and the defendant Martha K. King appeal.

The pleader has brought all the facts before the court, the bond, the sale of the property, the collateral agreement, and the mortgage, and has asked the court to settle all questions between the parties and

to so deal with the facts as to carry out the intention and agreement of the parties and give the appropriate remedy. The respondent asked the court to make for the pleader a complaint other than the one which he deemed proper and wise by striking out allegations which are appropriate to the judgment which he prays, and the court at Special Term has granted his request.

If causes of action have been improperly joined, if the complaint is susceptible to attack as matter of law or matter of fact, the proper way to settle such questions is by raising an issue at law by demurrer or upon the trial by proper motion or objection to evidence. It seems to us that a motion to strike out is an improper method of raising such questions. It is an attempt to try issues of law in a way not contemplated or authorized by the Code. So long as the allegations are appropriate to the cause of action set up, and tend to support the relief prayed for, they can scarcely be said to be irrelevant, though they may seem so to the party who desires a different issue tendered from that set up by the pleader.

We express no opinion upon the questions sought to be raised by the motion because not raised in the proper manner. Confining ourselves to the order appealed from we think it should not be sustained upon the authority of *Bradner v. Faulkner*, 93 N. Y. 515, where it was said:

"It is proper for us to say here that those questions which may properly be raised to a pleading upon demurrer, or upon objections to the evidence offered thereunder, are not necessarily presented by motion to strike out. On such a motion, if the facts alleged could in any form of relation be material to be proved upon the trial, the court will not strike them out."

And *Rankin v. Brush Brown*, 108 App. Div. 294, 95 N. Y. Supp. 719, where it was said:

"The portions of the answer stricken out subsequently determine the sufficiency of a separate defense, and that question should be determined by demurrer or upon the trial, and not by a motion to strike out as irrelevant."

The order appealed from should be reversed, and the motion denied, with costs to the plaintiff appellant, and the appeal of the defendant appellant should be dismissed, with costs to respondent. All concur.

(56 Misc. Rep. 605.)

KOERNER v. KELLEY.

(Supreme Court, Appellate Term. December 12, 1907.)

TRIAL—TIME—WAIVER OF PREFERENCE.

Though the complaint shows plaintiff entitled to a preference as to time of trial under Code Civ. Proc. § 791, subd. 5, claim to the preference is lost under section 793, and N. Y. City Court Rule 3, by failure to serve notice of application for preference with the notice of trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 32.]

Appeal from City Court of New York.

Action by Charles Koerner, by Moses Koerner, his guardian ad litem, against Hannah E. Kelley. From an order granting plaintiff's

motion for a preference, defendant appeals. Reversed, and motion denied.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Carl Schurz Petrasch, for appellant.

Henry Kuntz, for respondent.

PER CURIAM. Issue was joined in this action on May 25, 1906, and plaintiff on January 29, 1907, noticed the cause for trial for the February term, 1907. No notice of application for a preference was served, although it appeared upon the face of the complaint that plaintiff was entitled to a preference under subdivision 5, § 791, Code Civ. Proc. On May 6, 1907, plaintiff served a notice of motion returnable on the 13th for a preference, and on the 17th this motion was granted and an order entered setting the cause down for trial on the 23d. The plaintiff by his failure to serve notice of application for a preference with his notice of trial waived any claim to such preferment. Section 793, Code Civ. Proc.; Rule 3 of the Rules of the City Court of the City of New York.

Order reversed, with \$10 costs and disbursements, and motion for preference denied, with \$10 costs.

KRAM v. SHYEV.

(Supreme Court, Special Term, New York County. November 25, 1907.)

PARTNERSHIP—DISSOLUTION—USE OF FIRM NAME.

LAWS 1897, pp. 561, 562, c. 420, §§ 20, 21, provide that on the dissolution of a partnership, and the continuance of the business by a new firm composed of some of the old members, the new firm may continue to use the partnership name under certain circumstances by filing with the county clerk a certificate containing the names and places of residence of the persons composing the new firm, etc., and publishing the same in a newspaper. *Held*, that such act is not solely for the benefit of persons giving credit to the new firm, but is also for the benefit of the retired members of the old firm who are entitled to restrain the continuing partner from using the old firm name without complying with the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 88, Partnership, § 476.]

Bill for injunction by Harry Kram against Joseph Shyev. Writ granted on condition.

Eugene Cohn & Julius Levy (Eugene Cohn, of counsel), for the motion.

Isaac Fromme, opposed.

GIEGERICH, J. This is an application for an order restraining the defendant from listing the name of the plaintiff in any combination with his own name in any directory, or otherwise employing the plaintiff's name in connection with the business carried on by the defendant. The plaintiff and the defendant, up to June 1, 1903, were copartners dealing in bonnet wire under the firm name "Kram & Shyev," on which day the defendant purchased the good will and assets of the business, and for some time thereafter he used as a busi-

ness sign the following: "Joseph Shyev, Successor to Kram & Shyev," and also used the same style upon his stationery. About a year after the dissolution he discontinued all reference to the former firm of Kram & Shyev, both upon his signs and stationery, using his own name alone; but he did continue to have inserted in the telephone directory the following: "Kram & Shyev, Bonnet Wire," with his street and telephone number added. He claims that this is only for the convenience of a few customers of the old firm who might occasionally forget the change in the name of the business. The plaintiff carries on a business in the same line, and in the telephone directory his name appears third from that of the old firm name, with a designation of the same line of business, namely bonnet wire. That the defendant, as purchaser of the good will and assets of the copartnership, would be entitled to continue to use the firm name upon compliance with the statute (chapter 420, §§ 20, 21, pp. 561, 562, Laws 1897) is established by Slater v. Slater, 175 N. Y. 143, 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. Rep. 605. On behalf of the defendant it is insisted, first, that the acts complained of do not constitute a continuance of the copartnership name within the meaning of the statute; and, second, even if they do, the plaintiff is not entitled to complain, as the sections of the statute in question were enacted solely for the benefit of persons giving credit to the assumed firm. This does not seem to be the fact, however. In Slater v. Slater, just cited, the court observed that the purchaser is required by the statute to make the real facts a matter of public record from which it will appear who the members of the firm are, and that no legal liability can attach to the survivor from any dealings between the purchaser of the firm name and third parties or the public. The court further observed that the survivor could not be held liable in any sense for the debts or obligations of the parties who transact business under the firm name, and that the principal purpose of the statute was to render such a result impossible. From this I think it is apparent that the outgoing partner is so interested in the matter that, for the purpose of being freed from any liability that might otherwise attach to him in favor of third persons who deal with the plaintiff under the old firm name, he is entitled to insist that the defendant shall either cease hereafter to list his telephone and business number under the style of the former firm or comply with the statute.

If proof is submitted within five days after the publication of this memorandum of such compliance, the motion will be denied, without costs; otherwise it will be granted, with \$10 costs.

WOHLFARTH v. NATIONAL EXPORT ASS'N OF AMERICAN MFRS. et al.

(Supreme Court, Special Term, New York County. November 27, 1907.)

PROCESS—AMENDMENT.

Where a summons showed plaintiff suing individually and alone, but the complaint showed him suing for himself and other stockholders of defendant corporation, under Code Civ. Proc. § 723, providing for the amendment of any process in furtherance of justice, on a motion to strike the complaint, decision would be reserved for five days from publication

of the memorandum decision to enable plaintiff to amend the summons to conform to the complaint, in default of which motion to be granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 230.]

Action by Rene Wohlfarth against the National Export Association of American Manufacturers and another. Motion to strike out the complaint, decision reserved to enable plaintiff to move to amend the summons, in default of which motion granted.

George Q. Collins, for the motion.

C. A. Mountjoy, opposed.

GIEGERICH, J. The motion asks to have the complaint stricken out upon the ground that it does not conform to the summons; the variance alleged consisting of the fact that in the summons the plaintiff appears as suing individually and alone, whereas in the complaint it is stated that he is suing in behalf of himself and all other stockholders of the defendant. In opposing the motion the plaintiff's attorney cites *Cochran v. American Opera Co.*, 20 Abb. N. C. 114, *Bauer v. Platt*, 72 Hun, 326, 25 N. Y. Supp. 426, and *Hilton Bridge Const. Co. v. Foster et al.*, 26 Misc. Rep. 338, 57 N. Y. Supp. 140, as authorities that the summons is correct in its present form. An examination of those cases will show, however, that the question under discussion was the sufficiency of the complaint against demurrer, and not of variance between the summons and complaint. In *Cochran v. American Opera Co.*, 20 Abb. N. C. 114, 120, the court, after observing that the summons cannot be before the court on a demurrer, significantly adds that if the complaint does not conform to the summons there is another and appropriate remedy open to the defendant, apparently meaning thereby the remedy sought by the defendants by the present motion. See *Tuttle et al. v. Smith*, 14 How. Prac. 395, and cases cited; *Shafer v. Humphrey*, 15 How. Prac. 564. While I feel that the defendants' position is technically correct, the matter is chiefly one of form rather than substance. It would appear that a case is presented where the power of the court conferred by section 723 of the Code of Civil Procedure should be exercised.

In order that the whole matter may be before the court at one time, I will reserve decision upon the present motion for five days from the publication of this memorandum, to enable a motion to be made by the plaintiff to amend the summons to conform to the complaint. If such motion is not made, this motion will be granted, with \$10 costs.

LEVY v. NEW YORK PRESS CO., Limited.

(Supreme Court, Special Term, New York County. December 6, 1907.)

PLEADING—AMENDED ANSWER—TIME FOR SERVICE.

A defendant, obtaining on the day his time to serve an amended answer expired an ex parte order extending the time, is entitled to serve an amended answer within the extended time and before motion to vacate the order is granted, though a motion has been made and notice thereof served.

Action by Jules Levy against the New York Press Company, Limited. On motion to compel plaintiff to accept service of amended answer. Granted.

Nicoll, Anable, Lindsay & Fuller, for defendant and motion.
Solomon S. Leff, opposed.

GIEGERICH, J. The defendant has made this motion to compel the plaintiff to accept service of an amended answer. The facts necessary to be stated are as follows: On the 4th day of November, 1907, the time for the defendant to serve an amended answer expired, and on that day an ex parte order was granted extending such time 20 days, or until November 24th. On November 7th the plaintiff served notice of motion to vacate and set aside the order of November 4th extending the defendant's time. On November 12th the amended answer was served, and was returned at once by the plaintiff's attorney, with a statement that it was returned because the time within which to serve the same had expired. On the following day, November 13th, the motion to vacate the order extending the time was granted, and an order to that effect was entered and filed on November 15, 1907. That the motion should be granted seems to follow from the decision made in *De Pallandt v. Flynn*, 104 App. Div. 501, 93 N. Y. Supp. 678. In that case the defendant, on the last day allowed for service of his answer, obtained an order which, among other things, extended his time. A motion was at once made to vacate the order in so far as it extended the time to answer. The motion to vacate was granted, but, intervening the time when the court announced its decision and the entry of the order, the answer was served. The court held that as the order extending the time remained in full force and effect until the order vacating it had been actually signed and entered, the answer was served at a time when the defendant had a right to serve it.

The motion is granted, but without costs.

In re GABLER.

(Supreme Court, Special Term, New York County. November 30, 1907.)

MECHANICS' LIENS—EXTENSION—FORECLOSURE—NOTICE OF PENDENCY OF ACTION—STATUTORY PROVISIONS.

Under Laws 1897, p. 522, c. 418, § 16, providing that a mechanic's lien shall not be a lien for more than a year, unless within that time an action is commenced to foreclose it, and a notice of the pendency of such action is filed with the county clerk of the county in which the notice of the lien is filed, the commencement of a foreclosure suit within one year is insufficient to extend the lien, where the notice of the pendency of the action is not filed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, *Mechanics' Liens*, § 306.]

Application of John C. Gabler for the payment of money deposited with the chamberlain of the city of New York to discharge and cancel a mechanic's lien. Application granted.

William E. Gowdey, for petitioner and motion.

GIEGERICH, J. This is an application made for an order directing the chamberlain of the city of New York to pay to the petitioner a sum deposited by him to procure the discharge of a mechanic's lien upon real property covered thereby. Since the filing of the lien the lienors became bankrupt, and notice of the motion was given to the trustee in bankruptcy, who failed to appear and oppose the motion. The year limited by the statute has expired, and no order has been obtained extending the lien, nor has any action been commenced, except under the circumstances following: On December 12, 1905, the petitioner made an application to this court for the same relief as is now sought, and early in the morning before that motion came on in court a summons and notice of an action were served by the attorneys of the trustee, and when the application, later in the day, came on for hearing it was denied, on the ground that an action had been commenced to foreclose the lien. Thereafter the petitioner appeared and demanded service of a copy of the complaint, but the attorneys for the trustee refused to serve a copy of the complaint or to proceed with the action, and on the 30th day of January, 1906, an order was made dismissing the action. Since that time nothing has been done in the matter. Upon the present motion it is stated that no notice of pendency of any action to foreclose the lien in question has ever been filed in the county clerk's office. The commencement of an action to foreclose the lien is not alone enough under the requirements of the statute (section 16, c. 418, p. 522, of the Laws of 1897) to continue the lien in effect, but there must be also a notice of the pendency of such action. Even if the notice of the pendency of the action had been properly filed, nevertheless, under the peculiar circumstances of this case, indicating hasty action on the part of the attorneys for the trustee in order to avoid a discharge of the lien, and a subsequent abandonment of all intention to prosecute the action, followed by a dismissal thereof, there might be a question whether an action had been commenced within the year within the meaning of the statute; but this question need not be determined because of the plain failure to comply with the requirement that notice of pendency of the action must be filed as well as that the action should be commenced.

Motion granted, upon the authority of *Matter of Thirty-Fifth Street and Fifth Avenue Realty Company*, 106 N. Y. Supp. 390.

(119 App. Div. 883.)

IN re SPENCER'S ESTATE.

(Supreme Court, Appellate Division, First Department. May, 1907.)

TAXATION—TRANSFER TAX—LIABILITY.

Where the will of a donee of a power neither adds to nor takes from any of the beneficiaries the benefits which the will of the donor of the power conferred on them, the beneficiaries are not liable to a transfer tax under the will of the donee of the power.

Appeal from Order of Surrogate, New York County.

In the matter of the transfer tax on the real estate of Sarah J. G. Spencer, deceased. From an order of the Surrogate's Court of the county of New York reversing a prior order assessing a tax, and re-

mitting report of appraiser for further consideration, the Comptroller of the State appeals. Affirmed.

The following is the opinion of Thomas, Surrogate:

The vital distinction made by the Court of Appeals in *Matter of Cooksey*, 182 N. Y. 92, 74 N. E. 880, and *Matter of Lansing*, 182 N. Y. 238, 74 N. E. 882, argued on the same day before that court, is based upon the difference existing in the two wills of the several donors of the powers. In the will in *Matter of Cooksey*, the remainder of the trust estate created for the benefit of the donee of the power was directed to pass to or vest in the children of the donee of the power upon her death, as she by her "last will and testament shall designate and appoint, and in such manner and upon such terms as he or she may legally impose." The only alternative provision was that, "in case such person dies intestate," the said trust fund should "vest absolutely and at once" in the surviving children; share and share alike, of the donee of the power. Under this will, it was necessary, in order that the children of the donee of the power should take, either that there should be an exercise of the power, or that the donee of the power should die intestate. Her children had no title except under the execution of the power, and the transfers to them were therefore held taxable. In the *Lansing Case*, there was a direct devise and bequest contained in the will of the donor of the power, by which the corpus of the trust fund was given "to her heirs at law, subject, however, to the power of such child to devise hereinafter contained." Under this will, Vann, J., remarked: "The execution of the power left the title where it was before, and the result is the same as if there had been no power to exercise." In other words, the final beneficiaries of the corpus of the trust property having been selected by the donor of the power, and an explicit bequest and devise of that property having been made by the donor of the power to such final beneficiary, subject only to a power in the donee to modify or change such bequest and devise, the title of the remainder passed to the beneficiaries under the will of the donor of the power, notwithstanding an attempt to exercise the power by the donee in such a way that no change whatever was effected in such original bequest and devise. The distinction between these two cases was pointed out by Vann, J., in 182 N. Y. 246, 74 N. E. 883. In the case before me, the will of the donor of the power is substantially the same as the will in *Matter of Lansing*, and the will of the donee of the power neither adds to nor takes from any of the final beneficiaries the benefits which the will of the donee of the power expressly conferred upon them.

The order appealed from must therefore be reversed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and LAMBERT, JJ.

G. J. Hardy, for appellant.

P. D. Trafford, for respondent.

PER CURIAM. Order affirmed, with costs and disbursements, on the opinion of the Surrogate.

WYNNE v. BAILEY.

(Supreme Court, Appellate Term. December 12, 1907.)

EXPLOSIVES—INJURIES FROM BLASTING—LIABILITY.

A contractor is not liable for injury to a stone wall along a street and to a lawn and hedge adjacent thereto, due to blasting necessary in grading the street, unless the blasting was negligently performed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Explosives, §§ 9, 10.]

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Catherine L. Wynne against George I. Bailey. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Rufus W. Sprague, Jr., for appellant.

Davis & Kaufman, for respondent.

BRUCE, J. This is an action to recover damages to plaintiff's stone wall running along the highway and to the lawn and hedge adjacent thereto, resulting from defendant's negligence in blasting. Defendant was engaged upon a lawful work under a contract with the city in grading the street in front of plaintiff's premises. In the prosecution of the work it became necessary to remove rock which was close up to plaintiff's line. To do this, it was necessary to use blasts. There was no proof of any physical trespass. There was some evidence that a portion of the injury to the lawn and hedge was caused by the negligence of the defendant's workmen in allowing steam and oil to be discharged thereon from the steam drills used in the prosecution of the work, but there was no evidence from which it could be determined how much of the damage resulted from this cause, the action having been tried upon the theory that damage was principally caused by negligent blasting.

The rule of law is well settled that negligence is essential to be proven in a case such as this of consequential injury in order to create any liability in the defendant. *Holland House Co. v. Baird*, 169 N. Y. 136, 141, 62 N. E. 149. The trial justice, however, laid down the broad proposition that no affirmative proof of negligence was necessary. In this he was in error.

The plaintiff produced no evidence tending to establish negligent performance by the defendant of the blasting necessary in the prosecution of this work.

At the close of plaintiff's case, the defendant moved to dismiss the complaint upon the ground that there was no proof of negligence on the part of the defendant. This motion was denied. This was error. The evidence thereafter offered by the defendant tended to establish that the work was performed in a careful and prudent manner, and no evidence was offered in rebuttal.

The judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

GUTMAN v. WOLFSOHN.

(Supreme Court, Appellate Term. December 12, 1907.)

1. MONEY LENT—PRESUMPTIONS AS TO LOAN—CHECKS—PAYMENT.

Unless it appears otherwise, the giving of a check is presumed to be in payment of a debt, and not the making of a loan.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Money Lent, § 11.]

2. SAME—SUFFICIENCY OF EVIDENCE.

In an action to recover money lent, evidence *held* insufficient to show the alleged loan.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Money Lent, §§ 11-13.]

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by Joseph M. Gutman against Henry Wolfsohn. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

M. & B. Jaffe, for appellant.

Benjamin B. Fridman, for respondent.

GUY, J. Appeal from judgment rendered in favor of plaintiff. Complaint alleges an account stated amounting to \$1,523.16 for goods sold and delivered and moneys loaned, payments thereon to the extent of \$1,306.90, and a balance remaining due of \$216.26.

On the trial of the action no evidence was introduced by plaintiff as to the stating of the account, which is denied by the defendant. Plaintiff's counsel stated to the court: "There are only two items in dispute now, \$75 and \$30, money loaned. The only thing disputed is that the money was loaned. They admit they didn't repay it, but they say they never received it." This statement appears to have been uncontradicted. Plaintiff offered in evidence two checks for the above amounts, which he said he gave to the defendant on the days of their respective dates, and that he was never repaid the amounts. Defendant on the other hand testified that plaintiff came to him and borrowed money to pay his employes, in each instance two days before the date of plaintiff's checks; that defendant drew his own checks and sent his bookkeeper to the bank, obtained the money, and gave the same to the plaintiff, taking in return therefor the checks of plaintiff dated ahead; and that he never borrowed any money from plaintiff as represented by said checks. He was corroborated by his bookkeeper as to going to the bank, obtaining the money, and handing the same to the plaintiff.

The presumption of law would be that the giving of a check, without evidence as to the circumstances, would be in payment of a debt and not the making of a loan. *Nay v. Curley*, 113 N. Y. 577, 21 N. E. 698. While this presumption of law might be overcome by evidence as to the circumstances under which the checks were given, there is an entire absence of such evidence in this case. The plaintiff does not state that he loaned the defendant the respective amounts repre-

sented by the checks, except so far as the statement is made in his bill of particulars, and the evidence shows clearly that in coming to such conclusion he relies upon his books which are admittedly inaccurate. On the other hand, the defendant absolutely denies the loan, and his testimony is corroborated by that of his bookkeeper and the surrounding circumstances.

The plaintiff has failed to make out his case by a preponderance of evidence, and the court clearly erred in directing judgment in plaintiff's favor.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

CAR ADVERTISING CO. v. NEW YORK CITY CAR ADVERTISING CO.

(Supreme Court, Special Term, New York County. December 9, 1907.)

TRADE-MARKS AND TRADE-NAMES—NAMES SUBJECT TO OWNERSHIP.

Plaintiff, the "Car Advertising Company," was not entitled to have defendant restrained from using the name "New York City Car Advertising Company," the expression "car advertising" being a general term appropriately descriptive of the business, and one which cannot be exclusively appropriated by any one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 1, 2, 4, 4½, 13.]

Action by the Car Advertising Company against the New York City Car Advertising Company. Motion by plaintiff for an injunction pendente lite. Denied.

Guggenheimer, Untermeyer & Marshal (Louis Marshal, of counsel), for the motion.

Einstein, Townsend & Guiterman (B. F. Einstein, of counsel), opposed.

GIEGERICH, J. The plaintiff seeks an injunction pendente lite restraining the defendant from using the name "New York City Car Advertising Company." The facts are as follows: From 1897 until the summer of 1901 Henry Wineburgh, Jesse Wineburgh, and Abraham Wineburgh, brothers, were the owners of the Railway Advertising Company, a corporation, and were engaged in the business of advertising in cars. Some time in 1900 or 1901 differences arose between Henry on the one hand and the other two on the other hand, and the former withdrew and organized the plaintiff corporation under the laws of the state of New York, and is the owner of nearly all of its stock, and is now and has always been the president of the company. Abraham and Jesse continued the old business under the old name of the "Railway Advertising Company," but in the spring or summer of 1907, another company of a somewhat similar name having started in business in New York City, they adopted, instead of their old name, the present designation, the "New York City Car Advertising Company." The plaintiff company's operations are carried on principally in the city of Philadelphia, but its home office and the place

where all contracts are approved is in New York City, at No. 527 Fifth avenue. Henry Wineburgh is its president, and is so advertised. The defendant company controls the advertising space in all the surface cars in the boroughs of Manhattan and the Bronx, and has its place of business on Fifth avenue, near Twenty-Sixth street, having recently moved there from Broadway. Its president is Abraham Wineburgh. The plaintiff complains that there has been confusion in the delivery of mail, and in other respects the one company being mistaken for the other, and instances a number of such cases. On behalf of the defendant it is shown that there are various corporations engaged in similar business, which have as part of their names the words "car advertising company"; among such being the Intercity Car Advertising Company, which has its principal office in Brooklyn, and the New Jersey Car Advertising Company, which has its principal office in Newark, N. J. The expression "car advertising" is a general term appropriately descriptive of the business, and the authorities are to the effect that such a term cannot be exclusively appropriated by any one. In *Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co. of Kansas*, 1 N. Y. Supp. 44, the court said:

"Nor could the first national bank established enjoin every other bank from using the name 'First National Bank.' Nor could the Mechanics' National Bank of New York enjoin the Mechanics' National Bank of New Jersey. * * * The name 'Loan & Trust Company' is not an uncommon one as applied to certain monetary institutions. And it would seem that the prefix 'Farmers' has been applied to designate companies engaged in similar business in different states."

And the court held that it was not therefore such an arbitrary and exclusive designation of a particular corporation (as distinguished from a class) as would entitle it per se to be protected from infringement. So, too, in *Koehler v. Sanders*, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576, the International Banking Company was refused an injunction restraining the defendants from advertising under the name "International Bank." In *Matter of U. S. Mort. Co.*, 83 Hun, 572, 32 N. Y. Supp. 11, the United States Mortgage Company wished its name changed to the United States Mortgage & Trust Company. Its application to the court for permission to make such change was opposed by the United States Trust Company of New York on the ground that the similarity of names would create confusion. The general term held that the application should be granted on the ground that to entitle a name to equitable protection as a trade-mark the right to its use must be exclusive, and not one which others may employ with as much truth as those who use it. In *Hygeia Water Ice Co. v. N. Y. Hygeia Ice Co., Lim.*, 65 Hun, 619, 19 N. Y. Supp. 602, the court, after referring to the general rule that apart from any statute a corporation has a right to the exclusive use of its name, and that this would be protected upon the same principle that persons are protected in the use of trade-marks, observed that this general statement of the rule is subject in this state to the limitation that no corporation can lawfully appropriate as its exclusive name words necessary to describe the business intended to be conducted. My conclusion is that neither upon the principle of the proprietary right nor upon the prin-

ciple of being protected against unfair competition has the plaintiff made out a case. See *Day v. Webster*, 23 App. Div. 601, 49 N. Y. Supp. 314. It is plain that there has been in the past, and doubtless there will continue to be in the future, more or less of confusion and of mistakes made, such as in sending mail, telegrams, and telephone messages to the two companies. But this ought not to be held due to the act of the defendant, but rather to the act of the plaintiff, which adopted a generic and descriptive term for its corporate name without adding any distinguishing word whatever. There is no evidence to show that the defendant has done anything to encourage or increase such mistakes on the part of the customers of the two companies; but, on the contrary, has sought by means of carefully selected and printed stationery and otherwise, including the mailing of about a quarter of a million circulars, to distinguish itself from other companies engaged in the same line of business. It might also be observed that there is apparently every motive of self-interest impelling the defendant to take such course, because it has a monopoly of the most valuable car advertising business in this city, while at the present time the plaintiff is doing none at all. So far as inconvenience to the public is concerned, a remark made by the Court of Appeals in *Hygeia Water Ice Co. v. N. Y. Hygeia Ice Co., Lim.*, 140 N. Y. 94, 35 N. E. 417, is in point, which was to the effect that courts of equity must in cases like this assume that the public will use reasonable intelligence and discrimination with reference to names of corporations with which they are dealing or intend to deal, the same as in the case of individuals bearing the same or similar names.

The motion is denied, with \$10 costs.

(56 Misc. Rep. 287.)

PEOPLE ex rel. HART v. DEMEREST.

(Supreme Court, Special Term, New York County. July 31, 1905.)

SUNDAY—BASEBALL PLAYING.

Baseball playing on Sunday in an inclosed ground, to which the public is admitted without hindrance, is within the prohibition of Pen. Code, § 265, prohibiting public sports on Sunday, though no admission is demanded, where a contribution box is placed at the entrance gate for purposes of voluntary contribution.

Certiorari by the people, on the relation of one Hart, against Demerest. Writ dismissed.

Lewis Stuyvesant Chanler, for the application.

Robert C. Taylor, Asst. Dist. Atty., opposed.

BLANCHARD, J. This is a writ of certiorari, bringing up for review the deposition upon which the relator and others were committed by a city magistrate. The relator, together with other persons, is a member of a baseball club called the "Cedar Baseball Club," and played a game of nine innings with another club called the "Emerald Baseball Club" on Sunday afternoon in Bronx Oval, an inclosed ground, surrounded by a fence eight feet high. The ground is adja-

cent to the highway, but not observable from the highway, and is about 1,000 feet from the nearest house and a quarter of a mile from the nearest place of worship. No complaint has been made by any one in the vicinity of the ground of any disturbance. The game was played in the presence of about 1,000 men, women, and children, who gained admittance to the ground through a single gate, at which was placed a box, in which any of them voluntarily dropped coins, ranging from 5 to 25 cents. No person was denied access to the ground, nor was the payment of money exacted as a condition of admittance. After the game the relator, together with other persons, was arrested upon the charge of violating section 265 of the Penal Code. The section above mentioned provides:

"All shooting, hunting, fishing, playing, horse racing, gaming or other public sport, exercises or shows, upon the first day of the week, and all noise disturbing the peace of the day, are prohibited."

Public baseball playing on Sunday, for which an admission is charged, is clearly within the prohibition of the statute. *Matter of Rupp*, 33 App. Div. 468, 53 N. Y. Supp. 927; *Brighton Athletic Club v. McAdoo*, 47 Misc. Rep. 432, 94 N. Y. Supp. 391; *People v. Poole*, 44 Misc. Rep. 118, 89 N. Y. Supp. 773; *Capital City Athletic Ass'n v. Commissioners*, 9 Misc. Rep. 189, 29 N. Y. Supp. 804; *Dunham v. Binghamton & L. B. B. Ass'n*, 44 Misc. Rep. 112, 89 N. Y. Supp. 762. Since the game of baseball in the present case was played in a field apparently adapted for a public audience, to which the public was admitted without hindrance, it seems that the game must be regarded as public, and therefore within the letter of the statute. The placing of the contribution box at the single gate of entrance, although unaccompanied by any sign asking for contributions, was actually a silent invitation for contributions, and shows that the game was played for gain, and therefore within the principle of the cases above mentioned. In determining whether the game is played for gain, the court will look behind the device by which the money is obtained. *Ontario Field Club v. McAdoo* (N. Y. L. J. July 5, 1905) 107 N. Y. Supp. 295. The facts of the present case are, accordingly, clearly distinguishable from those in the following cases, where the game was not played for gain nor in such public manner as to disturb the repose of the community: *People, etc., v. Dennin*, 35 Hun, 327; *People ex rel. Bedell v. De Mott*, 38 Misc. Rep. 171, 77 N. Y. Supp. 249; *People ex rel. Poole v. Hesterberg*, 43 Misc. Rep. 510, 89 N. Y. Supp. 498.

The writ is therefore dismissed.

COHN v. TOMES.

(Supreme Court, Appellate Term. December 12, 1907.)

1. MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—LIABILITY OF ABUTTING OWNERS—OWNERSHIP—BURDEN OF PROOF.

In an action against one alleged to be the owner of premises abutting upon a sidewalk on which plaintiff was negligently injured, the burden was upon plaintiff to prove such ownership.

2. SAME—WEIGHT OF EVIDENCE.

Evidence in an action for personal injury caused on a sidewalk in front of premises alleged to be owned by defendant *held* to show defendant was not the owner.

Appeal from City Court of New York, Trial Term.

Action by Samuel Cohn against George Tomes. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Nadal, Carrere & Jones (Edwin A. Jones and Albert Van Winkle, of counsel), for appellant.

Stern & Ballin (Sydney W. Stern, of counsel), for respondent.

BRUCE, J. This is an action to recover damages for personal injuries. The complaint alleges that the defendant, on the 4th day of October, 1904, was the owner of premises No. 125 West 115th street, in the borough of Manhattan, city of New York, and that the plaintiff, while walking on the sidewalk in front of these premises on the night of that day, was precipitated into a coal hole, which was "open and not properly guarded." The answer denies that the defendant was the owner of the premises at the time the accident occurred. This was the main defense relied upon at the trial. On the question of ownership, the plaintiff introduced in evidence a deed of the premises in question dated July 9, 1903, from one Rosenwasser and wife, to the defendant, recorded July 10, 1903, also a certified copy of a deed from the defendant and his wife to one Stein, dated October 29, 1904, and recorded November 4, 1904. He then called one of his attorneys in this action, Nathan Ballin, who testified that he served the summons and complaint upon the defendant on October 22, 1904. That prior to that he had had a conversation with Albert B. Atterbury, an attorney, who told him to go and see the defendant. That at the time he served the defendant he stated to him that he had had some trouble in locating the owner of the premises, and he wished to know whether or not he (the defendant) was the owner of the premises in question on October 4, 1904, because that was the date when the accident occurred. That the defendant replied: "I was the owner then, and am the owner now." This was the only evidence offered by the plaintiff in proof of ownership. The defendant introduced in evidence a deed from himself and wife to Atterbury, dated July 11, 1903, which was two days after the property was deeded by Rosenwasser and wife to the defendant. He also introduced in evidence a deed of the premises from Atterbury and wife to him, dated October 27, 1904. This was some

three weeks after the accident. These deeds were never recorded. Both the defendant and Atterbury testified that the first deed was delivered on the day of its execution, and that the deed of October 27th was delivered on October 28th. Atterbury also testified that he paid the purchase price of the property, and was the owner of the premises in question from July 11, 1903, to October 28, 1904; that during that time he made no other conveyance; that the people who worked in the house, such as the janitor, hall boys, etc., were his employes, and that he collected the rent for the premises and paid the employes for their services. The defendant denied that he ever stated to Ballin that he was the owner of the premises at the time the accident occurred. In response to an inquiry by the court, Atterbury testified that, in all these transactions, the defendant was a dummy. That there was a second mortgage to be made, and therefore he bought the property in defendant's name, that the defendant never paid anything for the property, and never went into possession. On October 29, 1904, Tomes and wife conveyed the property to Helen Stein, and Atterbury testified that he at that time delivered the two unrecorded deeds of the property to her. At the close of plaintiff's case, the defendant moved to dismiss the complaint, upon the ground that there was no proof that the defendant was the owner of the premises on the date the accident occurred. This motion, the court denied. At the close of all the evidence, defendant renewed his motion to dismiss, and moved for the direction of a verdict for the defendant upon the same ground. This motion was denied. The court submitted the question of ownership to the jury, and they rendered a verdict for the plaintiff. The defendant thereupon moved to set aside the verdict upon all the grounds specified in section 999 of the Code of Civil Procedure, which motion was denied and an exception taken. We think this motion should have been granted. The only evidence that the defendant was the owner of the premises on the day of the accident was the testimony of Ballin that the defendant admitted his ownership to him at the time the summons and complaint were served. This conversation was denied by the defendant. The defendant, upon the other hand, testified that he was not then the owner, and in this he is expressly corroborated by Atterbury, and both are corroborated by the deeds of the defendant to Atterbury, and Atterbury to the defendant, the due execution, acknowledgment, and delivery of which were not controverted. Moreover, there is no evidence that the defendant went into possession of the premises under the deed of July 9, 1903. On the contrary, Atterbury testified he paid the purchase price of the property, collected the rents, paid the employes, and was in possession up to the time the property was transferred to Stein. It is true that the deeds from the defendant to Atterbury and Atterbury to the defendant were not recorded, but this is not essential to transfer of title. The burden of proving ownership was upon the plaintiff. I do not think he sustained this burden. On the contrary, the evidence establishes that the defendant was not the owner of the property at the time the accident occurred.

The judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

(56 Misc. Rep. 639.)

SHEPPARD v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Term. December 12, 1907.)

1. CARRIERS—INJURY TO PASSENGER—NEGLIGENCE OF CONDUCTOR—EMERGENCY ACTION.

Where a female passenger on a street car, after the conductor gave one bell and the car slowed up, got on the running board, ready to alight, but made no other move to alight, and the conductor then seeing her gave three bells to stop the car, for fear she would step down, whereupon it was stopped with a jerk throwing her off, the carrier is not absolved from liability for the conductor's negligence, on the ground that he acted when the passenger was in apparent danger, and for her safety, and that, if he made a mistake in judgment, it was not responsible therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1205.]

2. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Exclusion of questions to show that a witness had made an affidavit, contradictory of his testimony, is harmless; the making of the affidavit, which was admitted in evidence, being admitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4194-4199.]

Appeal from City Court of New York.

Action by Mary Sheppard against the New York City Railway Company. From a judgment for a verdict for plaintiff, defendant appeals. Affirmed.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

James L. Quackenbush (Bayard H. Ames and Walter Henry Wood, of counsel), for appellant.

Charles E. Simms, for respondent.

BRUCE, J. This action is brought to recover damages for personal injuries which the plaintiff alleges she sustained by reason of the negligence of the conductor of one of defendant's south-bound Amsterdam Avenue cars upon which she, together with her daughter and a friend, was a passenger. The testimony of plaintiff and her companions was that as the car neared the north corner of Sixty-Ninth street she arose and signaled the conductor to stop. The conductor gave one bell, and the car slowed up. The plaintiff then got down on the running board of the car ready to alight, and while she was in this position the conductor gave three bells, and the car stopped with a jerk, which loosened her hold and threw her to the street, from which fall she sustained the injuries complained of. The conductor was also called by the plaintiff, and gave the same account of the accident, except that he adds that after giving the one bell his attention was diverted from the plaintiff by a "drunk," and that, upon turning back again, he saw her on the running board and "gave three bells to stop the car for fear she would step down." Only one witness, the investigator, was called by the defendant, by whom the defendant desired to show that the conductor, shortly after the accident, made an affidavit in which he stated that plaintiff stepped from the car while it was in motion. The case was submitted to the jury upon the sole question of the conductor's negligence and plaintiff's freedom from contributory negligence. There were no exceptions to the

charge and no requests to charge. This appeal is based upon the court's refusal of the motion to dismiss the complaint, upon the ground that the plaintiff's evidence shows that the conductor gave the three bells at a time when the plaintiff was in apparent danger, and for her protection, and that even if he made a mistake in judgment the defendant is not responsible therefor. Although the principle relied upon by the defendant is undoubtedly sound, I do not think it applies to this case. There is no evidence that the plaintiff had extended her foot or made any preparation to alight, other than that she was on the running board. The only apparent danger to which she was exposed is present every time a woman gets upon the running board or step of a car ready to alight before the car comes to a complete stop. None of the cases called to the attention of the court has held that such a situation or any similar one calls for or justifies emergency action by a railway employé, and I think that to say that this principle applies to the facts here would be to extend it to an unreasonable and dangerous length. The exclusion of the questions to the investigator did not constitute reversible error, as they only tended to corroborate the affidavit of the conductor which he admitted signing, and which purported on its face to have been sworn to before the witness, and which was admitted in evidence. The conductor was already discredited, and without his testimony there were three witnesses for the plaintiff who were unimpeached and whose story was not contradicted. Judgment affirmed, with costs. All concur.

MANDEL v. CONSOLIDATED FEED CO. et al.

(Supreme Court, Appellate Term. December 12, 1907.)

APPEAL—NEW TRIAL IN INTEREST OF JUSTICE.

Defendant gave real estate to plaintiff to sell, with the understanding that it was to receive \$44,000 net, and would not be responsible for commissions. On finding a customer for \$500 more than that, plaintiff, on the representation that because of the customer being his relative defendant could more easily collect the commission than he, induced defendant's president and secretary to include the \$500 in the purchase price expressed in the contract, on his promise to give them \$25 each. Verdict in an action for the commission, on both parties asking direction of the same, was directed for plaintiff; and defendant's motion, then made, to go to the jury on "the facts," the issues of facts, desired to be submitted, not being stated, was denied. *Held* that, because of the conduct of plaintiff and defendant's officers in agreeing to share the commission, the best interests of justice would be subserved by granting a new trial on which the issues of fact should be submitted to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4597-4603.]

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

Arthur C. Mandel against the Consolidated Feed Company and another. From a judgment for plaintiff, defendants appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Boudin & Liebman, for appellants.
Jerome Steiner, for respondent.

PER CURIAM. This is an action to recover a balance of broker's commission upon a sale of real estate. A contract of sale in which the purchase price named was \$44,500 was executed, and the purchaser thereupon deposited \$1,000. Title never passed on account of objections raised by the purchaser to incumbrances. It appears from the evidence that the president and secretary of the defendant stated to the plaintiff and his associate, who were lawyers, at the time the property was placed in their hands, that the defendant must receive \$44,000 net, and would not be responsible for commissions. Prior to the signing of the contract, the plaintiff induced these officers of the defendant to include in the purchase price expressed in the contract the sum of \$500 for commissions, upon the representation that, as the purchaser was his sister-in-law, the defendant could more easily collect the commissions than he. These officers of the defendant consented to do this, upon the condition that each of them receive \$25 out of the \$500 for a "suit of clothes." The president of the defendant, upon the signing of the contract, paid the plaintiff \$225 on account of commissions. The associate of the plaintiff, who for many years had been attorney for the defendant, refused to join in the action, and was therefore made a party defendant. He appeared, however, upon the trial in the capacity of attorney for the plaintiff. At the close of the evidence, each side moved for the direction of a verdict, and the court directed a verdict for the plaintiff. The defendant thereupon moved to go to the jury upon "the facts," but neglected to state the issues of fact which he desired to have submitted to the jury. A careful reading of the evidence, taken in connection with the reprehensible conduct of the plaintiff and his associates and these officers of this corporation in agreeing to share the commissions, leads us to believe that the ends of justice will best be subserved if a new trial be had and the issues of fact be submitted to a jury for their determination.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

(122 App. Div. 502.)

COMMONWEALTH TRUST CO. v. YOUNG et al.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. PRINCIPAL AND AGENT—DEALING BY THIRD PERSONS WITH AGENTS—LIMITATION OF AGENT'S AUTHORITY.

One dealing with an agent, with knowledge that he is an agent, is bound to know the limitations placed on his authority.

2. SAME.

Plaintiff trust company, with which defendant had agreed to procure in Europe the underwriting and the public issue or withdrawal of certain bonds, on the statement of its agent that defendant's commission therefor should be settled at the same time that the bonds were so issued or withdrawn, delivered to its agent, to enable him to settle such commission account, interim certificates, entitling him or his assigns to a certain amount of the bonds. Some of these certificates were delivered by the agent to defendant in settlement of commissions, without defend-

ant having procured the public issue or withdrawal of the bonds in performance of his agreement, and others were purchased by defendant from the agent. *Held*, that defendant was bound to know the limitation placed on the agent's authority, and his possession of the certificates so obtained gave him no right to the bonds as against plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 377, 377½.]

Appeal from Special Term.

Action by the Commonwealth Trust Company of New York against John W. Young and others, in which defendant Pierre Calvet Rogniat pleaded a counterclaim. From a judgment entered on a decision after trial at Special Term, dismissing the counterclaim, said defendant Rogniat appeals. Affirmed.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAUGHLIN, HOUGHTON, and LAMBERT, JJ.

Frederic R. Coudert, for appellant.

D. Cady Herrick, for respondent.

PER CURIAM. The attitude of the appellant respecting the subject-matter of his claim is unmistakably indicated in the contention of his counsel that such claim is not based upon a contract for commissions, but upon the possession of the "interim certificates" which entitled him, irrespective of antecedent relations, to the possession of the bonds called for by them; or, in other words, whatever may have been his situation before those "interim certificates" were delivered, when they were given into his possession there was a termination or severance of antecedent relations, a recognition of his performance of all that was incumbent upon him to perform to entitle him to such certificates, and consequently his rights reposed upon the ownership of the certificates, which, although not negotiable, were quasi negotiable.

This contention is based upon the consideration that the transaction respecting the certificates and the antecedent matters was one between the appellant and Young as principals. The fallacy of this is in the assumption that Young and the appellant were dealing together as principals. It is plain that Young was an agent and not a principal, which fact the appellant knew and understood when he dealt with him, and therefore was bound to know the limitation placed upon his authority. When the "interim certificates" were delivered to Young, they were not delivered free from all conditions. On the contrary, they were delivered for a specific purpose. The evidence is satisfactory that Young applied for them in order that they might be used in Paris simultaneously with the carrying out of the subscription agreement made by the Rogniat Syndicate; for Young, in applying for them, stated to the trust company issuing them that it was necessary to settle with the appellant his commission account at the same time the bonds were issued or withdrawn in Paris, and with that understanding, and for that purpose alone, the certificates were issued and forwarded to Young. There was thus a limitation placed upon Young's right to use the certificates, and the present contest being between the original parties to the transaction, the appellant is bound by this limitation. He therefore holds them not independently of, but still connected with, the

terms of his agreement respecting the subscribers procured by him in France to the shipbuilding scheme. By the terms of his agreement his duty was not fulfilled in simply procuring the names of subscribers, of whom he was one to a large amount. He was not only to procure subscribers, but the fair import of the terms of his agreement is that he undertook to procure, in addition to that, either the public issue or withdrawal of the bonds. The several things he was obliged to do before he became entitled to his commission were (1) to procure the underwriters, (2) procure the public issue of the bonds, or (3) their withdrawal from public issue. Thus it would appear that the claim of the appellant must stand upon his right to compensation for services, which right has not accrued because he has not performed his contract, and it does not stand upon the possession of the "interim certificates" which, as the facts are shown in the record, gave him no additional or other rights than he possessed under his agreement with Young acting as agent.

Nor does the appellant stand in any better position with reference to the "interim certificates" which he claims to have purchased from Young. As already said, the certificates were delivered to Young, acting as agent for the trust company, for a specific purpose, viz., to settle with the appellant his commission account when he had fully performed the agreement entitling him to such commissions. He was bound to know that Young could not use the certificates for any other purpose, and that he had no right to purchase them from him.

The judgment appealed from is affirmed, with costs.

(56 Misc. Rep. 653.)

GERACI v. ITALIAN ASS'N ST. BARTHOLOMEW EOLIANA OF MUTUAL AID OF NEW YORK.

(Supreme Court, Appellate Term. December 12, 1907.)

1. BENEFICIAL ASSOCIATIONS—SICK BENEFITS—"DIARY" OF SICKNESS.

Under the by-laws of a society requiring it to pay a sick benefit of \$1 per day to a sick member, and its physician to leave with the sick member what is termed a "diary," giving date of visits till there is a complete cure, on presentation of which diary it seems the society pays the sick benefits based on the length of illness shown therein, and also requiring a notice to the society's secretary of the beginning and end of the sickness, the member is not concluded by the diary, so as to prevent recovery of benefits till the time he is actually cured, where, to enable him to get the sick benefits then accrued, the physician gives him his diary, writing thereon "the member not yet recovered * * * requests that the diary be closed and that he be declared cured."

2. SAME—SERVICES OF PHYSICIAN.

A society, under the by-laws of which a member is to have the services of its physician during his sickness, is liable to him for the reasonable value of the services of a physician procured by him after notice to and failure of the society's physician to attend him when sick.

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Domenico Geraci against the Italian Association St. Bartholomew Eoliana of Mutual Aid of New York. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Giuseppe L. Maggio, for appellant.
James E. Brande, for respondent.

PER CURIAM. This action was brought by the plaintiff against the defendant to recover the sum of \$39, of which sum it was alleged that \$25 thereof was for sick benefit, and \$14 for money paid out for medical services. The pleadings were oral, the answer being a general denial. The trial began on August 8, 1906, and the hearing was adjourned, and it was not resumed again until January 23, 1907. At the close of the trial the court gave judgment for the defendant. Under one section of the defendant's by-laws it agrees to pay a sick benefit of \$1 per day to a sick member, and he is also entitled to the medical attendance of the society's physician. It is undisputed that the plaintiff became ill on the 16th day of September, 1905, and that he was unable to perform labor as a carpenter, which was his trade, until October 16, 1905, a period of 28 days. For the first five days he was attended by a physician called by himself, and from September 21, 1905, until October 6, 1905, the defendant's physician attended him. Another section of the by-laws of the defendant requires the association's physician to leave with the sick member what is termed a "diary," giving the member's name, nature of the illness, date of each visit, etc., until there is a complete cure, also requiring a notice to be given to the corresponding secretary of the defendant of the commencement of the illness and its termination. It seems that upon presentation of this diary the association pays the sick benefits based upon the duration of the member's illness as shown therein. On October 6, 1905, the plaintiff, wishing to obtain from the defendant the sick benefits then accrued, asked the defendant's physician, then attending him, to declare him cured. The physician demurred to doing so, but finally gave the plaintiff his so-called "diary" at the end of which he said: "The member not yet recovered from the disease requests that the diary be closed and that he be declared cured, at his request, this 6th day of October, 1905. Dr. A. Cavallaro." It does not appear whether or not the diary was presented to the defendant until after the plaintiff was completely cured. On October 7th, however, the plaintiff again called upon the defendant's physician, and asked him to continue to treat him. This he refused to do, saying that the plaintiff's illness was but slight. Thereupon the plaintiff notified the defendant that its physician refused to attend him, asked that a physician should be sent to visit him, and warned the defendant that upon its failure to send a physician that he (plaintiff) would employ one at the expense of the association. Nothing came of this notice, and the plaintiff employed the physician first engaged by him, who visited the plaintiff seven times, for which he charged \$14. The \$1 per diem for 28 days' sick benefits, less \$3, required by the laws of the defendant to remain with the society on deposit in aid of a certain fund, and the \$14 before stated, making \$39 in all, constituted the plaintiff's claim. The defendant did not seriously dispute the testimony on the part of the plaintiff. It admitted a liability for 16 days at \$1 per day, less \$3 as above stated, and paid into court the sum of \$13, but claimed that the plaintiff was bound by the report of the society's physician in the

so-called diary and could not collect for illness after October 6th. We cannot adopt this view. The society's physician in his certificate of October 6th expressly declares that the plaintiff was not cured, and on October 7th he admitted that the plaintiff had a "slight illness." It was shown without contradiction by the plaintiff's physician that the plaintiff was wholly unable to perform labor from October 6th to October 16th, inclusive, so that the claim for 28 days' illness is established. We are also of the opinion that a fair construction of the by-laws of the defendant would render it liable to one of its sick members, to whom the services of the society's physician had been refused, for the reasonable value of the services of a physician procured by the member after notice to and failure of the society's physician to attend such a sick member.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

PEPPER v. PRICE et al.

(Supreme Court, Appellate Term. December 12, 1907.)

1. TROVER AND CONVERSION.

Taking and using a horse without consent of the owner, and refusing to give him up on demand, constitutes a conversion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 25-37.]

2. SAME—QUESTION FOR JURY.

Evidence, in an action for conversion of a horse, held sufficient to go to the jury on the question of conversion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 295-303.]

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Leon Pepper against Michael Price and another. From a judgment dismissing the complaint, plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Louis Lichtenberg, for appellant.

William Klingenstein, for respondents.

GUY, J. This is an appeal from a judgment dismissing plaintiff's complaint. The action is brought for damages for the conversion of a horse; answer, general denial; and the pleadings oral.

The evidence is as follows: One Isidor Pacher, a witness called on behalf of the plaintiff, testified that his employer, Joseph Ressler, directed him to get an expressman for the purpose of making a shipment. Being unable to find one, he proceeded to the place of Leon Pepper, the plaintiff in this action, who consented to loan his horse to the witness to take the goods down town to the expressman, whereupon Pacher took the horse and wagon belonging to the said plaintiff and proceeded to Ressler's place of business. Having deposited

the goods on the wagon, he proceeded down town to defendant's place of business. Arriving at the defendant's place of business he, Pacher, found the defendant, and informed the defendant that his employer had sent him with some goods. The defendant Price then informed the witness that the address on the box was wrong, and while witness had gone to a near-by drug store for the purpose of telephoning to his employer, the horse and wagon disappeared. It developed that the address upon the goods was correct. On returning, the witness inquired of defendant as to the whereabouts of the horse and wagon, and defendant answered: "Don't worry. He will be right away back. * * * You will get it back. Don't worry. I am good for the horse. I am in this neighborhood for 18 years." The witness then testified that the defendant said to another person, in witness' hearing, in Jewish, "How I fooled him." "He brought me an order, and I took the horse, and sent the horse to the ———," and after witness waited two hours defendant said to him: "Don't worry. I will pay you for the horse."

On the motion to dismiss the plaintiff was entitled to the most favorable construction of the evidence. There was sufficient evidence in the case to justify a finding by the jury that defendant Price converted the horse of the plaintiff. The plaintiff was entitled to the absolute dominion of his property, and the act of the defendant Price in taking possession of and in using the horse, without the consent of the owner, was an unlawful interference with the plaintiff's right, and refusing to give him upon demand constituted a conversion.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

(56 Misc. Rep. 634.)

SAWYER v. DEICKEN et al.

(Supreme Court, Appellate Term. December 12, 1907.)

1. BROKERS—ACTION FOR COMMISSIONS—EVIDENCE—CUSTOMARY TIME OF PAYMENT.

In an action for commissions on the sale of merchandise, where the contract made no provision as to the time when the commissions were payable, evidence as to custom in the city where both parties lived was admissible on that question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 113.]

2. SAME—QUESTIONS FOR JURY.

In an action for commissions on merchandise whether a custom existed as to time of payment of commissions and whether the parties contracted with reference thereto, *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 121-129.]

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by Francis M. Sawyer against George W. Deicken and another. From a judgment for plaintiff, defendant appeals. Reversed. Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Paskus, Cohen, Lavelle & Gordon, for appellants.

I. S. Lambert, for respondent.

BRUCE, J. This is an action for commissions on the sale of merchandise. The defendants were the selling agents of the manufacturer. They made an agreement with the firm, of which the plaintiff was a member, and to whose rights he had succeeded, for the exclusive sale of these goods within a limited territory. The agreement was verbal, and nothing was stated as to when the commissions were payable. Plaintiff's firm secured a number of orders, which were accepted by the defendants, but the goods were never delivered, on account of the failure of the manufacturers. The defendants, upon the trial, offered evidence to prove that there was a uniform, well-settled custom or usage among commission houses in this city, that being the location of the houses of both parties herein, when commissions for the sale of goods of this character are payable. This evidence was excluded, to which the defendants duly excepted. The exclusion of this evidence was highly prejudicial to the defendants, and constitutes reversible error. The contention of the defendants throughout the trial was that the commissions were not payable under the contract until the goods were charged as delivered to the customer, and that this was in accordance with the uniform usage in the trade in this market in the sale of such goods, and that the parties, all of whom were old commission men, by leaving their agreement silent upon this subject, must be deemed to have contracted with reference to this well-established custom. I think that this evidence should have been admitted, and that it was for the jury to determine whether or not such a custom existed, and if it did whether or not the parties contracted with reference thereto. *Underwood v. Greenwich Ins. Co.*, 161 N. Y. 413-423, 55 N. E. 936; *Horst v. Lovdal*, 113 App. Div. 277, 98 N. Y. Supp. 996. The cases relied upon by the respondent are not applicable to the facts here. They refer to the well-established law with reference to the payment of commissions on the sale of real property, and are not controlling in commercial transactions in the sale of merchandise.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

LEHMAN v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Term. December 12, 1907.)

STREET RAILWAYS—INJURY TO VEHICLE—NEGLIGENCE—QUESTION FOR JURY.

Evidence as to the striking of an automobile by a street car held sufficient to take the question of the company's negligence to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 251-257.]

Appeal from Municipal Court, Borough of Manhattan, Fourteenth District.

Action by Allan Lehman against the New York City Railway Company. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Hollander & Bernheimer, for appellant.

William E. Weaver, for respondent.

PER CURIAM. Action for damage to plaintiff's automobile through defendant's negligence. The plaintiff was proceeding south on Madison avenue and crossed 125th street to the south side, where he turned on the south-bound track, and ran along for a short distance in order to avoid a truck standing in the street. Just as he was leaving the south-bound track, and turning again off the track to the pavement, he was struck in the rear by the car of the defendant, which had been standing still on the north side of 125th street. The complaint was dismissed. Under the decision of *Bang v. N. Y. Q. C. Ry. Co.*, 113 App. Div. 673, 99 N. Y. Supp. 946, and *Central Brewing Co.*, 49 Misc. Rep. 523, 97 N. Y. Supp. 1025, it was error to dismiss the complaint. The defendant should have been put on its defense.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

KNIGHT v. SHERWOOD.

(Supreme Court, Appellate Term. December 12, 1907.)

APPEAL—REVERSAL—ORDERING NEW TRIAL—MATTERS NOT LITIGATED.

Where, in an action involving the question whether certain unpaid tax assessments were incumbrances on property conveyed by defendant with covenant against incumbrances, a certificate of sale for such assessments, introduced as evidence that the property was sold therefor within 20 years after the assessments became due, did not show on its face that the property described therein was the property affected by the covenants, and such question was not litigated on the trial, judgment for plaintiff will be reversed.

Appeal from City Court of New York, Trial Term.

Action by Margaret Knight against William Sherwood, for breach of covenant against incumbrances. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Dulon & Roe, for appellant.

Saul S. Myers, for respondent.

BRUCE, J. The defendant, by deed dated May 5, 1905, conveyed to the plaintiff a lot of land on the north side of 122d street, in this city, distant 261 feet 3 inches west of Second avenue. He covenanted that the premises were free and clear of incumbrances, excepting two mortgages. It is conceded that, at the time title passed, there were two unpaid assessments upon the property, one of which was levied and confirmed March 28, 1838, and the other December 16, 1838. On July 15, 1906, the plaintiff paid these assessments, amounting, with interest, to \$320.58. The defendant contends that these assessments ceased to be a lien upon the premises in 1858, 20 years after they were levied. The plaintiff vigorously opposes this proposition, but maintains that, even if this were sound, it is not applicable here, since the evidence establishes that the premises were sold at a corporation sale in 1856 for these assessments, 2 years prior to the lapse of the 20 years.

At the close of the evidence, the jury was withdrawn, and the case submitted to the court. The court found that the premises were sold

in 1856 for these unpaid assessments, and, in the last finding of fact, states that all the facts found were admitted by the defendant in open court. The defendant excepted to the court's finding that all the facts were admitted by him in open court, and also to the finding that the premises were sold for assessments in 1856.

We are unable to find in the record any admission of this sale. The plaintiff introduced in evidence a certificate issued by the Bureau for the Collection of Assessments and Arrears of Taxes and Assessments and Water Rents to establish the fact that the premises were sold on June 13, 1856, and this certificate was received without objection. The court undoubtedly assumed that it was conceded by the defendant that the premises described in the certificate were the premises in question.

The defendant now contends, however, that it does not appear upon the face of the certificate that the property described in the certificate is the property described in the complaint. As this question was not litigated upon the trial, and is decisive of the case, we are of the opinion that a new trial should be had, in order that all the facts with reference to this sale may be laid before the court.

Judgment reversed, and new trial ordered, with costs to abide the event. All concur.

ROSENTHAL v. RIESSER et al.

(Supreme Court, Appellate Term. December 12, 1907.)

COURTS—MUNICIPAL COURTS—JURISDICTION.

Under the express provisions of Municipal Court Act, Laws 1902, p. 1533, c. 580, § 139, the Municipal Court is without jurisdiction of an action on a written contract of conditional sale of personal property.

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Joseph Rosenthal against Eli J. Riesser and another. Judgment for plaintiff, and Riesser appeals. Reversed, and complaint dismissed as to both defendants.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Douglas Armitage, for appellant.

Jacob Newman, for respondent.

GUY, J. The action against the defendant Rabinowitz is based upon a written contract for conditional sale of personal property, and comes within the prohibition of section 139 of the Municipal Court Act, Laws 1902, p. 1533, c. 580. The Municipal Court had therefore no jurisdiction of this cause of action against the said defendant. As to the defendant Riesser, there is an entire failure of proof on the part of the plaintiff as to any act on the part of said defendant constituting a conversion of the property in question, and positive proof by said defendant, corroborated by another witness, that said property was never in the possession of the defendant Riesser.

The judgment is therefore reversed, and the complaint dismissed as to both defendants, with costs to the appellant in this court and the court below. All concur.

(56 Misc. Rep. 650.)

VAN DEVENTER v. MORTIMER.

(Supreme Court, Appellate Term. December 12, 1907.)

1. EVIDENCE—FOREIGN JUDGMENTS—AUTHENTICATION—STATUTES—CONSTRUCTION.

Code Civ. Proc. §§ 952, 953, providing that a copy of the record or other judicial proceedings of a court of a foreign country is evidence when authenticated by the attestation of the clerk of the court with the seal of the court affixed, or of the officer in whose custody the record is legally kept, under the seal of his office, relate only to the authentication of copies of records of courts of foreign countries.

2. SAME.

No provision is made by the Code of Civil Procedure as to the requirements for admission in evidence of records of courts of other states, the procedure relating thereto being governed by the Constitution of the United States.

3. SAME—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. U. S. art. 4, § 1, provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. Rev. St. U. S. § 905 [U. S. Comp. St. 1901, p. 677], provides that the record or judicial proceedings of a foreign state shall be proved by the attestation of the clerk and seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate that the attestation is in due form. *Held*, in an action in New York on a judgment rendered in an action brought in New Jersey "in a court for the trial of small causes," and tried before a justice of the peace of a certain named county, that a transcript of the judgment sued on, certified by the clerk of the county named, with a certificate by the justice of the common pleas court, to the effect that the attestation was in due form and that the signature of the county clerk was genuine and the seal of the common pleas court attached, was not a compliance with the statutory requirement so as to render the record admissible.

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by William Van Deventer against John Mortimer, on a foreign judgment. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.
B. C. Chetwood, for appellant.

GUY, J. This is an appeal from a judgment, dismissing the complaint in an action brought on a foreign judgment, recovered in a "court for the trial of small causes," tried before a justice of the peace, in the county of Monmouth, state of New Jersey.

A transcript of said judgment, certified by the clerk of that county and of the common pleas court, with a certificate by a justice of the common pleas court, and the seal of said court attached, was offered in evidence by the plaintiff and was excluded upon the ground that it did not comply with the provisions of section 949 of the Code of Civil Procedure, which provides the manner in which a transcript from the docket book of a justice of the peace within an adjoining state of a judgment rendered by him * * * shall be authenticated. Appellant contends that the transcript was competent evidence under sections 952 and 953 of the Code, which provide that a copy of a

record or other judicial proceeding of a court of a foreign country is evidence, when authenticated by the attestation of the clerk of the court with the seal of the court affixed, or of the officer in whose custody the record is legally kept, under the seal of his office. In *Trebilcox v. McAlpine*, 46 Hun, 469-471, it is held "that sections 952 and 953 of the Code of Civil Procedure relate only to the authentication of copies of records, etc., of courts of foreign countries. The Code contains no provision as to the records of courts of other states in this country. Provisions for these are contained in the Constitution and statutes of the United States." Section 1, art. 4, Const. U. S., provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," and section 905 of the United States statutes [U. S. Comp. St. 1901, p. 677] provides the manner in which such acts, records, and proceedings shall be proved.

The record offered in evidence by plaintiff would be competent evidence, if authenticated in the manner provided by the United States statute, but it has not been so authenticated. The statute provides that the record or judicial proceeding shall be proved "by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate that the attestation is in due form." The action in New Jersey, as appears from the record, was brought in a "court for the trial of small causes," and tried before a justice of the peace, and the judgment roll was certified by said justice. But the clerk's certificate is made by the county clerk of the county of Monmouth, not by the clerk of the trial court, the seal attached is the seal of the common pleas court, and the certificate of the justice of the common pleas court is solely to the effect that the attestation is in due form and that the signature of said county clerk is genuine.

No statute of the state of New Jersey was introduced in any way connecting the common pleas court or the justice thereof or the county clerk with the proceedings in the "court for the trial of small causes," or with proceedings before a justice of the peace. The United States statute contemplates a certificate by the clerk of the court in which the action was tried, and a certificate by the judge of such court that the attestation is in due form.

In the absence of such authentication, the record was properly excluded.

Judgment affirmed, without costs. All concur.

(56 Misc. Rep. 680.)

McENROE v. TAYLOR.

(Supreme Court, Appellate Term. December 12, 1907.)

MASTER AND SERVANT—INJURIES TO THIRD PERSONS—AUTHORITY OF SERVANT.

Where plaintiff was injured by defendant's automobile, operated by defendant's chauffeur, but defendant testified that the chauffeur was acting without his authority and against his express commands, failure of defendant at the time he was served with summons and complaint to deny that the chauffeur was acting at the time of the accident as his em-

ployé and in the performance of duties for him, could not be considered as proof that the agent had authority.

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by John McEnroe against Moses Taylor. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and FORD, JJ.

Frank V. Johnson (Allan E. Brosmith, of counsel), for appellant.

John C. Coleman, for respondent.

PER CURIAM. It is undisputed that plaintiff was struck by defendant's automobile while being run or operated by defendant's chauffeur. The defendant testifies that the chauffeur was acting without his authority and against his express command. The chauffeur was not produced at the trial; his absence, however, being explained. There is evidence that the defendant failed to deny the authority of the chauffeur when served with the summons and complaint.

The court charged the jury that the failure of the defendant at the time he was served with the summons and complaint to deny that the chauffeur was acting at the time of the accident as the employé of the defendant, and in the performance of duties for the defendant, "may be considered as proof that the agent had authority," to which exception was taken. In so charging the jury, the court committed error prejudicial to the defendant.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

CEBRELLI v. FRANKLIN CONTRACTING CO.

(Supreme Court, Appellate Term. December 12, 1907.)

COURTS—MUNICIPAL COURTS—SET-OFF AND COUNTERCLAIM—SUIT BY ASSIGNEE.

Under Municipal Court Act, Laws 1902, p. 1539, c. 590, § 152, subd. 3, the counterclaim can only be allowed to an amount equalling the demand, in an action on a demand by an assignee thereof.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Antonio Cebrelli against the Franklin Contracting Company. From a judgment for defendant for the full amount of his counterclaim, plaintiff appeals. Modified and affirmed.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Sigmund Wechsler, for appellant.

Henry W. Jessup, for respondent.

PER CURIAM. Upon the trial of this action the complaint was dismissed, and the defendant, who had interposed a counterclaim, was given a judgment against the plaintiff for the full amount of such counterclaim. An examination of the record fully justifies the finding of the court below in its dismissal of the complaint, but as the plaintiff is the assignee of the demand sued upon, no affirmative judgment could

be given against him. The counterclaim could only be allowed to an amount equalling the plaintiff's claim. Municipal Court Act, Laws 1902, p. 1539, c. 580, § 152, subd. 3. The judgment rendered should have been for the defendant. *Brown v. Coleman*, 55 Hun, 501, 8 N. Y. Supp. 808.

Judgment modified by directing that the same be rendered for the defendant in the court below, with appropriate costs in that court, and, as modified, affirmed, without costs of this appeal to either party.

(56 Misc. Rep. 306.)

IN RE CITY OF NEW YORK.

IN RE COMMISSIONERS OF DOCKS.

(Supreme Court, Special Term, New York County. November, 1907.)

1. EMINENT DOMAIN—COMPENSATION—AWARD—SUFFICIENCY.

An award of \$800,000 for land and bulkhead rights acquired by a municipality, which produced to the owner a net income of \$43,000 a year, is inadequate, as the value of the lands should be measured by the net income.

2. SAME—BENEFITS.

In fixing the award to be paid for lands used for business purposes, which are leased by the owner, the benefits accruing to remaining property from the improvements are properly considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, *Eminent Domain*, § 378.]

3. SAME—ELEMENTS OF DAMAGE.

Where land in connection with certain gas mains is taken for a public improvement, the revocation of the license granted by the city to lay such mains is no ground for an award of damages.

4. SAME—CONSEQUENTIAL DAMAGES.

Where land is taken for public use, the commissioners are not authorized to go outside of the area of the improvement and award consequential damages to lands embraced therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, *Eminent Domain*, §§ 237, 238, 239-244.]

5. SAME—REPORT OF COMMISSIONERS.

In condemning certain lands and bulkhead rights, it is unnecessary that the report of the commissioners should state the additional value they give the lands by reason of such rights, where they report that they considered the same and increased the value of the land taken therefor.

In the matter of the application of the city of New York, acting by the commissioners of docks, for the acquisition of certain lands between Fifteenth and Eighteenth streets, Tenth avenue, and the North river. Motion to confirm report of commissioners of estimate denied.

Charles D. Olendorf, for city of New York.

John M. Bowers, for claimant estate of Bradish Johnson.

John A. Garver and Carl A. Mead, for claimant Consolidated Gas Company.

BISCHOFF, J. The award for parcels Nos. 1 and 2 in this proceeding involves an inconsistency which requires that the report be sent back to the commissioners for further consideration. These parcels comprised the larger part of the block bounded by Fifteenth and

Sixteenth streets, Tenth avenue, and the North river; and the whole block was in single ownership of the estate of Bradish Johnson, a corporation, and leased to the Central Railroad of New Jersey for the purposes of a freightyard, at a net annual rent of \$55,000 under a lease, made in the year 1892, to endure for 21 years. The commissioners have awarded to the owner for the land and bulkhead rights taken the sum of \$752,000, and to the tenant \$48,000, and have apportioned the rent of the land not taken in the sum of \$12,000 per annum.

The gross award for all interests in these parcels is thus \$800,000; and, if the lease was a fair measure of the value of the land, the apportionment of rent discloses that the tenant had agreed to pay \$43,000 a year net for the land taken. Thus a value of over \$1,000,000 is indicated, at the ordinary investment rate, which measures the value of the land under a lease of this character, and the award of \$800,000 would appear, upon this basis, to be quite inadequate. There was expert evidence, however, that the rent reserved in the lease was too high; and, while this proof was not of a very satisfactory character, it may be that it could suffice for acceptance by the commissioners without disapproval by the court, in view of the court's limited power to review the evidence in these proceedings, but if, upon this theory, the award to the owner may be deemed adequate, the tenant must necessarily have made a very bad bargain and was benefited by being relieved of the greater part of its burden. But the tenant has been awarded \$48,000; and, since an allowance for fixtures could not, upon the evidence, have well exceeded \$20,000, it is clear that a large sum has been allowed for the loss of the lease. It is impossible to say that the tenant was damaged if the rent reserved was too high for this class of property; and if it was not too high, the owner's award is inadequate by some \$200,000, an amount which, in no possible aspect of the proof, could be applied as an offset for benefit to the remaining property.

The award to the Consolidated Gas Company, the owner of adjacent property, is to some degree involved, since, while the character of the parcels is not the same, in the uses to which they may be put, the value of one parcel bears upon the value of the other because of their similarity of situation, and therefore the awards as to all parcels should be reconsidered.

Certain objections, which have been presented, may properly be passed upon at the present time, notwithstanding that the report, as it stands, cannot be confirmed. The contention that benefits should be eliminated in the fixing of awards is met by the recent decision of the Appellate Division in *Matter of North River between West Eighteenth and West Twenty-Third streets*, 118 App. Div. 865, 105 N. Y. Supp. 750, and the benefits accruing from the improvement were thus properly considered by the commissioners.

The Consolidated Gas Company objects to the disallowance of compensation for damages suffered by it through the lessened value of its equipment in the streets of the city by reason of the taking of its gas tanks in this proceeding, the property referred to being in the form of gas mains laid in the city streets and fed by these tanks. If

these mains were laid in the streets under a license from the city merely, the claimant necessarily would be at the risk of being required to remove the property or to change its position when public convenience demanded it. (Matter of Deering, 93 N. Y. 361), and the bringing of this proceeding would serve in effect as the revocation of a license by the city, so far as it was revocable (Kingsland v. Mayor, 110 N. Y. 569, 18 N. E. 435); but it is claimed that the right to lay these mains in the streets existed by virtue of the claimant's charter, and that the city was not in a position to interfere with the rights so acquired. This contention I take to be untenable. The origin of the claim to a right to lay gas mains in the streets, so far as a right is deemed to have accrued to this claimant, is a certain franchise granted to the Municipal Gas Light Company by the city on March 22, 1877. The Municipal Gas Light Company was one of the constituent companies of the claimant corporation, but the franchise referred to contained the following provision:

"Neither said permission nor any right conferred on said company by said resolution shall be assigned or transferred without the previous consent of the common council."

Upon the consolidation which took place and which resulted in the formation of the claimant, the Consolidated Gas Company, under chapter 367, p. 448, Laws 1884, such rights as were possessed by the constituent companies passed to the corporation thus formed, but no greater rights were acquired than were originally possessed; and, failing the consent of the common council, there appears to have been no warrant in law for this claimant's maintenance of the gas mains in the streets. In this view, the claimant took no rights in the matter which could survive the city's determination to revoke the permission deemed to have been granted to the Municipal Gas Light Company to lay the mains, and there was no damage which could be made the subject of compensation in this proceeding because of the diminution in the value of the property thus placed in the streets. Again, it would appear that the commissioners had no authority to award damages for property not embraced within the area of the improvement. The matter is regulated by section 822 of the charter, which limits the award of damages to compensation for the property taken, and does not appear to include, by inference, consequential injury to the business of the owner elsewhere in the city by reason of the taking of the land.

The objection that the commissioners failed to make an allowance for "plottage"—a supposed enhancement of value by reason of the fact that the parcels, of which this claimant was the owner, were in a single ownership—is met in the finding of the commissioners that as a matter of fact in these instances no such added value did exist. The question whether or not "plottage" is an element of value depends necessarily upon the evidence of the particular circumstances surrounding the use of the property and its situation, and there is no rule of law that "plottage," taken alone, must have a value in every case.

It is also objected by both claimants that the commissioners refused to state what additional value was given to the land because of the fact that the land and the bulkhead rights belonged, in each instance,

to the same claimant. The report contains the statement that the commissioners have been taken into consideration and account the fact that the ownership of the bulkhead and bulkhead rights and the lands immediately adjacent were in the same owners, and have found that this fact increases the value of the land taken, and have included such increase in value in their awards. This statement appears to be all that can properly be required within the ruling of Board of Water Commissioners v. Shutts, 25 App. Div. 22, 49 N. Y. Supp. 319.

For the reasons stated, the motion to confirm the report is denied, and the report will be sent back to the commissioners for further consideration of the awards made.

Motion denied and report sent back.

HERZIG v. BLUMENKROHN et al.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

LANDLORD AND TENANT—LEASE—COVENANT AGAINST ASSIGNMENTS—BREACH.

Plaintiff leased certain premises to defendant B. for a term of years commencing July 1, 1907, at 12 o'clock noon, and ending at the same hour on October 1, 1920. The lease contained a covenant against assignments without the lessor's written consent, and reserved to the lessor the right to re-enter for breach thereof. Before the commencement of the lessee's term, and without the lessor's consent, the lessee leased the same premises to defendant C. for the same term at the same rent by a lease which, except for the date and names of the parties, was a precise copy of the original lease. *Held*, that such second lease, though containing a covenant that the lessee should surrender on the last day of the term, and reserving to B. the right of re-entry for condition broken, constituted an assignment of the original lease, and not a sublease, and was therefore a breach of the covenant against assignment in the original lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 228.]

Ingraham, J., dissenting.

Appeal from Special Term.

Suit by Joseph Herzig against Siegfried Blumenkrohn and another impleaded, etc. From an interlocutory judgment overruling a demurrer of defendant Blumenkrohn to the complaint, the impleaded defendants appeal. Affirmed with leave to withdraw demurrer and answer.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, HOUGHTON, and SCOTT, JJ.

William M. Seabury, for appellant.

Louis Marshall, for respondent.

George A. Strong, for defendant Crystal.

SCOTT, J. The defendant Blumenkrohn appeals from an interlocutory decree overruling his demurrer to the complaint. The facts are simple. The plaintiff held a leasehold estate in certain premises in the city of New York. On July 19, 1905, he leased the premises to the appellant Blumenkrohn for a term of years to commence on July 1, 1907, at 12 o'clock noon, and to end on October 1, 1920, also at 12 o'clock noon, the lease being duly recorded on April 30, 1906. This

lease contained a provision that "the lessee further covenants not to assign this lease without the lessor's written consent." The lease also reserved to the lessor, plaintiff herein, the right to re-enter upon default by the lessee with respect to any of the covenants by him to be performed. On May 16, 1906, and hence before his own term was to commence, the appellant Blumenkrohn, without consent of plaintiff, leased the same premises to the defendant Crystal for the same term as was conveyed by the lease from plaintiff to Blumenkrohn for the same rent by a lease which, except for the date and the names of the lessor and lessee, was a precise copy of the former lease from plaintiff to Blumenkrohn. The plaintiff, upon ascertaining the fact of the lease from Blumenkrohn to Crystal, and before the date for the commencement of the term fixed by either lease, commenced this action to have the leases declared void, asserting that, both having been recorded, they constitute a cloud upon his title. His position is that the instrument executed by Blumenkrohn to Crystal, although in form a lease, was in fact and law an assignment to Crystal of plaintiff's lease to Blumenkrohn and that thereby Blumenkrohn violated his covenant not to assign, and he alleges that he has exercised his option to cancel the lease for such violation, and has so notified both defendants.

The sole question presented therefore is whether or not the instrument executed by Blumenkrohn to Crystal is a sublease or an assignment. The distinction between a sublease and an assignment of the original lease has been the cause of much discussion, and of some apparent, rather than real, difference of opinion. It is quite well settled however that it is immaterial what form of instrument is used, or whether on its face it purports to be a sublease or merely the assignment of a lease. The essential distinction between a sublease and an assignment lies in the extent to which the original lessee has parted with his interest. If he has parted with his entire interest, he has made an assignment. If he has retained a reversion in himself, he has made a sublease. *Woodhull v. Rosenthal*, 61 N. Y. 391; *Stewart v. Long Island R. R. Co.*, 102 N. Y. 607, 8 N. E. 200, 55 Am. Rep. 844. In the desire to avoid forfeitures, the courts have been astute to discover in instruments asserted to be assignments features which implied some reservation sufficient to justify a finding that the original lessee had reserved to himself some portion of the term. Thus, when the instrument, although it disposed of the whole term, contained a covenant on the part of the second lessee to surrender to the original lessee on the last day of the term, it was considered that there had been reserved a reversion of a part of the last day of the term, and hence the instrument was deemed a sublease and not an assignment. *Post v. Kearney*, 2 N. Y. 394, 51 Am. Rep. 303. In the present case the instrument executed by Blumenkrohn to Crystal is, as has been said, identical in its language with the lease executed by plaintiff to Blumenkrohn. It covers the same premises, is for the same term, at the same rent, payable on the same days, and contains identical conditions and covenants. No such reservation can be spelled out of it as was found in *Post v. Kearney*, *supra*, for there the only provision as to the end of the term was that it should be on a certain day, and the covenant as to surrender was that the sublessee should surrender to the original

lessee. In the present case the end of the time is fixed at a particular minute in a day, to wit, at 12 o'clock noon on the 1st day of October, 1920, and Crystal's covenant to surrender at the end of the term is not that he will surrender the premises to Blumenkrohn, but that "he shall quit and surrender said premises in good condition, reasonable wear and tear excepted." This must be taken to mean that he will surrender possession to whomsoever shall at the end of the term be entitled to demand it, and that person cannot be Blumenkrohn, because his right to possession will terminate under his lease from plaintiff at the very moment that Crystal's term ends and the obligation to surrender becomes operative. It is clear, therefore, that Blumenkrohn has not reserved to himself any part of the term at its end. The only possible feature of the case upon which a contention can be based that the instrument was a sublease and not an assignment is that the instrument contains the customary clause reserving to Blumenkrohn the right of re-entry for condition broken, and it is upon this fact that the appellant chiefly relies. It is not to be disputed that there are to be found cases of high authority in which it has been said that the reservation of such a right of re-entry imparts to the instrument containing it the character of a sublease, rather than that of an assignment; but the better opinion, as we consider, is that the reservation of such a right alone is not sufficient to produce such a result. The principal authority in this state for the proposition contended for by appellant is *Collins v. Hasbrouck*, 56 N. Y. 162, 15 Am. Rep. 407, wherein Judge Folger says, "And again, if there be a right reserved to the lessor to re-enter for breach of conditions, this makes a sublease," and he cites as authority for this *Doe ex dem. v. Bateman*, 2 Barn. & Ad. 168. Whether this case fully supports the rule for which it is cited may be doubted. See dissenting opinion of Finch, J., in *Stewart v. Long Island R. R.*, 102 N. Y. 618, 8 N. E. 200, 55 Am. Rep. 844. It is certain that *Collins v. Hasbrouck* is not authority for the proposition that the reservation of the right of re-entry for condition broken alone characterized the instrument as a sublease, for there were many other features of the instrument then before the court which went to fix its character as a sublease. It was in the form of a lease, it reserved to the original lessees rent at a new rate and at a new time of payment, and provided for a surrender to the original lessees at the expiration of the term, and, finally, although the covenant in the original lease from plaintiff was against subletting, and the court found that the covenant had been broken and a sublease made, the decision went against the plaintiff because the court found that he had waived the forfeiture. In *Ganson v. Tifft*, 71 N. Y. 48, the court followed *Collins v. Hasbrouck*, but laid especial stress upon the fact, present in both cases, that the sublease contained a covenant for surrender to the original lessee at the end of the term. This case therefore cannot be successfully cited, for the proposition that the reservation of a right to re-enter for condition broken alone fixes the character of an instrument as a sublease. On the other hand, there are many authorities for the proposition that such a reservation alone, without any other reservation of a part of the term does not make an instrument a sublease which, otherwise, would be an assignment. This is the rule stated in

Woodhul v. Rosenthal, 61 N. Y. 382, wherein Commissioner Dwight cites Bacon's Abridgement as follows:

"Where the whole term is made over by the lessee, although in the deed by which that is done the rent and power of re-entry for nonpayment are reserved to him and not to the original lessor, this is an assignment and not an underlease, * * * and this although new covenants are introduced in the assignment." Bacon's Abr. Leases, 1, 8.

The question was treated with his usual thoroughness and clarity by Judge Rapallo in *Stewart v. Long Island R. R. Co.*, 102 N. Y. 607, 8 N. E. 200, 55 Am. Rep. 844. Speaking of cases like the present, where the question has arisen between the transferee and the original landlord, he said:

"In the latter class of cases the rule is well settled that if the lessee parts with his whole term or interest as lessee, or makes a lease for a period exceeding his whole term, it will, as to the landlord, amount to an assignment of the lease, and the essence of the instrument as an assignment will not be destroyed by its reserving a new rent to the lessor with power of re-entering for nonpayment, nor by its assuming by the use of the word 'demise' or otherwise the character of a sublease. * * * The fact that the lease to the defendant reserves a different rent from that reserved in the original lease, with a clause for re-entry, cannot affect the question between the parties to the present controversy of its operating in law as an assignment of the term. These points were expressly adjudicated in the case of *Doe v. Bate-man*, 2 Barn. & Adol. 168, and *Wollaston v. Hakewell*, 3 Scott's N. R. 616."

In commenting upon *Collins v. Hasbrouck*, Judge Rapallo points out that, in view of the result reached on the question of waiver, the discussion of the effect of the reservation of the right to re-enter for condition broken had been irrelevant, and again states what we deem to be the true rule—citing a great number of authorities in support of his position. To the same effect are the textwriters and a number of well-considered opinions in other jurisdictions. *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274; *Craig v. Summers*, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236. "So the right of re-entry is not an estate or interest in the land, nor does it imply a reservation of a reversion. It is a mere chose in action. When enforced the grantor is in through the breach of the conditions, and not by the reverter." *Tiedeman, Real Prop.* § 277. "An assignment as contradistinguished from a sublease signifies a parting with the whole term: and whenever the whole term is made over by the lessee, although in the deed by which that is done the rent and a power of re-entry are reserved to himself, yet the instrument amounts to an assignment and not a sublease." *Wood, Land. & Tenant (Am. Ed.)* vol. 1, § 258. To the same effect are *Taylor, Land. & Tenant*, vol. 1, § 16, and *Washburn, Real Prop.* (2d Ed.) vol. 1, §§ 451-474.

To sum up, therefore, the instrument executed by Blumenkrohn to Crystal conveyed the whole term without the reservation of any reversion or reversionary interest, except the right to re-enter for condition broken. This right of re-entry did not amount to or imply a reservation of any reversion in the term or of any interest in the land, but merely of a chose in action in case of a breach of covenant. The instrument, therefore, although in form a lease, was in legal effect an assignment of the lease from plaintiff, and, having been made with-

out his consent, was a breach of the covenant against assignments, and entitled the plaintiff to enforce a forfeiture of the original lease.

The judgment must be affirmed, with costs, with leave to appellant to withdraw his demurrer and answer within 20 days on payment of costs in this court and in the court below. All concur, except INGRAHAM, J., who dissents.

INGRAHAM, J. (dissenting). There is not entire accord in the cases which have discussed the question that is presented in this case, which seems to have arisen from the different aspect in which the question has been presented, as a more stringent rule has been applied when it was sought to construe an instrument which was in form a sublease of the premises as an assignment of the lease where the original lessor claimed a forfeiture of the lease than in cases where he claimed to be entitled to recover from the sublessee the rent reserved by the original lease. In 18 Am. & Eng. Ency. of Law (2d Ed.) p. 657, it is said:

"It is immaterial by what kind of an instrument or conveyance the term is so disposed of. Thus the grantee or nominal lessee becomes an assignee if the lessee * * * executes an instrument purporting to be a lease or demise of the premises for the balance of his unexpired term or a period exceeding his term, or conveys the premises in fee simple."

But on page 658 it is said:

"To constitute the transaction a subletting instead of an assignment it is not necessary that the reversion retained by the original lessee be for any particular time. A reversion of the last day of the term is sufficient, and where the sublessee covenanted to redeliver possession to the original lessee on the last day of the latter's term, the transaction was held to be a sublease. The fact that the lessee reserves in the transfer of his term a rent, so called, payable to himself, will not necessarily prevent the transaction from constituting an assignment instead of a sublease, and the same has been held true where he also reserved a power of re-entry for nonpayment."

The original lease in question contains no covenant against subletting, and it seems to be conceded by Mr. Justice SCOTT in his opinion that under the authorities of this state, if the sublease had contained an express covenant by which the sublessee agreed to redeliver possession of the premises to his lessor on the last day of the latter's term, the transaction would be held to be a sublease. It seems to me that this is the effect of the covenant. It is true that the word "lessor" is not named; but the sublessee covenanted and agreed to and with his lessor, his heirs and assigns, that the said lessee "at the end or sooner termination of this lease shall quit and surrender said premises in good condition, reasonable wear and tear excepted." That, I think, is in effect a covenant to deliver to the lessor, the party of the first part to the instrument and with whom the covenant is made. The covenant was made with the lessor that at the end or sooner termination of the lease he would quit and surrender the premises. Certainly this cannot be understood as a covenant to surrender the premises to any one but the person with whom the covenant was made. The lessor in the sublease being entitled, as I construe the lease, to repossession of the premises on the last day of the term, it seems to

me that under the authorities in this state the transaction is to be considered as a sublease and not as an assignment of the lease.

In *Ganson v. Tift*, 71 N. Y. 48, the question was clearly presented and it was there said:

"The instrument referred to contained a provision reserving a right of re-entry for nonpayment of rent, or a breach of other conditions, and that at the expiration of the term, or other sooner determination of the demise, the lessees should quietly surrender and yield up possession of the demised premises to the lessor. This constituted a sublease of the premises, and not an assignment of the entire term, which transferred any right of action against the defendant."

The cases of *Collins v. Hasbrouck*, 56 N. Y. 157, 15 Am. Rep. 407, *Woodhull v. Rosenthal*, 61 N. Y. 383, *Post v. Kearney*, 2 N. Y. 394, 51 Am. Dec. 303, were cited and considered. In *Stewart v. L. I. R. Co.*, 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844, the original lease was the lease for 50 years. What was called the sublease was a lease for 99 years, and it was held that that was an assignment and not a sublease because the original lessee had transferred to the defendant the entire term during which the original lessee was to hold the demised premises as lessee and left no particle of that term in the original lessee, or in his first assignee. But the opinion in that case recognized the rule established in *Post v. Kearney*, supra, and *Ganson v. Tift*, supra, that where, in an assignment of a lease, or in a demise by the lessee for the same term as that granted by the original lease, there is a covenant to surrender to the assignor, this prevents a sublease from operating as an assignment. This has been because the whole instrument taken together has been held to reserve to the original lessee some fragment of the original term, although almost inappreciable in point of duration. The question is not free from doubt; but I think when a lessor comes into a court of equity and asks for equitable relief, based upon a forfeiture, he should present a case free from reasonable doubt, or equity will not interfere, but will leave him to his remedy at law.

I think, therefore, this judgment should be reversed, with costs, and the demurrer sustained, with costs.

(56 Misc. Rep. 300.)

PEOPLE ex rel. VICTORIA PAPER MILLS CO. v. SUMMERVILLE et al.

(Supreme Court, Special Term, Onondaga County. November, 1907.)

TAXATION—ASSESSMENT—REVIEW—REDUCTION.

In proceedings to review an assessment, a referee was appointed who reported his findings as to the value of the property and the amount of the assessment on three other parcels of real estate. Held that, where from the evidence the court can infer that inequality in the assessment of the relator's property exists in comparison with other parcels in general, the court may order such reduction as seems just.

Action by the people, on relation of the Victoria Paper Mills Company, against Fred Summerville and others. Motion to confirm referee's report, and for an order reducing an assessment on the property of the relator.

Piper, Rice & Wilson, for the motion.

H. J. Fanning and F. G. Spencer, opposed.

ANDREWS, J. An order should be entered herein correcting the assessment of the property of the relator upon the assessment rolls of the city of Fulton for the year 1906, by reducing the same from the sum of \$100,000 to the sum of \$60,000, on the ground that such assessment was unequal in that it was made at a higher proportionate valuation than the assessment of other property on the same roll by the same officers, and that the relator was injured thereby. The relator should also be awarded his costs herein against the city of Fulton and \$100 extra allowance. A writ of certiorari was heretofore allowed to review the assessment made for the year 1906 upon the property of the Victoria Paper Mills Company. A return to such writ was duly made; and upon the hearing, it appearing that testimony was necessary for the proper disposition of the matter, a referee was appointed to take evidence and to report it to the court with his findings of fact and conclusions of law. A hearing was had, and the matter comes again before the court upon the referee's report and the evidence taken by him.

He finds, upon sufficient evidence, that at the time of the assessment the value of the relator's property was \$120,000, and that it was assessed at \$100,000. On the same roll, assessed by the same officers, was property of the Hunter Arms Company, worth \$250,000, and assessed at \$100,000, of the firm of Dilts & Bennett, worth \$20,000, and assessed at \$9,250, and of the American Woolen Mill, worth \$865,000, and assessed at \$259,850; and he holds that the assessment of the relator's property was unequal as it was made at a higher proportionate valuation than the assessment on the three properties mentioned. These findings by themselves do not justify an order such as is asked for in this case. The mere fact that the relator can point out one or three or five instances where property has been assessed at a smaller proportion of its true value than has been done with regard to its property does not necessarily show that it has been injured. The burden is upon it to show that this inequality is general; in other words, that it is to be required to pay more than its just proportion of the aggregate tax. *People ex rel. Warner v. Carter*, 109 N. Y. 576, 17 N. E. 222; *People ex rel. Litchfield v. Feitner*, 107 App. Div. 267, 95 N. W. Supp. 10; *People ex rel. Fiske v. Feitner*, 95 App. Div. 217, 88 N. Y. Supp. 694; *People v. Feitner*, 95 App. Div. 481, 88 N. Y. Supp. 774. But, although there is no such finding in the report of the learned referee, the order need not necessarily be denied. The reference was not one to hear and determine, but to take the evidence and report it to the court, with findings of fact and conclusions of law. It was merely to inform the conscience of the court, which can adopt the referee's findings or disregard them and draw its own conclusions from the evidence. *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572.

The evidence shows that while there are 2,417 parcels of real estate upon the tax rolls of the city of Fulton, but 82 are owned by corporations, and only about 27 are manufacturing plants. Three of these are assessed at 40 per cent., 46 $\frac{1}{4}$ per cent., and 31 per cent., respectively, of their actual value, while the relator's is assessed at 83 $\frac{1}{3}$ per cent. The relator offers no proof as to other parcels; but, in view of the great discrepancy shown to exist in these instances, in view of the

failure of the defendants to give evidence on the subject, in view of the reasons given by them for assessing the relator's property at the amount fixed by them, the referee would have been justified in finding, and this court has come to the conclusion, that the inequality complained of is general, and that, unless corrected, the relator will be required to pay more than its just proportion of the aggregate tax. *People v. Christie*, 115 N. Y. 158, 21 N. E. 1024.

As regards the amount of the reduction to be made, the referee has been sufficiently liberal to the defendants. A proper order may be prepared and settled on due notice.

Ordered accordingly.

GUILIANO v. F. W. SEAGRIST, JR., CO.

(Supreme Court, Appellate Term. December 12, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action by an employé against his employer for injuries sustained by the fall of a fire escape on which plaintiff put his foot in leaving his work on the third story of a building which was being demolished, evidence examined and *held* to show that the fire escape was not the only way furnished by defendant by which plaintiff could have descended.

2. SAME—RES IPSA LOQUITUR—APPLICATION OF DOCTRINE.

The doctrine of *res ipsa loquitur* does not apply in an action by an employé against his employer for injuries caused by the fall of a fire escape on which plaintiff put his foot in leaving his work on the third story of a building which was being demolished, where the fire escape was not the only way by which plaintiff could have descended from his work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 881.]

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by Biagio Guiliano against F. W. Seagrism, Jr., Company for personal injuries. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, defendant appeals. Reversed, and new trial granted.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Nadal, Carrere & Jones (Edwin A. Jones and Albert Van Winkle, of counsel), for appellant.

Eugene L. Parodi (James A. Foley, of counsel), for respondent.

GUY, J. Appeal from judgment in favor of plaintiff for \$500 for personal injuries, and from denial of motion for new trial.

The plaintiff herein was injured by the fall of a fire escape by which, at the time of the fall, he was about to descend from the third story of a building upon which he was employed by the defendant. The building was one of three five-story brick buildings which were being demolished by the defendant. At 4:30 o'clock p. m. on the day of the accident the plaintiff was sent to the third floor of the middle building to clean brick. He went up by means of the fire escape together with his "boss." He had not worked in this building before, although for

several weeks he had been employed on this job. At 5:50 o'clock plaintiff, with the other workmen, was told to go home. Plaintiff testified that he, together with the foreman and other workmen, then went toward the fire escape, and as he put "his foot on the fire escape it turned and fell."

It appears that the top two stories of the building had been demolished at the time of the accident, and that the brick wall extended some one foot and a half or two feet above the fire escape. This is the only evidence of the situation at the time of the accident. There is no evidence as to what gave way, or how the fire escape was erected or fastened to the building. It is evident that this is not a question of a safe place to work, as plaintiff was not working upon the fire escape, nor was there anything connected with his work which would take him upon the fire escape.

The jury seems to have found that this was the only "way" furnished by the defendant by which plaintiff could have reached and could have descended from the third story. This conclusion appears to be against the weight of evidence, as the record clearly shows that there was a door leading into the adjoining house and a safe stairway in that house. There is no evidence sufficient to justify the conclusion that the defendant was negligent in not showing or directing him to the proper way down, or that he had knowledge of a danger as to which he should have warned the plaintiff.

The doctrine *res ipsa loquitur* does not apply to a master and servant case of this kind. *Starer v. Stern*, 100 App. Div. 393, 91 N. Y. Supp. 821; *Stackpole v. Wray*, 99 App. Div. 262, 90 N. Y. Supp. 1045, affirmed 182 N. Y. 567, 75 N. E. 1134.

The order denying the motion to set aside the verdict and for a new trial is reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

WEINBERG v. KLAUBER.

(Supreme Court, Appellate Term. December 12, 1907.)

APPEAL—RECORD—SUFFICIENCY—OPENING DEFAULT.

Where the record on an appeal from an order denying a motion to open a default fails to show that any answer was filed, and no affidavit of merits is shown, the order will be affirmed, with leave to renew the motion and restore papers which appellant claims were lost by the clerk of the court below.

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by Pesach Weinberg against Meyer B. Klauber. From a judgment and order denying a motion to open a default, defendant appeals. Affirmed, with leave to renew the motion.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Henry Kuntz, for appellant.

A. B. Schleimer, for respondent.

PER CURIAM. The defendant appeals from an order denying a motion to open his default. The moving papers are clearly defective, and the court below was justified in denying the motion. No answer appears in the record. It is claimed by the defendant that one was filed and lost by the clerk of the Municipal Court. The appellant should, in such a case, have procured the substitution of a copy. As the record appears before us, we have no way of determining as to whether or not the defendant has a defense to the cause of action set up in the complaint. Neither is there an affidavit of merits in the moving papers. These omissions are fatal.

Judgment and order affirmed, with costs, with leave to the defendant to renew the motion in the court below upon proper papers.

LIFSHITZ v. SCHWARTZ.

(Supreme Court, Trial Term, Kings County. December 11, 1907.)

1. NEW TRIAL—GROUNDS—WEIGHT OF EVIDENCE.

The judge should not set aside a verdict where there is evidence to support it simply because he would have found to the contrary, where the verdict is not clearly and palpably unjust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 142.]

2. BROKERS—ACTIONS FOR COMPENSATION—EVIDENCE—WEIGHT AND SUFFICIENCY.

In an action by a broker for commissions, involving the questions whether plaintiff was employed by defendant as broker to effect a sale of certain premises, and whether he was the procuring cause of the sale, evidence examined and held sufficient to sustain the verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 116-120.]

3. TRIAL—OBJECTIONS TO EVIDENCE—FAILURE TO OBJECT.

It is the duty of counsel to object to the introduction of improper evidence.

Action by Samuel Lifshitz against Roas Schwartz for a broker's commission for the sale of land. Judgment for plaintiff, and defendant moves for new trial. Motion denied.

Michael Kaufman, for plaintiff.

David W. Rockmore, for defendant.

KELLY, J. In this case I submitted to the jury the questions whether the plaintiff was employed by the defendant to act as broker on the sale of the premises, and whether he was the procuring cause of the sale. The only direct evidence as to employment came from the plaintiff, who testified that the property was given him for sale in connection with another broker, and plaintiff also testified to an express promise by defendant's husband and agent to pay him one-half the commission of 1 per cent.

If I were sitting as a jurymen, I would have found against the plaintiff on these propositions, because I am not satisfied on the whole case that the evidence establishes the hiring and the service. But as I understand it, the litigants are entitled to the verdict of 12 jurymen on

the issue; and where there is evidence to support their finding, the judge is not justified in setting the verdict aside simply because he might have found to the contrary, provided the verdict is not clearly and palpably unjust.

On reflection, I find that there are facts in the case corroborative of plaintiff's claim. A great deal of testimony was allowed to go before the jury which would have been excluded had objection been made by defendant's counsel. In fact, the court on one or two occasions called the attention of the defendant's attorney to his failure to make objection. In the trial of issues responsibility for objecting to testimony offered must rest with counsel for the parties. A judge hesitates to interfere to exclude evidence which the parties appear to be willing to bring before the jury. On many trials evidence is elicited and suffered to go to the jury which appears immaterial, and which, to the mind of the court, only serves to confuse the issue, but the judge cannot know what the counsel have in mind or what bearing the proposed evidence may have on the entire transaction, which is known to the parties and not to the court. And in the case at bar the responsibility must rest with defendant's counsel.

In this case the property was sold, and it was conceded that the usual commission on such sales was 1 per cent. Plaintiff claimed that he acted with another broker. This other broker received one-half the usual commission. It is true that he divided that one-half commission among a number of other claimants. But the other one-half of the usual commission was not paid to any one. It may well be that the jury considered this fact in connection with all the other testimony. If any of the brokers in the case had performed the whole work, it is unlikely that they would have failed to claim the remainder of the commissions. No one appears to claim it, but the plaintiff. If plaintiff is not entitled to it, there appears to be no other claimant, and this fact, coupled with plaintiff's demand and his testimony as to an express promise to pay him, believed by the jury, seems to present a case where I should not substitute my own judgment for that of the 12 jurymen who reached a verdict in less than 15 minutes after leaving the court room.

The motion for a new trial is denied.

(56 Misc. Rep. 659.)

TRENTON IRON CO. v. TASSI et al.

(Supreme Court, Appellate Term. December 12, 1907.)

1. GUARANTY—RIGHTS OF GUARANTORS—DEVIATION FROM CONTRACT.

A guarantor may stand upon the express terms of his contract, and is discharged by a deviation to which he does not assent, whether he is harmed thereby or not; and guarantors of an account need not prove damage through the creditor's failure to give them notice of the debtor's default in payments, as required by the contract of guaranty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, §§ 64, 77.]

2. SAME.

Where defendants guaranteed an account "to the extent of \$500," requiring the creditor to notify them of any default in payments, upon

which notice defendants agreed to see the account was paid and withdraw the guaranty, the creditor was not entitled to withhold notice of defaults until the indebtedness reached \$500, but was bound to give notice when the first default occurred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, § 77.]

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by the Trenton Iron Company against Louis Tassi and another. From a judgment for plaintiff, defendants appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Louis H. Reynolds, for appellants.

Manice & Perry, for respondent.

BRUCE, J. This action is brought to recover upon a guaranty made by the defendants to the plaintiff, as follows:

"New York, March 8, 1905.

"Trenton Iron Company, New York City—Gentlemen: We will guarantee C. Pagliughi's account with you for thirty days to the extent of \$300. Should he default in his payments, notify us and we will see the amount is paid, and withdraw this guaranty.

"Yours very truly,

Tassi Brothers."

"New York, September 8th, 1905.

"Trenton Iron Company, New York City—Dear Sirs: Under the same conditions as before, except that the time of payment be extended to sixty days, we are willing to guarantee an account of C. Pagliughi to the extent of \$500.

"Yours very truly,

Tassi Brothers."

Pagliughi had a running account with the plaintiff, but at no time prior to April 23, 1906, was his account overdue to the extent of \$500.

In the agreed statement of facts it appears that between the 24th day of October, 1905, and the 23d day of April, 1906, Pagliughi repeatedly defaulted in payments due the plaintiff for purchases made by him, and that prior to April 23, 1906, no notice of any of these defaults was given to the defendants.

It is the contention of the plaintiff that under the terms of the guaranty they were not required to notify the defendants of any default until Pagliughi's indebtedness, due and unpaid, aggregated the sum of \$500; and, further, that in any event it was incumbent upon the defendants to establish that by reason of the failure to give such notice they were damaged. It is well established that the obligation of a surety cannot be extended beyond what the terms of his contract fully import. He has a right to stand upon the express terms of the contract, and cannot be held if variation is made. It is not a question whether he has been harmed by any deviation to which he has not assented. He may stand upon a technical objection, and insist upon a fulfillment of the precise terms of the contract. *Barns v. Barrow*, 61 N. Y. 39, 19 Am. Rep. 247. By the terms of this guaranty it was expressly provided that the plaintiff should notify the defendants in case Pagliughi should default in his payments, to which the defendants add that in that event they would pay the account and withdraw the guaranty. Notice being required by the express terms of the contract, no proof of damage was necessary.

The plaintiff construes the guaranty to mean that they were required to notify the defendants of Pagliughi's defaults in his payments only when they aggregated the amount of \$500. If this construction were to be placed upon it, the statement of the defendants that they would withdraw the guaranty would be surplusage, since when the defaults amounted to \$500 the guaranty would be exhausted by its terms.

In the case of *Powers v. Clarke*, 127 N. Y. 417, 28 N. E. 402, the court said:

"A contract of guaranty, as all the authorities agree, should receive a reasonable interpretation, according to the intent of the parties as disclosed by the writing, which, in a case of ambiguity, may be read in the light of surrounding circumstances."

Interpreting this guaranty by this rule, it seems clear that it was the duty of the plaintiffs to notify the defendants when Pagliughi made his first default in order that they might see that the account was paid, and protect themselves by withdrawing the guaranty.

The judgment should be reversed, and a new trial ordered with costs to appellants to abide the event. All concur.

(56 Misc. Rep. 656.)

JEFFERSON BANK v. STARR et al.

(Supreme Court, Appellate Term. December 12, 1907.)

1. FRAUDS, STATUTE OF—PROMISE TO ANSWER DEBT OF ANOTHER—ORIGINAL PROMISE.

Indorsers of a note, having received and indorsed a check from the maker for its payment, on finding that he had not sufficient funds in bank to pay the check, promised the bank that if it would honor the check they would procure the assignment to the bank of accounts due the maker, the payment of which they would guarantee. The check was paid on the transfer of the accounts to the bank without the signature of the maker, the indorsers promising to procure his signature when he should recover from an illness. The maker repudiated the whole transaction as unauthorized by him, and collected the accounts. *Held*, that the guaranty of the indorsers of the payment of the accounts was not a promise to answer for the debt of another, within the statute of frauds, but an original promise, valid without writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, *Frauds, Statute of*, §§ 52, 53.]

2. SAME—PROMISE ON INDEPENDENT CONSIDERATION—BENEFIT TO PROMISSOR.

Promises in form collateral are, in reality, original when founded upon a new and independent consideration, and when the promisor receives the benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, *Frauds, Statute of*, § 50.]

3. ASSIGNMENTS—TRANSFER OF ACCOUNTS—UNAUTHORIZED DELIVERY.

Delivery of accounts of a debtor to a bank by indorsers of a check of the debtor, in consideration of the bank paying the check, though it had not sufficient funds of the debtor therefor, is not an assignment of the accounts, where it does not appear that such delivery was authorized by or known to the debtor, and he afterward repudiated the whole transaction.

Appeal from City Court of New York, Trial Term.

Action by the Jefferson Bank against Nathan Starr and Robert Starr

on a guaranty of payment of assigned accounts. From a judgment for plaintiff and an order denying a motion for a new trial, defendants appeal. Affirmed.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ. Mandelbaum Brothers (B. F. Einstein, of counsel), for appellants. Max D. Steuer, for respondent.

BRUCE, J. The defendants were indorsers upon, and had procured the discount, by the German Exchange Bank, of a promissory note of one Aronowsky, their brother-in-law. When the note became due Aronowsky gave the defendants his check upon the plaintiff bank, where he kept an account under the name of the Empire Belt & Purse Company, for \$1,000 to take up the note. The defendants indorsed this check, and delivered it to the German Exchange Bank. It reached the plaintiff bank through the clearing house on March 10, 1903, at about 11:30 a. m. Devlin, plaintiff's cashier, finding that Aronowsky did not have sufficient funds to meet the check, sent word to Aronowsky's place of business of the receipt of the check and the condition of his account. Devlin testified that shortly afterwards one Liebowitz, a bookkeeper of the defendants, came to the bank and stated that the defendants were very anxious to have the check paid "because they did not wish it to come back to their bank," and promised that if the plaintiff would honor the check the defendants would within a day or two procure the assignment to the plaintiff of certain outstanding accounts due Aronowsky, the payment of which the defendants would guarantee. Devlin, after consulting with Radt, the vice president of the plaintiff, told Liebowitz that if he would bring before 2 p. m. what the plaintiff considered satisfactory accounts, it would pay the check. He returned before 2 p. m. with a number of "bills and shipping receipts," which he delivered to the cashier, and after they had been examined the check was paid. Liebowitz stated that Aronowsky was ill, and that they could not then get his signature to make the proper assignment of the accounts, but that the plaintiff need not worry as the defendants were behind it, and that as soon as Aronowsky was better they would procure "his signature to the accounts." This was never done. Aronowsky later repudiated the whole transaction, and said that he had never authorized it, that it was all the work of the defendants, and that the plaintiff bank must look to them. He collected the accounts, and later went into bankruptcy. He continued his account with the plaintiff until April 1, 1903. After March 10th it was continuously overdrawn. On the 16th the overdraft was reduced to \$181.99, but when the account was closed on April 1st it amounted to \$908, for which amount the plaintiff obtained judgment below. The plaintiff subsequently brought suit against Aronowsky to recover the balance, but Aronowsky went into bankruptcy and the action was abandoned. Devlin, the cashier, was corroborated by Radt, the vice president. Liebowitz, however, contradicted both as to what occurred at the time the check was paid.

The principal defense relied upon by the defendants was that the "agreement, promise, or undertaking" of the defendants, if there was any, "is a special promise to answer for the debt, default, or miscar-

riage of another person," and therefore void under the statute of frauds. The trial justice decided that this was an original undertaking of the defendants, and I think his decision was correct. Aronowsky received no benefit from the honoring of the check, except a substitution of creditors. If the check had not been honored, he would have been indebted to these defendants. By the honoring of the check, he became indebted to the plaintiff. All the benefit of the transaction accrued to the defendants. Furthermore, the undertaking of the defendants was not to make good the \$1,000 if Aronowsky did not, but was to procure the assignment to the plaintiff of certain accounts due to Aronowsky, and to guarantee these accounts, and in the event that they failed to do this, to pay the amount of the check. Aronowsky was not obligated to assign the accounts, even if the bank did honor his check. In that event his obligation was to pay \$1,000, an entirely different thing. "It is well settled that promises which are in form collateral are, in reality, original, when founded upon a new and independent consideration, and when the promisor receives the benefit and will be held to be so construed." *Wysong v. Meyer*, 58 App. Div. 422, 426, 69 N. Y. Supp. 286; *Raabe v. Squier*, 148 N. Y. 81, 42 N. E. 516; *Clark v. Howard*, 150 N. Y. 232, 44 N. E. 695.

The court submitted to the jury the question whether or not Liebowitz was the duly authorized agent of the defendants in the transaction, and also whether or not this money was advanced by the plaintiff upon the undertaking of the defendants that these accounts would be assigned to the bank by Aronowsky within a few days. The jury determined each of these questions in the affirmative. The appellants urge that the delivery of the accounts constituted an assignment thereof. There is, however, no evidence tending to show that Aronowsky at the time either authorized or had knowledge of their delivery. On the other hand, he later told to the plaintiff's cashier that the transaction was wholly without his knowledge, and was altogether that of the defendants.

Judgment affirmed, with costs. All concur.

BROOKLYN BANK v. BARNABY.

(Supreme Court, Trial Term, Kings County. December 10, 1907.)

1. LIMITATION OF ACTIONS—BAR OF STATUTE—PAYMENT.

Code Civ. Proc. § 395, declares that an acknowledgment or promise contained in a writing, signed by the party to be charged thereby, is the only competent evidence of a new or continuing contract to take the case out of the statute, but that the section does not alter the effect of a payment of principal or interest. *Held*, that a payment on a note in order to bar the statute must be the deliberate, voluntary act of the debtor, or his act evidencing an intent to acknowledge the existence of the debt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 631, 632.]

2. SAME—PAYMENT BY AGENT—CASHIER OF BANK.

Where a note, secured by collateral, gave the payee bank express authority to sell the collateral and apply the proceeds to the payment of the note, and pursuant to such authority the cashier sold certain of the col-

lateral and indorsed the proceeds on the note, informing the maker thereof by letter, to which he did not reply, such payment was made by the cashier acting as the maker's agent, and was therefore sufficient to bar limitations.

Action by the Brooklyn Bank against Frank A. Barnaby on a note made by defendant February 12, 1894, to plaintiff's order for \$68,000, with interest payable on demand. The action was commenced September 12, 1906, to which defendant pleaded limitations. Judgment for plaintiff.

Prior to August 24, 1899, the defendant made certain payments on account of the note, which are not in dispute. On that day plaintiff alleges a payment of \$562.50, and another payment on December 10, 1901, on account of principal, \$1,437.50. Plaintiff also alleges a payment by defendant on account of interest on July 30, 1895, of \$500, and another interest payment on December 10, 1901, of \$337.50. Plaintiff alleges that there is a balance due of \$13,565. The defendant denies the four payments specifically referred to. The note in question is in the following form:

"\$68,000.

Brooklyn, N. Y., Feby. 12th, 1894.

"On demand, after date I promise to pay to the Brooklyn Bank of Brooklyn, or order, at the banking house of said bank, in funds current at the New York clearing house ——— dollars with interest at the rate of ——— per cent per annum, for value received, having deposited with said bank as collateral security 650 Brooklyn City R. R. Co.; 150 Lewis & Fowler Mfg. Co.; 30 Lewis & Fowler Girder Rail Co.; 2,000 Knickerbocker Bonds; 75 Knickerbocker Stock; 20 Brooklyn R. R. Exchange; 97 Lewis & Fowler Mfg. Co.; 297 Long Island Traction; 200 E. W. Bliss Co. Com.; 170 N. Y. & E. R. Stock; 100 E. W. Bliss Pfg.; 20 Eighth Ward Bank; 25 Eagle Warehouse; 100 B. O. R. R. Stock; 1,128 Lewis & Fowler Mfg. Co. Stock—which hereby authorize said bank, or its president or cashier, to sell without notice, at the board of brokers, or at public or private sale, at the option of said bank, or its president or cashier, in case of the nonperformance of this promise, applying the net proceeds to the payment of this note, including interest, and accounting to for the surplus, if any. In case of deficiency ——— promise to pay to said bank the amount thereof forthwith after such sale, with legal interest; and it is hereby agreed and understood that if recourse is had to the collaterals, any excess of collaterals upon this note shall be applicable to any other note or claim held by said bank against ——— and in case of any exchange of, or addition to the collaterals above named, the provisions of this note shall extend to such new or additional collaterals. The margin of collaterals on this note to be kept at not less than 20 per cent., or in default thereof the same to be payable on demand.

F. A. Barnaby."

As to the payments in dispute, it appears that on August 24, 1899, the defendant wrote a letter to plaintiff, requesting the delivery of 75 shares of the stock of the Knickerbocker Steamboat Company, deposited as collateral, and requested plaintiff to "accept in place thereof \$562.50." The letter was signed by the defendant, and the plaintiff's cashier delivered the stock to the defendant, and credited the money received on account of the loan represented by the note, indorsing the payment upon the note. On December 10, 1901, the plaintiff sold at private sale 25 shares of Eagle Warehouse stock, part of the collateral deposited, receiving therefor \$71 a share, in all \$1,437.50, and credited the proceeds on the loan represented by the note, indorsing thereon: "December 10th, 1901. Rec'd a/c within loan, fourteen hundred and thirty seven ⁵⁰/₁₀₀ dollars from sale of 25 shares Eagle Warehouse Co. Thomas M. Halsey, Cashier." The next day the cashier wrote and mailed to defendant a letter informing him of the sale of the collateral and the application of the proceeds. The defendant made no reply.

The defendant offered no evidence, but insists that the transaction of December 10, 1901, was not a payment sufficient to bar operation of the statute of limitations. A jury was waived, both parties moving for the direction of a verdict.

Dykman & Kuhn and John J. Kuhn, for plaintiff.

Myers & Goldsmith, Emanuel J. Myers, and Gordon S. P. Kleeberg, for defendant.

KELLY, J. To bar the statute of limitations there must be a deliberate voluntary act of the debtor or his agent, evidencing an intention on his part to acknowledge the existence of the debt. Section 382, Code Civ. Proc., provides that an action upon a contract, obligation, or liability, express or implied, must be commenced within six years after the cause of action has accrued. Section 395 of the Code provides:

"An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract, whereby to take a case out of the operation of this title. But this section does not alter the effect of a payment of principal or interest."

The defendant relies on a line of decisions to the effect that an involuntary payment, or a payment by operation of law, as through levy and sale under execution or by foreclosure and the like, is not sufficient to bar the statute. This may be so, but the payment in this case on December 10, 1901, was not such a payment. It was a payment made by defendant through his agent, the cashier, who was expressly authorized in writing signed by defendant to sell the collateral, without notice, at public or private sale, at his option, applying the proceeds to the payment of the note. And he was notified of the transaction, and in no way objected to the act of the cashier. Judge Rapallo says, in *Harper v. Fairley*, 53 N. Y. 442, cited by defendant:

"The reasoning of such cases as *McLaren v. McMartin*, 86 N. Y. 88, and *Pickett v. Leonard*, 84 N. Y. 175, determines that a part payment, whether made before or after the debt is barred by the statute, does not revive the contract, unless made by the debtor himself or by some one having authority to make a new promise on his behalf for the residue."

And to the same effect *Adams v. Olin*, 140 N. Y. 150, 35 N. E. 448; *Crow v. Gleason*, 141 N. Y. 489, 36 N. E. 497. In the case at bar the payment was made by the cashier acting as the agent of the defendant, under the express authority contained in the collateral note, a form of security used every day in the business world, and as to the legal effect of which there is, in my opinion, no question.

I therefore direct a verdict for the plaintiff for \$13,565, the balance due upon the note, with interest to be computed.

COX v. MANKIN.

(Supreme Court, Appellate Term. December 12, 1907.)

CONTRACT—PERFORMANCE—EXCUSES FOR BREACH—EVIDENCE—PREJUDICIAL ERROR.

In an action to recover a deposit made to insure performance of a contract to install windows, in which the defense was a failure to complete the contract in time, the exclusion of evidence that defendant notified the superintendent and foreman of plaintiff in charge of the work, that the work could not be completed until the window frames and moldings were placed, was prejudicial error, as the evidence would have tend-

ed to corroborate the claim of defendant that failure to complete the work was due to causes within the control of plaintiff.

Appeal from Municipal Court, Borough of Manhattan, Thirteenth District.

Action by Arthur S. Cox against Harris Mankin, to recover money deposited to secure performance of a contract. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Nathan Greenbaum, for appellant.

Wentworth, Lowenstein & Stern (Edwin F. Stern, of counsel), for respondent.

BRUCE, J. This action is brought to recover the sum of \$210 deposited by the plaintiff with Louis Goldstein to secure payment to the defendant for labor to be performed and materials to be furnished in installing glass in the premises at Nos. 65-67 Broome street, borough of Manhattan, city of New York. The action was brought against Goldstein, upon whose motion the defendant herein was interpleaded. It is conceded that the defendant failed to complete the contract at the time agreed upon, and that the plaintiff thereupon employed others to complete the work. The defense offered was that the delay was caused by the failure of the plaintiff to have a part of the window frames and mouldings in position so that the glass could be installed. Upon this question the evidence of the plaintiff and the defendant was at variance. The contract called for the placing of 12 large plate windows, and the defendant admits that he installed only 7. The defendant offered evidence tending to prove that he repeatedly notified Levy, who, it appears, was the superintendent and foreman of the plaintiff, that he would be unable to complete his work at the time specified on account of the absence of the window frames and mouldings. The trial court excluded this evidence, stating that Levy had no authority to represent the plaintiff with respect to this matter, to which the defendant duly excepted. We think the exclusion of this evidence was error, and that it was highly prejudicial to the defendant. Levy testified that he was the superintendent and foreman of the plaintiff in charge of this work. The evidence excluded would have tended to corroborate the defendant that his failure to perform his contract within the time agreed upon was due to causes which were entirely within the control of the plaintiff.

The judgment should therefore be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

(56 Misc. Rep. 212.)

COCHRANE v. ALEXANDRE et al.

(Surrogate's Court, Onelda County. October, 1907.)

1. PERPETUITIES—ACCUMULATION OF INCOME.

A will provided for the payment of income of a share of the estate by the trustee to the guardian of the beneficiary, less the sum of \$5,000 annually while under the age of 15 years and less the sum of \$10,000 annually until majority, after which the beneficiary was to receive \$15,000 annually until he was 25 years of age, at which time the principal sum is to be turn-

ed over, less so much as is required to produce an annual income of \$10,000, such latter sum to be held in trust for the beneficiary's life, with remainders over. *Held*, that the directions for accumulation of income during minority are invalid, so far as the accumulation is sought to be made a part of the fund to be held in trust after the beneficiary became of age, and on attaining majority he is entitled to such accumulation and the entire income without deduction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 89, Perpetuities, §§ 67-73.]

2. JUDGMENT—RES JUDICATA.

Where trustees' accounts are settled from time to time during the minority of the beneficiary, the decrees rendered do not estop the beneficiary from asserting the invalidity of the provisions for accumulation of income on his becoming of age.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 80, Judgment, § 1214.]

Action by John W. Cochrane, trustee of James Joseph Alexander, deceased, against Leonie Alexandre and others, to construe a will. Motion for commission to take certain testimony denied.

Ernest P. Hoes, for plaintiff.

Eugene D. Alexander, for defendant Jerome Alexandre.

Augustus N. Hand, guardian ad litem, for defendant Natalie Alexandre.

Robert Thorne, guardian ad litem, for Leonie Alexandre.

J. Albert Lane, guardian ad litem, for defendants Helen L. Alexandre and others.

BISCHOFF, J. The question before me concerns the disposal of certain income accruing from a trust fund created for the benefit of the defendant Jerome Alexandre by the will of James Joseph Alexander, deceased. The will provided for the payment of the income by the trustees to the guardian of the beneficiary during infancy, less the sum of \$5,000 annually while he should be under the age of 15 years, and less the sum of \$10,000 annually during the succeeding period until his majority. Upon the beneficiary's attaining the age of 21 years, the trustees were directed to pay him the sum of \$15,000 per annum until he should reach the age of 25 years, then to pay over to him the principal sum, less so much as would be required to produce an annual income of \$10,000; this sum so deducted to be held upon trust for the beneficiary's life with certain remainders over. All accumulations of income within these provisions were directed to be added to the principal of the trust fund. The defendant Jerome Alexandre having attained the age of 21 years, and having asserted the right to the possession of all accrued income, as well as to the enjoyment of the full annual income now accruing from the trust fund, the plaintiffs have brought this action for a construction of the will, to the end that their duties may be defined.

There can be no doubt that the direction for the accumulation of income during minority was invalid, so far as the accumulated money was sought to be made a part of the fund to be held upon trust after the period of nonage had expired. Accumulations of income may be directed for one purpose only, and within a single period, for the benefit of an infant and during minority (4 Rev. St. [8th Ed.] pt. 2, c.

1, tit. 2, §§ 37, 38; *Id.* pt. 2, c. 4, tit. 4, §§ 3, 4; Real Prop. Law, Laws 1896, p. 568, c. 547, § 51; Pers. Prop. Law, Laws 1897, p. 508, c. 417, § 4); and, as judicially interpreted, the statute prohibits further disposal of the accumulated fund upon any trust, with the result that the beneficiary upon attaining his majority is entitled to the accumulations which have actually been made (*Pray v. Hegeman*, 92 N. Y. 508; *Hascall v. King*, 162 N. Y. 134, 56 N. E. 515, 76 Am. St. Rep. 302; *Barbour v. De Forest*, 95 N. Y. 13). So, too, within the same rule, the directions in the will before me for the accumulation of income after majority and during a future period are clearly invalid, and the beneficiary—presumptively entitled, as he is, to the “next eventual estate” upon his attaining the age of 25 years—becomes, by virtue of the statute, entitled to the income thus undisposed of by valid direction. Real Prop. Law, Laws 1896, p. 568, c. 547, § 53; *United States Trust Co. v. Soher*, 178 N. Y. 442, 450, 70 N. E. 970.

But, while conceding the invalidity of these directions for an accumulation, as an original question, the parties whose interests are favored by the carrying out of the directions contend that that defendant Jerome Alexandre is estopped by adjudication to assert that invalidity. It appears that during this defendant's minority successive accounting proceedings were instituted in the Surrogate's Court, to which proceedings he was a party, represented by special guardian, and that decrees were entered settling the accounts of the trustees, whose acts, in purported compliance with the will, were thus approved. Were the validity of the provisions for the accumulation involved in the very matter brought before the surrogate for decision, the decrees which expressed the ultimate result would be deemed to have concluded the question, notwithstanding that the point was not actually litigated (*Thorn v. De Breteuil*, 179 N. Y. 64, 71 N. E. 470); but, as I view the case, no such situation arose here. In none of these earlier proceedings was the question of the ultimate distribution or application of the accumulated income involved. The accounts show the fact that there had been an accumulation; but an actual inclusion of this fund with the principal trust fund was not suggested, nor was its propriety a matter for incidental decision.

To the extent that the will directed the accumulation during infancy, the accounts show that the trustees had observed it, by adopting a schedule to set forth the items of accumulations styled “special trust fund.” So far, as to the validity of the will, the surrogate may be deemed to have registered a decision, but no further, since the accounts and the decrees settling them related wholly to the past, and nothing was asked or required in the way of a determination of the disposal of the “special trust fund.” Needless to say no such determination could be appropriately made in the accounting proceedings, while the beneficiary was still a minor; for the contingency of his death during infancy left the situation an open one, as to which no decision upon a speculative state of facts could aid the trustees in their then duties nor affect the passing of the accounts. The surrogate's power to construe wills not being general in character, but confined by the statute to the necessities of the case before him and as incidental to his determination (*Code Civ. Proc.* § 2472; *Id.* § 2481, subd. 11; *Washbon v. Cope*,

144 N. Y. 287-295, 39 N. E. 388), the adjudication expressed by these decrees certainly did not extend to the status of the accumulated income at the time when the beneficiary should reach his majority. The case of *Kirk v. McCann*, 117 App. Div. 56, 101 N. Y. Supp. 1093, is directly in point, and is conclusive as an authority that there was no estoppel by adjudication on the facts before me. Again, and for still another reason, there was no adjudication upon the provisions of the will which related to the accumulations of income during the period between the beneficiary's twenty-first and twenty-fifth years. Here there was to be an accumulation only in the event that the income exceeded \$15,000 per annum; and the necessary uncertainty as to this rendered the question quite immaterial, in any aspect to the passing of the accounts.

I conclude that upon the attainment of his majority the defendant Jerome Alexandre became entitled to the income accumulated during his infancy, and that he is also entitled to the full income from the trust fund as it accrues pending the payment over of the principal and the retention of the smaller trust fund by the trustees upon his reaching the age of 25 years.

The defendant Leonie Alexandre, an infant, the beneficiary of a trust upon identical terms, prays for a similar construction of this will as to her interests, depending upon her reaching the age of 21 years. All parties being before the court and a general construction being sought, the decree may properly cover this phase of the controversy; and it may be framed accordingly, with provision for costs to all parties payable out of the corpus of the two trust funds.

Form of decree may be presented on notice of settlement.
Judgment accordingly.

(56 Misc. Rep. 216.)

IN re NEIDNIG'S ESTATE.

(Surrogate's Court, Kings County. October, 1907.)

JUDGMENT—FOREIGN JUDGMENT—IMPEACHMENT.

Where the paternity of the petitioner was established in Germany more than 20 years ago, and on account thereof money was paid to the petitioner by his alleged father on his attaining his majority, a commission will not be issued at his request to take the testimony of witnesses in Germany to impeach the correctness of such determination.

In the matter of the estate of Andrew Neidnig. Motion for issuance of a commission. Motion denied.

Edmund Fletcher Driggs, for petitioner.

Watson & Kristellar (Charles H. Kelby, of counsel), for respondents.

CHURCH, S. The question involved in this motion for the issuance of a commission to Germany is the legitimacy of the administrator. A legal proceeding was had in Germany, shortly after the petitioner's birth, in which his mother averred that his father was a man other than the deceased herein; and, as a result of this proceeding, a substantial sum of money was paid by said alleged father;

the proportion of that which was allotted to the petitioner being collected by him on attaining his majority.

The petitioner asks for a commission to take the testimony of the burgomaster who was at the trial, and also of two persons who, it is claimed, heard the deceased acknowledge that he was the father of the petitioner. A decree of a foreign court having jurisdiction of the cause and of the parties is entitled to full credence here. *Hilton v. Guyot*, 159 U. S. 112, 16 Sup. Ct. 139, 40 L. Ed. 95. If obtained by fraud, or without jurisdiction, there are circumstances under which it may be assailed, but that must be by the party who has suffered by the fraud; but the petitioner here is the party who has benefited by the fraud, if any, and to permit statements of the burgomaster, or any one else, as to what took place at a trial held over 20 years ago, would be improper. Concerning the testimony of the other witnesses, as it does not appear that the same is competent, a commission should not issue to them.

Motion denied.

(56 Misc. Rep. 229.)

IN RE CAMPBELL'S ESTATE.

(Surrogate's Court, Erie County. October, 1907.)

1. ADMINISTRATORS—REVOCATION OF LETTERS—GROUNDS.

Code Civ. Proc. § 2885, subd. 1, authorizing revocation of letters of administration of a person "Incompetent or disqualified by law," refers to section 2861, forbidding the issuance of letters of administration to certain persons, and not to the effect of a subsequent application for letters by one having a prior right.

2. SAME.

Where the surrogate, by consent of all the parties to a proceeding therefor, has issued letters to a creditor, and the administrator has qualified, his letters will not be revoked because in the petition it was alleged that the decedent was older and his estate less than in fact they were; such erroneous statement not being "a false suggestion of a material fact" within Code Civ. Proc. § 2885, subd. 4, authorizing a revocation in such case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 193.]

Application for revocation of letters of administration on the estate of Robert M. Campbell, deceased. Application denied.

Kellogg & Baker, for petitioner.

George F. Schultz (Daniel J. Kenefick, of counsel), for administrator.

HART, S. The decedent had been a successful practicing physician and well-known resident of the city of Buffalo for a number of years. During the latter years of his life he had given up the practice of his profession and lived an isolated life in comparative obscurity. The intestate died at the city of Buffalo on May 27, 1907, after an illness of short duration, unattended by any of his relatives or former friends.

A petition for administration upon his estate was filed with this court on May 29th by Dr. Edw. N. Pfohl, who had attended the deceased during his last illness, praying that letters issue to him as a

creditor. At the time of the filing of the petition there appeared before me one Sammis, a nephew, residing in Canada, the petitioning creditor, two attorneys, one of whom had been intimate with the deceased, and the undertaker, also a creditor. An inquiry was had into the facts and circumstances; it appearing that the deceased left surviving him relatives in Canada and one brother in California. All parties present joined in the application asking the appointment of Dr. Pfohl, and letters of administration were issued to him without the issuance of a citation. The surrogate exercised the discretion vested in him by section 2663 of the Code of Civil Procedure and dispensed with the issuance of a citation to the nonresident relatives. Subsequently the administrator appeared voluntarily and made application for modification of his official bond on account of the discovery of assets in excess of the amount alleged in the original petition, and appraisers were appointed at his request; also, an order directing the publication of a notice to creditors.

A petition for the revocation of letters of administration was filed in the latter part of July, 1907, in behalf of the brother, a resident of California. Upon the return day of the citation issued thereon, the administrator appeared and by counsel opposed the application. The petitioner asserts that there was a false suggestion of material facts made to the surrogate in the petition for administration, within the meaning of subdivision 4, § 2685, of the Code of Civil Procedure, in that the age of James Campbell was stated therein to be 75 years, when in truth it was but 62, and in that the value of the estate was estimated in the petition at \$15,000 and is in fact \$45,000. I do not regard these discrepancies as at all material, and the fact that James Campbell was 13 years younger and the estate \$30,000 greater would not have influenced my action in dispensing with citation to the nonresident relatives and awarding letters to Dr. Pfohl. The petitioner relies upon an interpretation of subdivision 1, § 2685, of the Code, citing *Matter of Tyers*, 41 Misc. Rep. 378, 84 N. Y. Supp. 934. The cases are readily distinguishable. In the case cited the nonresident brother was diligent and had presented a petition; and, presumably, while procuring his bond, a zealous creditor anticipated him and secured letters which were subsequently revoked for obvious reasons. The administrator in this estate had been regularly appointed, has qualified, and is administering the estate with full protection to all persons interested. He has given a surety bond of a responsible company which reserves joint control of the funds of the estate.

The phrase "incompetent or disqualified by law," as used in section 2685 of the Code, I believe refers to the provisions of section 2661 of the Code, and not to the question of prior right of a nonresident to administer.

The application of the petitioner for revocation of letters is therefore denied.

(56 Misc. Rep. 616.)

In re SEITZ.

(Supreme Court, Appellate Term. December 12, 1907.)

1. EXECUTION—SUPPLEMENTARY PROCEEDINGS—ACTS CONSTITUTING CONTEMPT.

Under Code Civ. Proc. § 2281, providing that where accused has committed a contempt that was calculated to, or did, defeat, impair, impede, or prejudice the rights or remedies of a party, etc., the court must make a final order directing that he be punished by fine or imprisonment or both, failure of a judgment debtor to appear for examination under an order in supplementary proceedings is a contempt justifying a fine, irrespective of proof of actual damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 1197-1200.]

2. SAME—PUNISHMENT.

Where a judgment debtor is fined for contempt for failure to appear for examination in supplementary proceedings, the mere fact that the fine imposed equals the amount of the judgment in favor of the creditor and the costs of the proceeding would not be ground for reversing the order to punish for the contempt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 1202.]

3. SAME—WAIVER BY ATTORNEY FOR JUDGMENT CREDITOR—EFFECT.

Where it appears that, after issuance of an order to a judgment debtor to appear for examination in supplementary proceedings, the attorney for the judgment creditor informed the debtor by telephone that the requirement of the order would not be insisted on for thirty days, the debtor should not be punished for contempt in failing to appear for examination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 1197-2000.]

Appeal from City Court of New York, Special Term.

Application by Joseph Seitz, judgment creditor, to punish Joseph Keitel, judgment debtor, for failure to appear for examination in proceedings supplementary to execution. From an order imposing a fine equalling the judgment and costs, defendant appeals. Reversed.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Ralph B. Ittelson, for appellant.

Cornelius J. Earley, for respondent.

PER CURIAM. This is an appeal from an order granting a motion to punish the judgment debtor for contempt for failure to appear for examination in supplementary proceedings, and imposing a fine of \$186, the amount of the judgment in favor of the judgment creditor, together with the costs of the proceeding.

It is the contention of the appellant that, in the absence of proof of actual damage, the court had no power to impose a fine in the amount of the judgment, but solely to impose such fine as the court in its discretion deemed proper to maintain the dignity of the court. Section 2281 of the Code, however, provides that, where the failure to obey such an order was "calculated to," or did actually, defeat, impair, impede, or prejudice the rights or remedies of a party to an action, the court may impose a fine, and the authorities hold that such fine may be imposed irrespective of whether actual damage is proven. *Swenarton v. Shupe*, 40 Hun, 41; *Moffat v. Herman*, 116 N. Y. 131, 22 N. E. 287. The mere fact that a fine imposed happens to be identi-

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cal with the amount of the judgment in favor of the judgment creditor would not be ground for reversal of the order. The statute is remedial in character, and certainly was intended to preserve and promote "the rights or remedies of a party to an action," so that it necessarily follows that a failure to comply with an order based thereon is "calculated to" defeat, impair, impede, or prejudice such rights. The more serious point, however, is that raised by point 1 of defendant's brief, that the judgment debtor was not guilty of contempt for the reason that he was not given a reasonable opportunity to appear for examination. It appears by the affidavit of the attorney for the judgment creditor submitted in support of the motion that said attorney and the judgment debtor, subsequent to the issuance of the order in supplementary proceedings, had a conversation over the telephone, at the termination of which said attorney "told judgment debtor that he would hold the matter for 30 days, as he had promised, in order to give him an opportunity to arrange his matters so as to pay this judgment." The attorney denies that he agreed to call the matter off as claimed by the judgment debtor; but it is impossible to place any other construction upon the language admitted to have been used by the creditor's attorney than that it was intended that the requirement of the order should not be insisted upon for 30 days, and that the attorney waived the right to make such examination on the return day of the order. Judgment had been entered and execution issued, and there appears to have been no other matter to "hold off," save the examination in supplementary proceedings. The only other construction that might be placed upon the language so used would indicate an intent on the part of the attorney to enter a default and hold the order of the court over the head of the debtor in order to compel the fulfillment by him of an agreement entered into subsequent to the issuance of the order, an abuse of the process of the court which would be deserving of condemnation and censure.

The order should be reversed, with \$10 costs and disbursements.

(56 Misc. Rep. 676.)

MOPPAR v. WILTCHIK et al.

(Supreme Court, Appellate Term. December 12, 1907.)

1. PARTIES—DEFECT OF PARTIES PLAINTIFF—AMENDMENT.

In an action for damage to goods, where the pleadings were oral, so that a defect of parties could not be taken advantage of by demurrer, and upon the trial it appeared that plaintiff was not the sole owner of the injured property, defendants should be allowed to amend their answer, setting up the defect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 87, Parties, § 124.]

2. SAME—PLAINTIFFS—PERSONS IN INTEREST.

To maintain an action, plaintiff must be the only person possessed of any interest in the demand, so that, as a result of the litigation, all rights of action in respect thereto will be barred as against defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 87, Parties, § 18.]

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Kohos Moppar against Louis Wiltchik and another. Judgment for plaintiff, and defendants appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Morris A. Rabinovitch, for appellants.

Bennett E. Siegelstein, for respondent.

PER CURIAM. This action was brought to recover damages to merchandise injured by the leakage of water from pipes, which were being placed in premises leased by the plaintiff by a contractor employed by the defendant. We should not be inclined to disturb this judgment, were it not that it appeared upon the trial that the plaintiff was not the sole owner of the injured property. The proof shows that the plaintiff's son, one Louis Moppar, was a partner with plaintiff, and that the copartnership owned the damaged goods.

The pleadings were oral, and consequently the defect of parties could not be taken advantage of by demurrer. As soon as this fact was made to appear upon the trial, the defendants' counsel moved to amend the answer, setting up a defect of parties plaintiff. This motion was denied. It should have been granted. It affected a substantial right of the defendants, and was in the furtherance of justice. The rule is well settled that, to maintain an action, it must appear that the plaintiff is the only person possessed of any ownership or interest in the demand, so that, on a recovery and subsequent payment, all rights of action in respect thereto will be barred as against the defendants.

Judgment reversed, and new trial ordered, with costs to appellants to abide the event.

(56 Misc. Rep. 693.)

ROSENBERG v. JACOBSON et al.

(Supreme Court, Appellate Term. December 12, 1907.)

VENDOR AND PURCHASER—DEFECTS IN TITLE—WAIVER OF.

Objections to title to be taken, subject to two mortgages, in that one of the mortgages contained the "Brundage clause" and the "estoppel certificate clauses," and the other the "estoppel certificate clauses," are not of such a character that if made at the time fixed for closing title they could not have been obviated by the vendors, and hence are waived where the vendee did not tender performance and raise such objections at the time fixed for closing title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 267-270.]

Appeal from City Court of New York, Trial Term.

Action by Anna Rosenberg against George Jacobson and others. Judgment for plaintiff, and defendants appeal. Reversed, and a new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Levitt & Hetkin, for appellants.

Herman Roth, for respondents.

BRUCE, J. This action is brought to recover the deposit made by the plaintiff's assignee upon a contract for the sale of real estate and

the expense of examining title. By the terms of the contract the premises in question were to be taken, subject to two mortgages, which were not then in existence. On the day for the closing of the title plaintiff raised certain objections, which were waived upon the trial, and upon the strength of the objections so waived, made no tender of the balance of the purchase money.

Plaintiff now alleges that the defendants committed a breach of the contract in that one of the mortgages upon the premises contained the "Brundage" and the "estoppel certificate clauses," and the other the "estoppel certificate clauses." These objections now relied upon were not raised at the time set for closing title.

As stated by Mr. Justice Scott, in *Oppenheimer v. Knepper Realty Co.*, 50 Misc. Rep. 186, 187, 98 N. Y. Supp. 204:

"The rule is that tender of performance on the part of the vendee is dispensed with in a case, where it appears that the vendor is disabled from performance on the day fixed therefor. In such a case tender of performance on the part of the vendee would be a mere idle ceremony, and the vendee may, without tender or demand, sue for the money paid on the contract and for damages. *Ziehn v. Smith*, 148 N. Y. 558, 42 N. E. 1080. This rule, however, does not apply when it appears that the incumbrance constituting an objection to the title is one which is within the power of the vendor to remove. In such a case the vendee may not maintain an action unless he tenders performance and makes his objection at the time fixed for performance; for he will then be deemed to have waived the objection. But if the incumbrance be not one within the power of the vendor to remove, the vendee, in order to maintain an action, need not make tender or raise the particular objection at the time fixed for closing title. *Higgins v. Eagleton*, 155 N. Y. 406, 50 N. E. 287."

There are certain incumbrances as to which it may be presumed that the vendor, if his attention had been called thereto, could and would have removed.

The question is whether or not it can be said, as a matter of law, that the objections now made are of such a character that if made at the time they could not have been obviated by the defendants. *Higgins v. Eagleton*, supra; *Ziehn v. Smith*, supra.

Mr. Justice Woodward, in *Rosenberg v. Feiering* (Sup.) 105 N. Y. Supp. 812-815, in a similar action, where objection to the "Brundage clause" not raised at the time of closing title was subsequently relied upon, said:

"If the specific objection had been made, the defendant might have procured a modification of the extension instrument by eliminating that clause and should have been afforded an opportunity to do so, since she was entitled to an adjournment to June 15th, or earlier if she so elected by the terms of the contract. Clearly the specific objection to the tax clause was an afterthought presented for the first time on the trial in the manner heretofore stated, to the surprise if not astonishment of the defendant."

The reasoning in *Rosenberg v. Feiering*, supra, seems to be decisive as to the question involved here with reference to the "Brundage clause," and applies with equal force to the "estoppel clause."

In *Oppenheimer v. Knepper Realty Co.*, supra, cited by the learned trial justice in his opinion in this case, the objection made by the vendee was to an incumbrance consisting of an agreement that in case of the destruction of a party wall which was a part of the premises it

should be rebuilt at the joint expense of the owners, and this was declared in terms to be a covenant running with the land. It is obvious that such an objection could not have been obviated by the vendor had it been raised at the time title was to have passed. In *Rosenberg v. Levitt*, also cited by the learned trial justice, in which case a judgment for the plaintiff was affirmed by this court without opinion at the June term, the objections raised by the vendee were the same as those raised in the case at bar, but they were made at the time agreed upon for the closing of title.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

MARCUS v. LIEBOVITZ.

(Supreme Court, Appellate Term. December 12, 1907.)

1. GUARANTY—CONSTRUCTION.

A guarantor is entitled to stand upon the letter of his contract, and his undertaking is to be construed strictly in his favor, and is not to be extended by implication or inference beyond the scope of its terms.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, § 28.]

2. SAME—CONDITIONS—BREACH.

In an action on a guaranty of the account of a third person for one year, with a condition that statements were to be rendered to the debtor on the first of each and every month for the account of the preceding month, and settlements to be made monthly, evidence that plaintiff rendered a statement on the first of the month, and was told that the month was not up till the seventh, and that the debtor would then pay, and that the debtor also stated that the figures were all right, and plaintiff waited until the seventh of the month before notifying the guarantor of nonpayment, did not as matter of law show a breach of the condition of the guaranty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, § 106.]

Appeal from Municipal Court, Borough of Manhattan, Thirteenth District.

Action by Louis Marcus against Harry Liebovitz on a guaranty. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Gustavus A. Rogers, for appellant.

Ruskay & Ruskay, for respondent.

PER CURIAM. On or about September 17, 1906, the defendant made and delivered to the plaintiff the following guaranty, viz.:

"In consideration of the sum of \$1, to me in hand paid, the receipt whereof is hereby acknowledged, I do hereby guarantee to L. Marcus (plaintiff) of 231 Water street, in the borough of Manhattan, New York City, the account of Morris Liebovitz, for one year, up to the sum of \$300. The conditions of this guaranty are that statements are to be rendered by the said L. Marcus to the said Morris Liebovitz, on the first of each and every month, for the account of the preceding month, and settlements are to be made monthly. In default of which conditions this guaranty is to be null and void."

The court found upon the trial of the action brought by plaintiff on said guaranty that "the plaintiff has failed to prove, on the evidence

presented to the court, that he rendered statements to Morris Liebovitz on the first day of each and every month for the account of the preceding months and made settlements monthly, as provided in the written guaranty under which he is attempting to hold the defendant Harry Liebovitz liable. In default of this evidence he has failed to make out a cause of action." The court, therefore, held that "the plaintiff is not entitled to recover as a matter of law, and judgment is that the action is dismissed on the merits, with costs."

It appears that plaintiff, relying on the guaranty, delivered coal to Morris Liebovitz between January 7, 1907, and February 7, 1907. As the court below based its decision on one feature of the case only, we will confine ourselves upon this appeal to a consideration of that branch of the case alone. The question, therefore, presented on this appeal, is this, does the testimony of plaintiff fail to show that he rendered a statement to Morris Liebovitz on the 1st of February, 1907, for the account of the preceding month, or that he made settlements monthly? The rule is that a guarantor is entitled to stand upon the letter of his contract, and his undertaking is to be construed strictly in his favor, and is not to be extended by implication or inference beyond the scope of its terms. The guarantor has a right to insist upon a strict compliance with the terms and conditions of his undertaking, and the time of credit must be given in strict conformity with the guaranty, and any deviation in this respect, however small, will exonerate the guarantor. *Walrath v. Thompson*, 6 Hill, 540; *Story on Contract*, 574; *Ward v. State*, 81 N. Y. 406; *National Mechanics' Banking Ass'n v. Conklin*, 24 Hun, 496.

Plaintiff's testimony is as follows, viz.:

"I handed him [Morris Liebovitz] a statement, with bill, on the 1st of the month [of February, 1907], and he said that the month would be up on the 7th, because he started on the 7th, and he said: 'On the 7th I will pay.' So Morris Liebovitz told me to wait until the seventh of the month, and he said: 'Besides you have got a guarantee for \$300, and I only owe you \$267. and if I don't pay, you can go to Harry Liebovitz, and you can get your money.' On the 7th I went down to Harry Liebovitz and saw him, and he claimed he was going to send me a check for it, which I never got. Q. Did you go over these accounts with Morris Liebovitz? A. The bookkeeper did, there. Q. Did you show him [Morris Liebovitz] the [guaranteed] account in your book? A. Yes. Q. Did he go over it, this guaranteed account? A. Yes. Q. What did he say about the correctness of the guaranteed account. What did he say about the figures? A. The figures were all right."

Whether he means that Morris Liebovitz so stated that the figures were all right, or whether he himself states that the figures were all right, is not altogether clear; but from the form of the question, to which this reply was made, it seems to be a reasonable inference that he refers to what Morris Liebovitz said. We are inclined to the opinion that plaintiff has sufficiently shown that he rendered a statement on the 1st of February for the account of the preceding month, and endeavored to have the settlements made monthly, as the guaranty required. He had a right to wait a while for Morris Liebovitz to pay up before applying to defendant on the guaranty. So that his apparent acquiescence, if any there be, in the suggestion of Morris Liebovitz to postpone payment, by waiting until the 7th before calling upon de-

fendant, can hardly be regarded as such an extension of the time of credit as exonerates the guarantor. There is nothing in the language of the guaranty to prevent plaintiff from so waiting seven days for Morris Liebovitz to pay up before calling the matter to the defendant's attention. Plaintiff had already done exactly what the guaranty required him to do, by presenting a statement on the 1st day of February of the account for the month of January, with a bill therefor, and demanding a settlement, i. e., payment. It seems to us that the learned court below fell into error in holding that "plaintiff has failed to prove * * * that he rendered statements to Morris Liebovitz on the first day of each and every month for the account of the preceding months, and made settlements monthly, * * * and that plaintiff is not entitled to recover as a matter of law." There is no dispute whatever as to any month preceding the month from January 7 to February 7, 1907, and as to that month, as we have seen, plaintiff has sufficiently shown compliance with the terms of the guaranty.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

MANN V. MERYASH.

(Supreme Court, Appellate Term. December 12, 1907.)

1. COURTS—NEW YORK CITY MUNICIPAL COURT—VACATION OF JUDGMENT TO PERMIT TRAVERSE OF RETURN OF SERVICE.

In the Municipal Court of the city of New York, a judgment cannot be vacated to permit a traverse of the return of service of summons.

2. SAME—VACATION OF JUDGMENT—NONSERVICE OF SUMMONS—STATUTORY PROVISIONS.

Prior to the amendment of New York City Municipal Court Act, Laws 1902, p. 1562, c. 580, § 253, by Laws 1907, p. 554, c. 304, no authority was given the Municipal Court to vacate or set aside a judgment for nonservice of summons, and the only remedy therefor was by appeal from the judgment, and serving and submitting affidavits that no service was made, which affidavits the plaintiff had the right to controvert.

3. SAME—OPENING DEFAULT AND SETTING FOR TRIAL—REQUISITES OF APPLICATION.

Where a defendant moves to vacate a judgment that he may traverse the return of service, but does not ask that the default be opened, and submits no proposed answer or affidavit of merits, nor declares that he has a defense, it is not an application for relief under New York City Municipal Court Act, Laws 1902, p. 1562, c. 580, as amended by Laws 1907, p. 554, c. 304, § 253, permitting a default to be opened upon motion and the case set down for trial, and the motion is properly denied.

4. SAME—APPEAL—DECISIONS REVIEWABLE—REFUSAL TO VACATE JUDGMENT.

Under the circumstances, an appeal did not lie from the order of the Municipal Court denying such motion.

5. SAME—REVIEW—ADDITIONAL PROOFS—MEETING AFFIDAVITS NOT SERVED.

Where affidavits that summons was not served on defendant, forming part of the return on appeal from a judgment of the Municipal Court against him, have not been served on plaintiff's attorney, and no notice was given him that defendant intended to rely on them on the appeal, an opportunity to controvert them should be given to plaintiff on appeal, if necessary.

6. PROCESS—SERVICE—RETURN—IMPEACHMENT—EVIDENCE—ADMISSIBILITY.

An affidavit of defendant's wife that she was served with summons in a certain action has no bearing on the question whether defendant was properly served therein.

7. SAME—SUFFICIENCY OF AFFIDAVIT.

An affidavit of a defendant that "he was never served with a summons and complaint in the action" is a mere conclusion, insufficient to overcome the sworn statement of the person who claims to have made the service, giving with exactness and particularity the time, place, and manner of service, and stating explicitly that the summons and complaint were delivered to and left with defendant personally.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 204.]

Appeal from Municipal Court, Borough of Manhattan, Thirteenth District.

Action by Samuel Mann against Louis Meryash. From a judgment for plaintiff, and an order denying a motion to vacate the judgment and permit a traverse of the return of summons, defendant appeals. Appeal from the order dismissed. Judgment affirmed.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Henry H. Silver, for appellant.

Joseph Gans, for respondent.

BRUCE, J. In this case the defendant appeared specially upon the return day of the summons, and filed no answer, but handed up an affidavit, verified by the wife of the defendant, in which she testified, in substance, that she had been served with a copy of the summons in this action. The court thereupon informed the defendant's representative that an affidavit of the defendant himself, showing that no service had ever been made upon him, should also be filed, as forming the basis for a dismissal of the action, and the court gave the defendant until 12 o'clock of that day in which to file an affidavit. No such affidavit was filed, and judgment was rendered against the defendant. The defendant then obtained an order to show cause why his default should not be opened and he be allowed "to traverse the return." This motion was denied, and the defendant appeals from the judgment and from the order denying his motion.

It is difficult to see just what the appellant intends to bring up for review upon this appeal. His motion in the lower court was that the judgment be vacated solely for the purpose of "traversing the return." No such practice exists in the Municipal Court. Prior to the amendment to section 253, Municipal Court Act, Laws 1902, p. 1562, c. 580 (chapter 304, p. 554, Laws, 1907), taking effect September 1, 1907, which amendment is not applicable to this case, there was no authority given to the Municipal Court to vacate or set aside a judgment for nonservice of a summons. *Diehl v. Steele*, 49 Misc. Rep. 456, 97 N. Y. Supp. 1024. The only remedy for a person who claimed that no process has been served upon him was by an appeal from the judgment, and, upon such appeal, serving and submitting affidavits showing that no service was ever made upon him, the allegations in such affidavits, the plaintiff in the action having the right to controvert. *Austen v. Columbia Lubricants Co.* (Sup.) 85 N. Y. Supp. 362. It is clear that the defendant did not intend that relief should be granted

him under section 253 of the Municipal Court act, as he did not ask that the default be opened and the case set down for trial, and he submitted no proposed answer, no affidavit of merits, and did not even declare that he had any defense, to the cause of action set up in the complaint. The court was clearly right in denying the motion, and no appeal will lie from the order made under such circumstances. *Bevins & Rogers*, App. Term Practice, 61, and cases there cited. The appeal from the order must therefore be dismissed.

For the purpose of disposing of the appeal from the judgment, we may consider it as having been taken under the provisions of section 311 of the Municipal Court act, and we may regard the affidavits submitted by the defendant in the court below, inasmuch as they form part of the return herein, as being the proof relied upon by him, on this appeal, to show nonservice of the summons. As such affidavits were never served upon the plaintiff's attorney, and no notice was given him that the defendant intended to rely upon them in this court, an opportunity to controvert the allegations contained therein would be given him if it was deemed necessary. Taking into consideration all the affidavits used, bearing upon the question of the service of the process, we are satisfied that the judgment should be affirmed. The affidavit of the defendant's wife has no real bearing upon the issue. That of the defendant is merely the bald statement that "he has never been served with a summons and complaint in this action." This is a mere conclusion, and gives no facts whatever. Opposed to this is the sworn statement of the person who claims to have made the service, giving with exactness and particularity the time, the place, and the manner of the service, stating explicitly and with positiveness that the summons and complaint was personally delivered to and left with this defendant and not with his wife, as testified to by her. These statements are not denied by the defendant in his affidavit. The judgment must therefore be affirmed. The defendant still has his remedy to move in the court below to open his default. Appeal from order dismissed.

Judgment affirmed, with costs. All concur.

(56 Misc. Rep. 673.)

DAXE v. HAJEK et al.

(Supreme Court, Appellate Term. December 12, 1907.)

1. MECHANICS' LIENS—ENFORCEMENT—PERSONAL JUDGMENT—ALLEGATIONS OF COMPLAINT.

Code Civ. Proc. § 8399, provides that a mechanic's lien can be enforced against the property and against a person liable for the debt on which the lien is founded. Section 8412 provides that, if the lienor fails to establish a valid lien in such an action, he may recover judgment therein for such sums as are due him, or which he might recover in an action on a contract against any party to the action. *Held* that, to base a personal judgment under these sections against any defendant, the complaint must allege facts which establish the liability of the defendant against whom such judgment is sought, and personal judgment must be demanded in the complaint against such defendant; and, in an action to enforce a lien for labor performed by plaintiff on a building under an agreement with contractors who were erecting it for the owners, where no

contract relation was shown between plaintiff and the owners, and there was no demand in the complaint for a personal judgment against any of the defendants, it was error to render a personal judgment against some of the owners and one of the contractors.

2. COURTS—MUNICIPAL COURT OF CITY OF NEW YORK—MECHANICS' LIENS—ENFORCEMENT—JUDGMENT.

Municipal Court Act, Laws 1902, p. 1488, c. 580, § 1, subd. 11, as amended by Laws 1905, p. 1173, c. 513, provides that the Municipal Court shall have jurisdiction in an action to enforce a mechanic's lien on real property, and may render judgment for the sum due, and declare the amount a valid lien against the interest of the defendant, in the property described in the complaint, at the time of the filing of the lien, where the amount does not exceed \$500, exclusive of interests and costs, but cannot render judgment for the foreclosure and sale of the property. *Held*, that the court is limited to rendering a simple money judgment against a defendant, to be enforced by an execution authorizing a sale of the interest of the judgment debtor in the property at the time the lien was filed; and, where plaintiff had performed labor on a building under an agreement with contractors who were erecting it for the owners, and the owners owed the contractors an amount greater than the sum which the contractors owed plaintiff and for which he claimed a lien, in an action on such lien in the Municipal Court, plaintiff's remedy against the owners was not by personal judgment against them, no such judgment having been demanded in the complaint, but by a sale under an execution of their interest in the premises to the amount of plaintiff's claim, which sum the owners could then offset against the claim of the contractors against them.

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Mayer Daxe against Frank Hajek and others to foreclose a mechanic's lien. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

W. E. Benjamin, for appellants.

Herman R. Elias, for respondent.

GILDERSLEEVE, P. J. The facts in this case are substantially as follows: The action is brought to foreclose a mechanic's lien. The defendants Hajek (Frank and William), Zahradnik, hereinafter called the "owners," and one Newberry, a copartner of said owners, made a contract with the defendants Joseph and Josephine Bernascheff, hereinafter called the "contractors," to erect a building on certain premises. The contractors fully performed their contract, and at the time the lien of the plaintiff was filed there was due from the owners and Newberry the sum of at least \$319. During the progress of the work plaintiff made an agreement with the contractors to paint the building. The painting was a part of the work to be done by the contractors. The price to be paid plaintiff therefor was \$125, and he fully performed the labor, and, when the lien was filed, that sum was due the plaintiff. The lien was duly filed against the owners and the contractors, and proper service thereof made upon them. The answer admits the ownership of the property in the two Hajeks and Zahradnik, and substantially denies the other allegations of the complaint. The complaint asks for judgment, that plaintiff has acquired a valid lien on the property for \$125, and that the interest of the owners be

sold, and plaintiff's lien paid out of the proceeds, together with the cost and expenses of the sale and of this action, and for such other and further relief as may be just. No demand is made for a personal judgment against any of the defendants. After the case was tried the court rendered the following judgment:

"That plaintiff have a valid mechanic's lien for the sum of \$125, with interest from January 25, 1907, at the rate of 6 per cent. per annum, against the said property of the defendant Frank Hajek, William Hajek, John Zahradnik, and Harold Newberry, and that the plaintiff have judgment against Frank Hajek, John Zahradnik, and Josephine Bernascheff for the sum of \$125, with interest thereon from the 25th day of January, 1907, at the rate of 6 per cent. per annum, besides the costs and disbursements of this action."

The judgment then directs a sale of the title and interest of the owners in the premises, and the payment of the plaintiff's judgment out of the proceeds of such sale. It also provides that:

"In case of any deficiency arising upon such sale, the plaintiff have a judgment against the said defendants Frank Hajek, John Zahradnik, and Josephine Bernascheff for such deficiency."

The appellants claim that the judgment gives more than is demanded in the complaint, and wrongfully allows a personal judgment against the two owners as well as against one of the contractors. Why the defendants William Hajek, Harold Newberry, and Joseph Bernascheff are not included in the personal judgment does not appear. Municipal Court Act, Laws 1902, p. 1488, c. 580, as amended by Laws 1905, p. 1173, c. 513, § 1, subd. 11, provides that the Municipal Court shall have jurisdiction in "an action to enforce a mechanic's lien on real property, in which the court shall have power to render judgment for the sum due, and to declare the amount a valid lien against the interest of the defendant in the property described in the complaint, at the time of the filing of the lien, where the amount does not exceed \$500 exclusive of interest and costs; but said court cannot render judgment for the foreclosure and sale of the property." See, also, *Drall v. Gordon*, 51 Misc. Rep. 618, 101 N. Y. Supp. 171. Section 3399 of the Code provides that a mechanic's lien can be enforced against the property and "against a person liable for the debt upon which the lien is founded." Section 3412 of the Code provides that:

"If the lienor shall fail, for any reason, to establish a valid lien in an action under the provisions of this title, he may recover judgment therein for such sums as are due him, or which he might recover in an action on a contract, against any party to the action."

In order, however, to base a personal judgment under these sections of the Code against any defendant, the complaint must allege facts which establish the liability of the defendant against whom such a judgment is sought, and personal judgment must be demanded in the complaint against such defendant. *Kane v. Hutkoff*, 81 App. Div. 110, 81 N. Y. Supp. 85. As there was no contract between plaintiff and the owners, they personally owed him nothing, and therefore no personal judgment against them could be obtained. *Siegel v. Ehrshowsky*, 46 Misc. Rep. 605, 92 N. Y. Supp. 733. As the owners owed the contractors \$319 and the contractors owed plaintiff \$125, plaintiff's

remedy against the owners was a sale, under an execution, of their interest in the premises, to the amount of the plaintiff's claim, which sum the owners could then offset against the claim of the contractors against them. Had the owners, however, in good faith and without collusion paid the contractors the full contract price, they would not be liable to the plaintiff for the amount due him from the contractors. *De Lorenzo v. Von Raitz*, 44 App. Div. 329, 60 N. Y. Supp. 736; *Droll v. Gordon*, supra; and cases cited. The Municipal Court is limited to the rendering of a simple money judgment against the defendant to be enforced by an execution authorizing a sale of the interest which the judgment debtor had in the property at the time the lien was filed. *Droll v. Gordon*, supra.

The judgment must be modified by striking out the personal judgment as to all of the defendants, and, as modified, affirmed, without costs of this appeal to either party. All concur.

(122 App. Div. 586.)

SHIELDS v. PAUL B. PUGH & CO. et al.

(Supreme Court, Appellate Division, First Department. December 6, 1907.)

1. NEGLIGENCE—INJURY TO PERSON ON STREET—BUILDING REGULATIONS—SHED OVER SIDEWALK—LIABILITY OF CONTRACTOR.

The New York City Building Code 1899, § 80, provides that, when buildings are erected or increased to over 65 feet in height upon or along a street, the owner, builder or contractor constructing or repairing them shall maintain a shed over the work in front of the premises to protect persons using the street. Greater New York Charter, Laws 1897, p. 15, c. 378, § 41, and city ordinance, provide that the owner or general contractor constructing a building over five stories in height shall build a temporary roof structure over the sidewalk of the building. *Held*, that a general contractor in charge of erecting a building above the height so specified who failed to construct such a covering was liable for the death of a mortar mixer struck by falling masonry, where the injury was caused by the contractor's neglect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 54.]

2. DEATH—ACTION—RIGHT OF PERSONAL REPRESENTATIVES.

The representatives of a person killed through failure to construct such covering have an action against the person liable for such failure under Code Civ. Proc. § 1902, giving them an action against any person negligently causing decedent's death who would have been liable therefor had death not ensued, though neither the building code nor the charter give a new cause of action.

3. NEGLIGENCE—VIOLATION OF STATUTE OR ORDINANCE—ACTIONS.

Failure to perform a duty imposed by a statute or ordinance is evidence of negligence, which, when injury results, gives a cause of action, and ordinarily justifies a jury in finding a verdict against the delinquent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 8.]

4. SAME.

The liability for an injury caused by failure to comply with the requirements of New York City Building Code, 1899, § 80, and Greater New York Charter, Laws 1897, p. 15, c. 378, § 41, that a covering shall be constructed over the sidewalk in front of a building being erected above a specified height, does not rest on any obligation of an employer to his employé, but on the duty imposed on one engaged in the construction of a building adjoining a public highway of protecting those in the street.

Appeal from Trial Term.

Action by Annie Shields, administratrix of Michael Shields, against Paul B. Pugh & Co. and another. From a judgment dismissing the complaint as against Paul B. Pugh & Co., plaintiff appeals. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Michael Schaap, for appellant.

Frank V. Johnson, for respondent.

INGRAHAM, J. The complaint alleges that the defendant Pugh & Co. was on November 28, 1902, and for some time prior thereto had been, engaged in erecting a building at or near 32 West Sixty-Fourth street, in the city of New York, and had general charge, management, and control of the said building and the erection thereof and the work thereon; that said building was over five stories in height, and was being erected over 65 feet in height; that the defendant Batton was a subcontractor of Pugh & Co. in the performance of certain mason work and masonry on said building; that the plaintiff's intestate was employed by the defendant Batton as a laborer, and on November 28, 1902, while engaged in mixing mortar in front of the said building, a heavy piece of masonry, terra cotta, brick, or similar substance fell from the upper part of said building, and struck the deceased, causing injuries which resulted in his death; that there was no shed, roof, structure, or other covering over the place where the deceased was at work, or over the sidewalk in front of the said building, and that the deceased's injuries were caused by the neglect of the defendant in failing to provide a proper, safe, or sufficient shed, roof, or structure over the sidewalk in front of the building where the deceased was at work. It is then alleged that section 80 of the Building Code of the City of New York approved on the 24th day of October, 1899, provides that:

"Whenever buildings shall be erected or increased to over sixty-five feet in height, upon or along said street, the owner, builder or contractor, constructing or repairing such buildings, shall have erected and maintained, during such construction and repair, a shed over the said work in front of said premises, extending from building line to curb, the same to be properly strong and tightly constructed, so as to protect pedestrians and others using such street."

It is further alleged that section 41 of the charter of the city of New York (chapter 378, p. 15, Laws 1897) provides that the owner or general contractor engaged in the construction or erection of any building over five stories in height "shall build or cause to be built a temporary roof structure over the sidewalk of said buildings," and that the injuries and death of the deceased were caused solely by the negligence of the defendants in that the said defendant Pugh & Co. failed to comply with the said provisions of the ordinance and charter.

The answer is a general denial. The case coming on for trial the complaint was dismissed as against Pugh & Co. because the complaint did not state a cause of action on the authority of *Koch v. Fox*, 71 App. Div. 288, 75 N. Y. Supp. 913. It is quite clear that that case

does not sustain the dismissal of the complaint. That was an action against the owner of the premises who was in Europe, and who had made a contract for the construction of the building with one Cabus; and it was held that the terms of the ordinance then in force were satisfied by a construction which requires compliance by the owner if he be doing the work by day labor or through contractors for separate parts, so that he retains charge and control of the building operation, and compliance by the general contractor if the work be all let by one contract, so that the contractor may be said to be independent, in that he has full charge and control of the entire work, subject only to such supervision as will insure to the owner compliance with the plans and specifications; that there was no difficulty in enforcing the ordinance against the general contractor. In this action it is alleged that the defendant Pugh & Co. were the general contractors in charge of the building, and therefore the duty was imposed on the defendant by the ordinance and the charter to erect a substantial covering over the sidewalk so as to protect pedestrians and others using the street. Whether the deceased could be said to be a pedestrian is doubtful. He was engaged in mixing mortar to be used in the construction of the building; but, if he was not a pedestrian, he certainly was lawfully using the street, and, if the general contractor had complied with the provisions of the building code and charter and erected a proper structure over the sidewalk, the deceased would have escaped the injury which resulted in his death.

It is quite true that neither the building code nor the provisions of the charter gave to the deceased nor to his personal representatives any new cause of action. His personal representatives have under section 1902 of the Code of Civil Procedure a cause of action against any person who has negligently caused the death of decedent who would have been liable therefor if death had not ensued. The effect of the ordinance is to impose upon this general contractor a duty to construct and maintain over the sidewalk a shed strong and tightly constructed so as to protect any one lawfully using the street in front of the building in course of erection. A failure to perform that duty is evidence of negligence, which, when injury results, gives a cause of action. It is a general rule that a violation of a duty imposed by a statute or ordinance is evidence of negligence which justifies a jury in finding a verdict against a person who has violated the statute or ordinance. *Marino v. Lehmaier*, 173 N. Y. 630, 66 N. E. 572, 61 L. R. A. 811; *Rooney, Adm'rs, v. Brogan Construction Company*, 107 App. Div. 258, 95 N. Y. Supp. 1; *Kiernan v. Eidlitz*, 109 App. Div. 726, 96 N. Y. Supp. 387. The distinction sought to be drawn between these cases and the present in that the deceased was not an employ   of Pugh & Co. is not material. The liability is not placed upon any obligation of an employer to his employ  , but a duty imposed upon one engaged in the construction of a building adjoining a public highway of protecting those in the street during the construction of the building. This duty is imposed upon the owner or contractor, and, while it is quite true that this court held in *Koch v. Fox*, supra, that the duty is imposed upon the owner only in the event that he retains control over the building operations, where an independent contractor undertakes the obligation

of building, it is clear that the ordinance and charter imposed a specific duty upon such a contractor, and a failure to perform that duty is evidence of negligence. In *Conroy v. Acken*, 110 App. Div. 48, 96 N. Y. Supp. 530, a new trial was ordered upon the ground that the question of the defendant's liability was for the jury, and this conclusion was affirmed by the Court of Appeals (185 N. Y. 566, 77 N. E. 1184); but the question discussed in the *Conroy* Case was not presented in this action, as it is here expressly alleged that the injury sustained by the deceased was the direct result of the negligence of the defendant *Pugh & Co.* in failing to comply with this ordinance.

I think a good cause of action was alleged, and it was error to dismiss the complaint.

It follows that the judgment must be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

BIELE v. LEVY.

(Supreme Court, Appellate Term. December 12, 1907.)

SALES—DELIVERY—TIME AS ESSENCE—COUNTERCLAIM.

Where plaintiff agreed to furnish defendant certain furniture, to be delivered on a certain date, knowing at the time that defendant needed the articles in order to commence carrying on business, time was of the essence of the contract; and in an action by plaintiff for a balance of the price defendant was entitled to counterclaim for damages from a failure of delivery at the time agreed, though he accepted a loan from plaintiff of furniture to take the place of that not delivered, until the delivery could be effected, since the acceptance of the loan cannot be regarded as a waiver of the defendant's right to damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 222, 976.]

Appeal from Municipal Court, Borough of Bronx, Second District. Action by Charles F. Biele against Aaron E. Levy for goods sold and delivered. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Cohen & Cohen, for appellant.

Charles H. Broas, for respondent.

PER CURIAM. The plaintiff agreed to furnish to defendant one show case, one table, five mirrors, and one cash desk, all to be delivered on October 1, 1906. The mirrors and cash desk were delivered on October 8th, and the show case and the table on October 24th. The agreed price was \$675, of which \$300 have been paid. Plaintiff sued for the balance, and obtained a judgment therefor with interest and costs. Defendant appeals.

The defense is that the failure to deliver the goods within the specified time prevented the defendant from doing business, and put him to a loss of \$500, and he counterclaims \$125, being the difference between the claim of plaintiff and the damages sustained by defendant. There is no doubt that time was of the essence of this contract, and that

plaintiff knew at the time the order was given that it was most important for defendant to have the goods as soon as possible, as he needed them before he could commence to carry on his business. It seems that plaintiff on October 12th loaned defendant some similar articles, until plaintiff had supplied the articles ordered; but the acceptance of this loan can hardly be regarded as a waiver of the defendant's right to damages for breach of contract as to the time limit, which had already expired, although such loan may be an element to be considered on the question of assessing defendant's damages for the said breach of contract. Whether defendant proved his full claim for damages or not, it is certain that he proved some damage, which should have been offset against plaintiff's claim.

The judgment should be reversed, and a new trial granted, with costs to appellant to abide the event.

BENNET v. LEVY.

(Supreme Court, Appellate Term. December 12, 1907.)

WORK AND LABOR—ACTIONS—JUDGMENT.

Where, in an action on an assigned claim for work done and materials furnished, the defendant admitted part of the debt sued for, a judgment for defendant was erroneous.

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by Henry Bennet against Moses Levy. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Laurence L. Driggs, for appellant.

Max L. Steuer, for respondent.

PER CURIAM. The action is on an assigned claim for work done and materials furnished of the alleged value of \$496. The answer admits a debt amounting to \$82. The justice gave judgment for defendant. Plaintiff appeals. At the end of the case the court said, "The judgment of the court is clearly for the defendant." The plaintiff's counsel then said, "There is a concession on the record of \$82." The defendant's counsel then said, "We admit \$82." To this admission the court replied, "Eighty-two dollars then would be the amount for the plaintiff." In spite, however, of the admission in the answer and at the trial that defendant owed \$82, the court gave judgment for defendant, with \$30 costs. The judgment is clearly against the evidence, and must be reversed. The articles in question consisted of a fur coat, muff, and hat made and delivered to the defendant by the plaintiff's assignor. It is the contention of the defendant that said articles were delivered upon the order of one Semel, and that the transaction fixed no liability upon defendant to the plaintiff's assignor, and that at the time of the alleged assignment to plaintiff the assignor had no claim against the defendant. There is considerable conflict of testimony upon the main issue. Upon another trial the dates of the sev-

eral conversations detailed should, if possible, be more definitely fixed, in order that the relation of oral to the documentary testimony may be accurately determined. A new trial must be ordered, with costs to the appellant to abide the event.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

(56 Misc. Rep. 641.)

KRAUS v. BLACK.

(Supreme Court, Appellate Term. December 12, 1907.)

1. CHATTEL MORTGAGES—DEFAULT—EFFECT.

Upon a breach of a chattel mortgagor's covenants, the title to the property vests in the mortgagee, subject only to the right of redemption, and the mortgagee may take the property into his possession at any time after default, without prior demand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 286-293.]

2. SAME—WAIVER.

Where a chattel mortgage provided that, on default in payment of any weekly installment, the whole debt should mature and the mortgagee might take possession of the property without prior demand, the mortgagee did not waive his right to foreclose without first demanding the property by accepting payments in amounts and at times other than those mentioned in the mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 524.]

Appeal from Municipal Court, Borough of Manhattan, Tenth District.

Chattel mortgage foreclosure action by Edward V. Kraus against Mildred G. Black. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and BRUCE and GUY, JJ.

Robert Lyon, for appellant.

Henry Brill, for respondent.

GILDERSLEEVE, P. J. On November 20, 1905, the defendant gave a chattel mortgage to the plaintiff to secure the purchase price of certain property purchased by her of the plaintiff. The mortgage provided that, in case default was made in payment of any of the installments provided for in the mortgage, the whole sum then remaining unpaid should become due, and the mortgagee had the right to take possession of the property without demand. The amount secured by the mortgage was to be paid in weekly installments. The defendant defaulted in making her payment in June, 1906, and the plaintiff brought an action to foreclose his lien in October, 1906. Upon the trial substantially the foregoing facts were shown, but the court below rendered judgment in favor of the defendant.

It appeared from the testimony that, although the mortgage provided that the installments to be paid by the defendant were to be made on Monday of each week, the defendant actually paid such installments in different amounts and at different times than was provided

for by the mortgage, which payments were accepted by the plaintiff, and that the parties did not adhere strictly to the terms of the mortgage in that respect. The respondent seeks to uphold this judgment upon the theory that the plaintiff, by accepting the payments in amounts and at times other than those mentioned in the mortgage, waived his right to institute these proceedings without first making a demand on the defendant for a return of the property. This position cannot be maintained. The case (*Toplitz v. Bauer*, 161 N. Y. 325, 55 N. E. 1059) cited in support of such a proposition does not apply to the facts in this case. That case was one involving the rights of pledgor and pledgee, and there is a notable distinction between that case and one like the case at bar involving the rights of a mortgagee and mortgagor of chattels. Upon a breach of the covenants in a chattel mortgage the title of the property mortgaged becomes that of the mortgagee, subject only to the right of redemption, and the mortgagee may take the property into his possession at any time after default without prior demand. There is nothing in the testimony showing that the plaintiff waived his right to institute these proceedings without first demanding the return of the property, and the judgment must be reversed.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

UNGHERO et al. v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Term. December 12, 1907.)

STREET RAILROADS—COLLISION WITH TEAM—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action for collision of a street car with a team, *held* that the negligence of plaintiffs' driver contributed to the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 210-216.]

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Domenick Unghero and another against the New York City Railway Company. From a Municipal Court judgment for plaintiffs, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

William E. Weaver, for appellant.

Leopold W. Harburger, for respondents.

PER CURIAM. This is one of the usual actions to recover for the alleged negligence of the defendant. The plaintiffs' driver was going east through Sixtieth street driving a horse attached to a light top buggy. When he reached the gutter on the west side, he saw a south-bound car on the northwest corner of Columbus avenue standing still, from 20 to 45 feet distant. He stopped his horse, but immediately started again, and at the same time the car also moved along, going at first slow, but gradually increasing its speed, and as the horse was nearly over the track the car hit the wagon near the front wheel,

causing the horse to fall, receiving the injuries complained of. The driver testifies that he raised his hand to the motorman, signaling him to stop the car, but at that time the car was only 7 or 8 feet distant. The facts above stated are those appearing in the record most favorable to the plaintiffs' case. Their mere recital shows that the plaintiffs' driver was clearly guilty of negligence contributing to the accident.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

LE GRECI v. SOLOMON et al.

(Supreme Court, Appellate Term. December 12, 1907.)

CONTRACTS—PARTIES INTERESTED—EVIDENCE—SUFFICIENCY.

Evidence in an action to recover for services rendered and materials furnished *held* to show that defendants were the real parties in interest, notwithstanding the addition of the words "for S., Trustee," to the signature of one of the defendants to the agreement.

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Nicoli Le Greci against George Solomon and another. Judgment for defendants, and plaintiff appeals. Reversed, and a new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

N. J. O'Connell, for appellant.

Thomas W. McKnight, for respondents.

PER CURIAM. This is an action to recover for services rendered and materials furnished by the plaintiff, a carpenter, at the agreed price of \$165, and for extra work and extra material, amounting to \$278.45. Of this \$165 there remained \$40 still unpaid. The main question litigated upon the trial, and the defense relied upon by the defendant, was that all the work performed and all the materials furnished were included in the contract, and that plaintiff did no extra work and furnished no extra materials. Upon this appeal, however, the main proposition relied upon by the respondent to support the judgment is that the contract was not made with the defendants, who were father and son, but with Louis Solomon, a brother of the defendant George Solomon. The defendants, in their motion to dismiss the complaint at the close of the plaintiff's case, did not refer to this as one of the grounds upon which the motion was based. The sole question litigated upon the trial seems to have been whether or not the plaintiff performed any extra work or furnished any extra material.

It appears from the evidence that the contract was in writing, and was signed, "George Solomon, for Louis Solomon, Trustee." The defendant George Solomon testified that he was associated in interest with his father, Moses Solomon, in these buildings; that this agreement was drawn by him (George Solomon); that Louis Solomon had nothing to do with these buildings as owner at the time the contract was made; and that his only purpose in adding to his signature "for

Louis Solomon, Trustee," was that the money for the completion of the work "was put in his brother's hands." He further testified:

"Q. What interest had Mr. Louis Solomon in the consummation of any contract with the carpenter? A. The contract was made with me. Q. Then you regarded that as made with you when you made the words there, 'Lew Solomon, Trustee'? A. It was made with me. Q. Is that your contract? A. This is my contract. Q. Why did you add the words 'for Louis Solomon, Trustee'? A. Because he had the money to complete the contract."

The fact that the defendants were interested in these buildings, and that Louis Solomon had no interest in them and was in no wise connected with them, except as a depository of the funds for their completion, taken together with the fact, disclosed by the evidence, that all the work was performed under the immediate supervision and direction of the defendant George Solomon, seems to adequately explain the addition of the words "for Louis Solomon, Trustee," to his signature to the agreement, and to establish, in the absence of any evidence to the contrary, that the defendants were the real parties in interest. It is unnecessary to discuss the question of extra work, since, as the evidence establishes that the plaintiff performed his part of the written contract, he was in any event entitled to recover the amount still due and unpaid upon the written contract.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

(56 Misc. Rep. 606.)

LUSTGARTEN v. HARLAM.

(Supreme Court, Appellate Term. December 12, 1907.)

REFERENCE—COMPULSORY REFERENCE—EXAMINATION OF LONG ACCOUNT.

In an action by a physician to recover for services rendered defendant's wife between certain dates, the complaint alleged that the reasonable value of the services was a certain sum, that defendant agreed to pay the same, and that later plaintiff rendered further services by giving advice over the telephone. Annexed to the complaint was a schedule setting forth the number and dates of the alleged visits to defendant's wife; but no schedule was given of the telephone calls. Defendant's answer admitted the hiring, but denied any knowledge as to the number of visits. It also denied that defendant agreed to pay plaintiff the sum alleged, or that such sum was the reasonable value of the services, and also denied all of plaintiff's allegations as to the telephone calls and their value. In his affidavit opposing plaintiff's motion for a reference, defendant swore that the services were rendered his wife while she was suffering from one illness. *Held*, that it was error to order a reference against defendant's will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reference, §§ 13-23.]

Appeal from City Court of New York, Special Term.

Action by Sigmund Lustgarten against Moses Harlam. From an order granting a motion for a compulsory reference, defendant appeals. Reversed.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Kellogg, Beckwith & Emery (Robert W. Crawford, of counsel), for appellant.

Edgar H. Rosenstock, for respondent.

PER CURIAM. Plaintiff made a motion for a compulsory reference, upon the ground that the trial of the issues would involve the examination of a long account and that no difficult or intricate question of law would arise on the trial. This motion was granted, and from the order granting the same defendant appeals.

The complaint sets forth that plaintiff, as a physician, rendered services to defendant's wife between May 18, 1906, and March 1, 1907, and that for said services defendant promised and agreed to pay to plaintiff the sum of \$1,455, which was, according to the complaint, the reasonable value of such services; that defendant has paid \$750 on account; that between October 12, 1906, and February 27, 1907, plaintiff rendered further and extra services by giving advice over the telephone, which extra services were worth \$300, making a total claim of \$1,005, for which plaintiff demands judgment. Annexed to the complaint is a schedule setting forth 1 alleged visit at \$5, 101 alleged visits at \$10 each, 26 alleged visits at \$15 each, and 2 alleged visits at \$25 each, with the date of each alleged visit, making up an alleged claim of \$1,455, upon which \$750 are acknowledged to have been paid. No schedule is given of the alleged telephone calls, for which plaintiff claims \$300, in addition to the balance of \$705 alleged to be due for the visits, making, as we have seen, a total claim of \$1,005. The answer admits the hiring of plaintiff by defendant, but denies knowledge or information sufficient to form a belief as to the number of visits. It further denies that defendant agreed to pay to plaintiff the sum of \$1,455 for the services rendered, or that such sum was the reasonable value of such services, and it also denies all of plaintiff's allegations concerning the alleged telephone calls and their alleged value. In his affidavit opposing the motion for a reference defendant swears that whatever services were rendered by plaintiff to defendant's wife were rendered while she was suffering from one complaint, and that the said services did not cover any separate illness of defendant's wife, which seems to be a reasonable inference from the allegation of the complaint that the services were rendered to defendant's wife for a malady under which she labored. It seems to us that the proof as to the number of visits and telephone calls would be merely formal, and that the alleged long account is not the immediate object of the action, and is not directly, but only collaterally, involved.

The main issue is: Did defendant promise to pay plaintiff the sum alleged, and was that sum the reasonable value of the visits and telephone calls? It would take but a short time to testify as to the number and dates of the alleged visits and telephone calls, and there is nothing in the papers in this case which would indicate that an average jury could no fully bear in mind and appreciate the evidence relating to the nature and value of the alleged services claimed to have been rendered by plaintiff to defendant. Under the conditions above indicated it was error to order a reference against the will of defendant. *Camp v. Ingersoll*, 86 N. Y. 443-436; *Aronin v. Philadelphia Casualty Co.*, 54 Misc. Rep. 630, 104 N. Y. Supp. 810; *Spence v. Simis*, 137 N. Y. 616-618, 33 N. E. 554; *Hedges v. Methodist Protestant Church*, 23 App. Div. 347, 348, 48 N. Y. Supp. 154; *Feeter v. Arkenburgh*, 147 N. Y. 237, 41 N. E. 518; *Prentice v. Huff*, 98 App. Div.

111-114, 90 N. Y. Supp. 780; *Randall v. Sherman*, 131 N. Y. 669, 30 N. E. 589; *Cantine v. Russell*, 168 N. Y. 484, 61 N. E. 769.

The order is reversed, with \$10 costs and disbursements, and the motion for a reference is denied, with \$10 costs.

(56 Misc. Rep. 677.)

FITZGERALD v. GOLDSTEIN.

(Supreme Court, Appellate Term. December 12, 1907.)

1. ADJOINING LANDOWNERS—NEGLIGENCE.

To charge an owner with negligence in failing to make repairs of his water pipes and prevent injury to an adjoining owner by an overflow, he must have notice, either express or implied, of the existence of the defective condition and a reasonable time thereafter to remedy the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, *Adjoining Landowners*, §§ 53-59.]

2. SAME.

A purchaser of a building not improperly constructed had no knowledge of a defect not discoverable through the exercise of ordinary care. On a Friday he received a notice of a defect causing injury to adjacent property. On the following Monday he made repairs, preventing further injury. *Held*, that he was not negligent as a matter of law in failing to make repairs within a reasonable time after notice of the defect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, *Adjoining Landowners*, §§ 53-59.]

3. NEGLIGENCE—RES IPSA LOQUITUR—APPLICATION OF DOCTRINE.

The doctrine of *res ipsa loquitur* does not apply where the cause of the accident complained of is fully explained.

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Julia Fitzgerald against Abraham Goldstein. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Samuel N. Freedman, for appellant.

Charles L. Hoffman (Henry A. Friedman, of counsel), for respondent.

GUY, J. Appeal from judgment rendered by the court without a jury in favor of plaintiff. The action is brought by plaintiff against the defendant as owner of a building adjoining the premises occupied by the plaintiff, to recover damages for injuries alleged to have been caused by the negligence of the defendant in carelessly and negligently permitting the Croton water pipes in defendant's building "to become and be in a worn state and condition," causing an overflow upon plaintiff's premises and resultant damage to plaintiff's property.

The evidence shows that defendant became the owner of said adjoining premises by purchase on January 27, 1907; and the negligence, if any, of the defendant must have arisen between that date and April 23, 1907, on which date plaintiff shows that the defective pipes were repaired and the flow of water onto plaintiff's premises ceased. The evidence fully establishes the fact that the Croton water pipes on de-

defendant's premises were in a defective condition, and that the damage to plaintiff's property was caused by an overflow from said defective water pipes. But plaintiff's agent testifies that the first time defendant's attention was called to such overflow was on Friday preceding the Monday when the repairs were made which stopped the overflow. He also testifies that the entire damage suffered by the plaintiff occurred before such notification of the defendant. The defendant testifies that he frequently visited his premises, and the cellar thereof, before such notification, and never noticed any overflow or dampness on his premises, and had no knowledge of the overflow until he was notified by the plaintiff. Defendant's testimony is supplemented by the testimony of defendant's witness Peltyn, who testified that he had frequently visited defendant's premises during the period in question, and never noticed any dampness; that he had used the toilets and sinks in defendant's premises, and never noticed any back water in them. Plaintiff's witness Lee also testified to the same effect.

There is no evidence that the building was improperly constructed and that defendant purchased the building with knowledge of such defects. On the contrary, the defects were concealed, and were such as would not have become known to the defendant through the exercise of ordinary care. It appears that it was only after the ripping up of the flooring by the plaintiff after frequent visits to defendant's premises that the defects were discovered. The rule is well established that, in order to charge an owner with negligence in failing to make repairs, he must have notice, either express or implied, of the existence of the alleged defective conditions and a reasonable time after such notice to remedy the same. *Spencer v. McManus*, 82 Hun, 318, 31 N. Y. Supp. 185; *Becker v. Bullowa*, 36 Misc. Rep. 525, 73 N. Y. Supp. 944; *Slater v. Mersereau*, 64 N. Y. 139. The evidence of plaintiff's witness clearly establishes that there was no unreasonable delay in the making of repairs after notice was given to the defendant; there being only one-half day (Saturday) intervening between the time of such notice and the beginning of the repair work by the plaintiff, which was continued and completed by the defendant.

It is sought by the plaintiff to invoke the doctrine *res ipsa loquitur* in this case. This doctrine would not apply, inasmuch as the cause of the accident is fully explained. The only question to be determined is whether the cause of damage was due to the negligence of the defendant in failing to make repairs within a reasonable time after actual or constructive notice thereof. In my opinion the plaintiff has failed utterly to prove negligence on the part of the defendant, and the trial justice erred in rendering judgment in plaintiff's favor.

It is unnecessary to consider the exceptions taken by defendant as to the admission of evidence. For the reasons above stated, the judgment should be reversed, and a new trial ordered.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

(56 Misc. Rep. 689.)

WELCH v. BUCHANS SOAP CORPORATION.

(Supreme Court, Appellate Term. December 12, 1907.)

1. JUDGMENT—CAUSES OF ACTION—SPLITTING.

Though separate actions may be brought on claims arising out of the same contract at different times as each liability accrues, if no action is brought until more than one claim is due, all claims that are due must be included in one action, or the recovery will bar matured claims not joined.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1118.]

2. SAME.

A written contract provided for the sale of 500 tierces of tallow, 100 deliverable during the last week in December, 1906, and 400 during the last week of January, 1907. The 100 tierces having been delivered and paid for, defendant, on January 17, 1907, requested plaintiff to deliver 250 of the balance the latter part of January, 1907, and the remaining 150 tierces the latter part of February, which was agreed to; but, defendant refusing to accept the tallow when tendered, it was sold in March for defendant's account, and on April 19, 1907, plaintiff sued and recovered judgment for damages resulting from the resale of the 250 tierces, which was satisfied of record. *Held*, that the change of deliveries did not substitute for the original contract two separate contracts for the delivery of 250 tierces in January and 150 tierces in February, but that the original contract remained in full force; and hence, plaintiff having failed to join his claim for damages resulting from the resale of the 150 tierces in his original action, the judgment therein was a bar to a subsequent suit therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1118.]

Appeal from Municipal Court, Borough of Manhattan, Twelfth District.

Action by Wilbur A. Welch against the Buchans Soap Corporation. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Frank H. Richmond, for appellant.

Graham & L'Amoreaux (Ralph Polk Buell, of counsel), for respondent.

GILDERSLEEVE, P. J. The action was tried on an agreed statement of facts, and the complaint was dismissed on the merits. Plaintiff appeals.

On November 16, 1906, defendant contracted with plaintiff for the purchase by defendant from plaintiff of 500 tierces of tallow, 100 to be delivered in December and 400 in January. The 100 tierces were taken and paid for. On January 15, 1907, before the time set for the delivery of the 400 tierces, defendant sought to have a resale of the same for its account, and was informed by plaintiff on January 17, 1907, that owing to the condition of the market such a resale would result in a considerable loss to defendant, and this proposition was abandoned. The original contract remained in force, except that a change was made as to the time of delivery, and it was agreed that 250 tierces should be delivered at the end of January and the remaining 150 tierces towards the end of February. Thereafter the 250

tierces and the 150 tierces were duly offered to defendant and rejected by it. They were thereafter, and on March 9, 1907, sold by plaintiff for defendant's account, and the sale realized a sum considerably less than the price fixed in the contract between plaintiff and defendant. Plaintiff on April 19, 1907, brought an action for the damages resulting from the resale of the 250 tierces, and recovered a judgment for the whole amount claimed, which judgment was paid and satisfied of record. Plaintiff at the same time—i. e., April 19, 1907—brought the present action for the damages resulting from the resale of the 150 tierces. The 250 tierces sued upon in the first action and the 150 tierces sued upon in this action were each part of the same contract between plaintiff and defendant. The court held that the recovery and satisfaction of the judgment in the first action constituted a bar to the present action, and dismissed the complaint on the merits.

The general principle is that several claims already due under the same contract shall be deemed one entire demand or cause of action. *Bendernagle v. Cocks*, 19 Wend. 207, 32 Am. Dec. 448. In order to avoid a multiplicity of actions, the law forbids that a cause of action shall be split up for the purpose of bringing several actions, and although, when several claims payable at different times arise out of the same contract or transaction, separate actions can be brought as such liability occurs, still, if no action is brought until more than one claim is due, all the claims that are due must be included in one action; and, if an action is brought when more than one claim is due, a recovery in that suit will be an effectual bar to a second action brought to recover the other claims that were due when the first action was brought. *Reformed Church v. Brown*, 54 Barb. 191; *Jex v. Jacobs*, 19 Hun, 105; *Samuel v. Fidelity Co.*, 76 Hun, 308, 27 N. Y. Supp. 741; *Pakas v. Hollingshead*, 184 N. Y. 211, 77 N. E. 40, 3 L. R. A. (N. S.) 1042, 112 Am. St. Rep. 601. In the case at bar, as we have seen, the resale of the whole 400 tierces took place at one time, and occurred prior to the commencement both of the first action and the one at bar.

The plaintiff claims that the original contract of November 16th was merged and extinguished by novation, and that a separate contract was thereupon made by novation, whereby plaintiff agreed to deliver and defendant agreed to take 150 tierces in the latter part of February, and that "the novation produced two distinct, several, severed, separate contracts, one for the delivery of 250 tierces of tallow in January, and the other for the delivery of 150 tierces in February." The statement of facts does not sustain this contention. The contract of November 16, 1906, is in writing, and sets forth the purchase by defendant from plaintiff of "500 tierces of tallow at 7½ cents, 100 tierces of the above to be delivered during the last week of December, 1906, 400 to be delivered during the last week of January, 1907." Thereafter, and on January 17, 1907, defendant's president proposed to plaintiff to deliver 250 of the 400 tierces in the latter part of January, 1907, and the remaining 150 tierces in the latter part of February, instead of delivering the entire lot of 400 tierces in the last week of January, 1907, as provided in said contract of November 16, 1906. This proposition was accepted by plaintiff in a letter dated January

18, 1907. There was no new, independent, or separate contract created by this agreement. Both the lot of 250 tierces and that of the 150 tierces had already been sold by plaintiff and bought by defendant by the contract of November 16, 1906. There was simply a modification of that contract of November 16th, by which modification the 400 tierces already bought by defendant were to be delivered in two installments, instead of being all delivered at the same time, as originally contemplated by the said contract. As was said in the case of *Pakas v. Hollingshead*, 184 N. Y. 214, 77 N. E. 41, 3 L. R. A. (N. S.) 1042, 112 Am. St. Rep. 601:

"The fact that the property was deliverable and the purchase money payable at different times in the future did not necessarily deprive the contract of the character of entirety, or make it other than a single one in respect to all the goods embraced in its terms; and there can be but one action for damages for the total breach of an entire contract to deliver goods, and the fact that they were to be delivered in installments from time to time does not change the general rule."

Plaintiff's own letters clearly indicate that plaintiff regarded the contract of November 16th as in full force some time after the time of the alleged rescission and novation, and as being the contract upon which plaintiff based his claim. It seems to us that the court below reached a correct conclusion in his disposition of this case, and that the judgment should be affirmed, with costs.

Judgment affirmed, with costs. All concur.

LEVIN v. HENDELMAN et al.

(Supreme Court, Appellate Term. December 12, 1907.)

CONTRACTS—PARTIAL PERFORMANCE.

The price which one was to receive for the making of garments for another must be reduced by the amount it cost the latter to complete the work which the former should have done, but failed to do.

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Hyman Levin against Karl Hendelman and another. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Max Salomon, for appellants.

Moses H. Rothstein, for respondent.

PER CURIAM. By evidence which the court below deemed worthy of credence, the plaintiff showed that he would have been entitled to recover the sum of \$24 for work done for the defendants in making a lot of six garments, and upon another lot of seven garments the sum of \$24.50, making in all the sum of \$48.50, had he fully completed the work given him to do. It is uncontradicted, however, that these garments cost the defendants on the first lot \$4.50, and on the second lot \$3.85, in all \$8.35, to complete the work which the plaintiff should

have done. As to a third lot claimed to have been done by the plaintiff, it appears by his own testimony that he simply took the lot from one shop to another, but was not allowed to do any work upon the same. The judgment rendered was for \$55.50 in favor of plaintiff. As the testimony appears, the defendant was entitled to recover but \$40.15.

Judgment modified, by reducing the same to \$40.15, with appropriate costs and \$5 extra costs in the court below, and, as modified, affirmed, without costs of this appeal.

PORUS v. HENDELMAN et al.

(Supreme Court, Appellate Term. December 12, 1907.)

CONTRACTS—PARTIAL PERFORMANCE.

Where certain garments on which plaintiff worked for defendant were not completed, and defendant paid for the uncompleted labor thereon, he is entitled to a deduction of such amount from the regular price.

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by David Porus against Karl Hendelman and another. From a judgment for plaintiff, defendants appeal. Modified and affirmed. Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Max Salomon, for appellants.

Moses H. Rothstein, for respondent.

PER CURIAM. This case and the case of *Levin v. Same Defendants*, 107 N. Y. Supp. 618, were tried on the same day, and the facts are somewhat similar. In this case the plaintiff substantially completed two garments in lot No. 1,867; the value of his labor being shown to be \$3.50 for the complete making of each garment, or \$7 in all. He did some work on three garments of lot No. 1,776, which, if the work had been fully done, would have been worth \$10.50, and on four garments of lot No. 1,761, which, if completed, would have been worth \$16, making as the total value of his labor, if each garment had been fully finished, the sum of \$33.50. It was conceded, however, that defendants paid \$3.85 for the uncompleted labor on the garments, and had also paid the plaintiff \$6 on account, making \$9.85 in all, which sum should have been deducted from \$33.50, and judgment for the plaintiff for \$23.65, instead of \$37.65, as given, should have been entered.

Judgment modified, by reducing amount to \$23.65, and, as modified, affirmed, without costs.

LEVY v. LOEW.

(Supreme Court, Appellate Term. December 12, 1907.)

COSTS—TENDER—PAYMENT INTO COURT.

Payment of money into the Municipal Court is not regulated by Code Civ. Proc. §§ 731-734, and section 3347, subd. 6, relating to tender and payment into court, but is controlled by Municipal Court Act, Laws 1902, p. 1537, c. 580, § 148; and payment into court precludes plaintiff from recovering costs after date of payment, and compels him to pay defendant's costs thereafter unless he recovers a more favorable judgment, in which case he is entitled to costs and the money paid into court must be credited on the execution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, §§ 187-184.]

Appeal from Municipal Court, Borough of Manhattan, Tenth District.

Action by Charles Levy against Leopold Loew. From a judgment granting insufficient relief, plaintiff appeals. Modified and affirmed.

Argued before GILDERSLEEVE, P. J., and BRUCE and GUY, JJ.

Oscar Englander, for appellant.

William N. Loew, for respondent.

GILDERSLEEVE, P. J. Plaintiff brought this action to recover the sum of \$165 for work and materials furnished to the defendant under a contract. The pleadings were oral, and the following indorsement appears upon the summons: "Tender \$150." The plaintiff proved himself entitled, as the trial court found, to the sum of \$159 damages, for which judgment was rendered in his favor, and also for \$2 costs and \$15 extra costs. Subsequently the defendant moved for a retaxation of costs, and asked that the clerk be directed to strike from the judgment the item of \$15 costs. Upon the hearing of this motion the court struck out that item and also made the following indorsement upon the summons:

"Under authority of *Goldman v. Swartwout*, 117 App. Div. 185, 102 N. Y. Supp. 302, this judgment must be reduced to amount between allowance and tender, namely, \$9."

The plaintiff appeals from the judgment as so reduced. The defendant's counsel in his brief says:

"The evidence shows a tender before suit, which was made good by the deposit of the sum offered and tendered with the clerk of the court, namely, of the sum of \$150."

An examination of the record fails to disclose any such fact. The only testimony given regarding a tender, is a question by the court: "Have you made a tender here?" Defendant's Counsel: "Yes; \$150." When a tender of this amount, if ever, was made to the plaintiff, does not appear; nor is there anything in the record to show that any sum whatever was paid into court. Section 148 of the Municipal Court act (Laws 1902, p. 1537, c. 580) contains the only provision regarding the payment of money into those courts, and declares the effect of so doing. Sections 731, 732, 733, and 734, Code of Civil Procedure, are

not applicable to the Municipal Court. See section 3347, subd. 6, Code of Civil Procedure. Payment of money into court by the defendant, unless accepted by the plaintiff, precludes him from recovering costs after the date of such payment, and compels him to pay the defendant's costs thereafter, unless the plaintiff recovers a more favorable judgment. In the case at bar, even if we assume that the defendant paid into court the sum of \$150, the plaintiff recovered a judgment more favorable than that amount, and therefore was entitled to costs. The court below had no authority to reduce the recovery, or strike out the \$15 costs, and the judgment must be modified. If in fact any sum was paid into court, it must be paid to the plaintiff and credited upon the execution.

Judgment modified, by increasing the amount of recovery to the sum of \$159 and increasing the amount of costs by \$15, and, thus modified, affirmed, with costs. All concur.

(56 Misc. Rep. 319.)

In re ROMERO, Mexican Consul General.

(Supreme Court, Special Term, New York County. November, 1907.)

1. COURTS.

The courts of the state will not, at the request of the Mexican court, order the service of a summons and complaint issuing out of such foreign court on a resident of the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1432.]

2. SAME—SERVICE OF PROCESS.

An order for the service of a summons and complaint in an action in a Mexican court by a resident of that country for legal services rendered therein for defendant, a New York corporation, having neither office, business, nor property in Mexico, will be vacated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1432.]

In the matter of the application of Cayetano Romero, consul general of the republic of Mexico. Motion of the Manhattan Trust Company to vacate an order directing service on them. Motion granted.

Curtis, Mallet-Prevost & Colt, for petitioner.

Strong & Cadwalader, for Manhattan Trust Company.

O'GORMAN, J. This is a motion by the Manhattan Trust Company of the city of New York to vacate an order entered herein on October 30, 1907, directing the service upon the trust company of certain so-called letters rogatory issuing out of the Second civil court of the city of Mexico. The papers issued by the Mexican court are not in the nature of letters rogatory, but appear to be a summons and complaint in an action instituted in that court by a resident of Mexico for legal services alleged to have been rendered in that country to the Manhattan Trust Company. In substance the Mexican court requests the courts of this state to order the service of a summons and complaint issuing out of a foreign court upon a resident of this state. It is clear that the courts of this state possess no power to perform such a function. By statute our courts will assist in the execution of foreign letters rogatory for the examination of witnesses within our ju-

risdiction; but even as to such process there is no inherent or implied power in the court. The authority must be found in the statute. *Matter of Canter*, 82 App. Div. 103, 81 N. Y. Supp. 416.

If, however, the court possessed the power, it should not be exercised in this case. The Manhattan Trust Company has no office in Mexico. It has no business and has no property in that republic. It is a New York corporation, with its offices in New York City. The Mexican court, therefore, has not and cannot obtain jurisdiction over the defendant. The principle is well recognized that no court can acquire jurisdiction over a person not located within the jurisdiction and having no property therein. The authority of every tribunal is confined to person and property within the territorial limits of the state or country in which it is established. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Story, Conf. Laws*, § 539; 12 *Ency. Pl. & Pr.* 143. It is conceded that our own courts could not by the service of a summons in the republic of Mexico acquire jurisdiction of a citizen of Mexico having no property in this state. The doctrine is well established that the laws of a foreign country will not be enforced, if such enforcement will contravene the settled policy of the forum or be prejudicial to the interests of its own citizens. 22 *Am. Eng. Ency. of Law*, 1319. Motion to vacate order granted.

Motion granted.

(56 Misc. Rep. 324.)

SULTZBACH CLOTHING CO. v. BALSAM.

(Supreme Court, Special Term, New York County. November, 1907.)

TRADE-MARKS AND TRADE-NAMES—INFRINGEMENT—INJUNCTION.

AN advertisement by defendant stated that a certain person named in the advertisement, of a recognized standing as a salesman and with a circle of acquaintance in the trade in which plaintiff and defendant were engaged, who was formerly in the employ of plaintiff, generally known as "George's" and "Fisher's," announced that he could be found at "Balsam's Misfit Parlors"; the name being defendant's surname. There was nothing in the contents of the advertisement calculated to mislead the public to plaintiff's detriment. *Held*, that an injunction pendente lite restraining defendant from using the names "George's" or "Fisher's," at present used by plaintiff in conducting its business at different places, would not be granted.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 46, *Trade-Marks and Trade-Names*, § 108.]

Action by the Sultzbach Clothing Company against Louis Balsam. Motion for injunction pendente lite. Denied.

Alynn Sulzberger, for plaintiff.

Edward M. Bernstein, for defendant.

FITZGERALD, J. This is a motion for an injunction pendente lite restraining the defendant, his agents, servants, or employes, from using the names "George's" or "Fisher's" (two trade-names heretofore and now used by the plaintiff, a domestic corporation, in conducting its business at two different places), or the name "Sultzbach," either singly or collectively in any advertisement published by the defend-

ant, and from deceiving the public by representing that the defendant was ever connected with the establishment of the plaintiff, or that the defendant is conducting business under any of the aforesaid names or under the name of the plaintiff, or that the defendant was ever in the employment of the plaintiff or any of the firms which formerly conducted business under any of the aforesaid names. This is not only substantially the language of the plaintiff's notice of motion, but is the gravamen of its charge against the defendant, as stated in paragraphs 16, 17, and 22 of the verified complaint. However, although not referred to in the notice of motion, unless the application for injunction against the defendant's use "either singularly or collectively" of the two names may be so construed, the plaintiff also alleges (paragraph 18 of the complaint) that the defendant's advertisements are also misleading to the public and injurious to the plaintiff, because they state that "George's" and "Fisher's" are one and the same firm, whereas they are the trade-names of two distinct establishments controlled and conducted by the plaintiff, but selling different lines of garments, pursuing different methods, and catering to different classes of trade, public knowledge of which would be detrimental to the plaintiff's business. A careful consideration of the pleadings and moving and opposing affidavits submitted on this motion, and a comparison of the advertisements published by both parties, convince me that pending the full hearing and determination upon the merits which will be had upon the trial of the action the extensive injunctive relief prayed for by the plaintiff should not be granted.

Considering the allegations of the complaint *seriatim*, and testing the defendant's advertisements thereby, the natural conclusion is that the latter in no way represent that the defendant was ever connected with the plaintiff's establishment or is conducting business under the plaintiff's corporate or trade-names, or that the defendant was ever in the employment of the plaintiff or of any of the firms formerly using those trade-names. The defendant's advertisements simply state that a certain person, not the defendant, fully named in the advertisement, and of recognized and admitted standing as a salesman, and with a wide circle of acquaintances in the trade of the plaintiff and the defendant, who was formerly with the plaintiff, "generally known as 'George's' and 'Fisher's,'" announces that he can be found at Balsam's Misfit Parlors, No. 206 West Thirty-Fourth street, which, it will be noted, is named according to the defendant's surname. Nor is there anything in the arrangement or composition of the contents of the advertisement calculated to mislead the public to the detriment of the plaintiff's trade. The name of the former employé is placed in large type in a single line at the top. It is true that the words "formerly with the" are in smaller type; but they are separated and spaced off, and readily discernible to a most casual perusal of the newspaper, and the name of the defendant and the address of his "parlors" are also stated in large type and on separate lines. Furthermore, the use by the defendant in the preliminary announcement of the former employment of the said salesman, in large type and in a separate line, of the corporate name of the plaintiff, which nowhere appears in the plaintiff's own advertisements, and the use by the defendant at the top

of his advertisement of the single name "Fisher's," as distinguished from the full name "The Fisher Tailor Parlors," printed at the bottom of the plaintiff's advertisements, also serve to arrest the attention of the casual reader, to stimulate his inquiry and further inspection, and to distinguish in his mind the different establishments of the parties. Nor can it be said on this motion that there is any misrepresentation by the defendant to the deception of the public and the injury of the plaintiff. The said salesman was admittedly a former valuable employé of the plaintiff corporation, who, on his retirement from its service, received from its president various letters of recommendation. He is undoubtedly the "discharged employé" referred to in the plaintiff's advertisements as the present employé of the plaintiff's "imitator." Whether he was formerly employed exclusively at the establishment of the plaintiff known as "George's," or at that known as "The Fisher Tailor Parlors," it is impossible for me to determine from the papers submitted, as they are silent on that point. But it appears that he was an employé of the plaintiff's corporation, which owned and conducted both establishments, and the fact that he received letters of recommendation from the president of the plaintiff, written on the printed stationery of both establishments, might fairly be said to be indicative of the fact that he had served both, and of the willingness of the writer to commend to prospective employers the services of his former salesman in both establishments.

The plaintiff's contention that the defendant's statement that it is generally known as "George's" and "Fisher's" should be restrained for the reasons above stated, and because it sells its lower-priced garments at the former and its higher-priced garments at the latter, is not confirmed by its own advertisements, where the range of prices are stated to be about the same in both places. Where no deception to the public and no injury to the plaintiff are shown, the defendant should not, on this motion, be restrained from fairly calling to the attention of the public at such proper times and in such proper places as he chooses that skill, knowledge, and experience of a former employé of the plaintiff, acquired at all the places where that employé evidently served the plaintiff, which the plaintiff's president himself commended, and which the defendant is evidently paying for. *Van Wyck v. Horowitz*, 39 Hun, 237.

The motion should therefore be denied, with costs. Settle order on notice.

(56 Misc. Rep. 331.)

BAILEY et al. v. MAYER.

(Supreme Court, Special Term, Saratoga County. November, 1907.)

1. PLEADING—BILL OF PARTICULARS—PERSONAL INJURIES.

In an action to recover for injuries caused by defendant's automobile while operated by a servant, a motion, before answer, for a bill of particulars to enable defendant to answer, will be denied, where defendant denies all knowledge as to the matters alleged in the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 954-962, 972, 973.]

2. SAME—PREMATURE APPLICATION.

A motion for bill of particulars in a personal injury action in order to prepare for trial is premature, when made before answer filed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 975.]

Actions by James M. Bailey and by Eldridge S. Adams against Mark A. Mayer. On motions for bill of particulars. Denied.

Rockwood & Salisbury, for the motions.

Edgar T. Brackett, opposed.

SPENCER, J. These are actions by different plaintiffs against the same defendant to recover damages for personal injuries alleged to have been occasioned by defendant's automobile while operated by his servant. The defendant, before answer, applies for a bill of particulars in each case, on the ground that such particulars are necessary in order to enable him to answer and to prepare for trial.

There can be no doubt that this court has unlimited power to require the delivery of bills of particulars as to pleadings at any time and for any purpose. Code Civ. Proc. § 500; 1 Nichols, Pr. 950. No restrictions have been placed upon the exercise of this power, except those which the court has imposed upon itself. Among these are two, which have operation here and are to the effect that applications for bills of particulars, in order to prepare for trial, are premature, if made before issue, and that such applications in order to plead are unnecessary if the applicants may by any method plead without the aid of the particulars sought. In other words, the courts have held that an applicant for a bill of particulars for either of the above-mentioned purposes must satisfy the court that the same is immediately necessary. The following decisions are among those which may be cited as supporting the foregoing propositions: *Bender v. Bender*, 88 Hun, 448, 34 N. Y. Supp. 876; *Watertown Paper Co. v. West*, 3 App. Div. 451, 38 N. Y. Supp. 229; *American Credit Indemnity Co. v. Bondy*, 17 App. Div. 328, 45 N. Y. Supp. 267; *Hicks v. Eggleston*, 95 App. Div. 162, 88 N. Y. Supp. 528; *Markham v. Shue*, 98 App. Div. 635, 90 N. Y. Supp. 1105; *Davis v. Wende*, 100 App. Div. 509, 91 N. Y. Supp. 1092; *Schultz v. Rubsam*, 104 App. Div. 20, 93 N. Y. Supp. 334; *Powers v. Hughes*, 39 N. Y. Super. Ct. 482; *Standard Materials Co. v. Bowen & Son Co.*, 118 App. Div. 91, 103 N. Y. Supp. 12.

The defendant here denies all knowledge concerning the matters alleged in the complaints, and is, therefore, in a happy position to deny them under the generous provisions of section 500, Code of Civil Procedure, which permits him to directly deny those allegations he knows are not true, to deny those which from information he believes are not true, and to deny those in respect to which he has not any information sufficient to form a belief. Therefore, in accordance with the practice as indicated by the decisions, he should not apply for bills of particulars for either purpose until he has answered the complaints. The decisions cited, with one exception, are from other departments, and the contention is made that they do not express the practice in the Third department in respect to bills of particulars in order to enable

a party to plead; and I am referred to the recent decision of *Washburn v. Graves*, 117 App. Div. 343, 101 N. Y. Supp. 1043, as supporting that contention. But in that case the motion was made after reply, and hence the present question did not arise. In *Bender v. Bender*, supra, of this department, the party seeking the bill of particulars alleged in his moving papers that he intended to defend the action and that he was wholly ignorant of the particulars alleged in the complaint and had no means of acquiring knowledge thereof sufficient to enable him to answer; and the court held that such ignorance did not entitle him to a bill of particulars and cited several authorities in support of its position. By careful research, I have not found any decision on this subject in this department in conflict with those elsewhere, nor any intimation of a different view.

In the absence of a clear departure therefrom by the Appellate Division of this department, these decisions of other departments are controlling as to this court. Furthermore, the practice should be uniform throughout the state. The defendant's motions are premature, and must, therefore, be denied, with costs.

Ordered accordingly.

BURNSTINE v. REDDY.

(Supreme Court, Appellate Term. December 12, 1907.)

1. APPEAL—ADJOURNMENTS—DISCRETION.

The grounds of an application for an adjournment, after several had been granted, not being such as to absolutely require it to be granted, but it being addressed to the favor of the court, the granting or refusal of it is within the court's discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error. §§ 8837, 8845.]

2. JUDGMENT—DEFAULT OF PLAINTIFF—RIGHT TO NEW ACTION.

The judgment for defendant, on plaintiff being unable to proceed, on the refusal of an adjournment, should be without prejudice to a new action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1013.]

Appeal from Municipal Court, Borough of Manhattan, Twelfth District.

Action by Nathan Burnstine against Patrick J. Reddy. From a judgment for defendant, plaintiff appeals. Modified and affirmed.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Burnstine & Goldberg, for appellant.

PER CURIAM. The court below refused to grant an adjournment asked for by the plaintiff after the case had been adjourned previously several times, and, the plaintiff being unable to proceed, judgment in favor of the defendant was rendered against the plaintiff. The grounds set forth in the plaintiff's affidavit as a basis for the adjournment were not such as to absolutely require that the motion should be granted. The application was addressed to the favor of the court, and the granting or refusal of it was within the court's discretion. The judgment, however, should have been rendered without prejudice to a new action.

Judgment modified, by directing that the same be without prejudice to a new action, and, as modified, affirmed, without costs to either party on this appeal.

R. M. GILMOUR MFG. CO. v. JOHNSON.

(Supreme Court, Appellate Term. December 12, 1907.)

APPEAL—MODIFICATION—REDUCING AMOUNT OF RECOVERY.

Where the trial court inadvertently rendered judgment for more than the proper amount, the Supreme Court on appeal will properly modify the judgment, and affirm it as modified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 4462-4476, 4498-4505.]

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by the R. M. Gilmour Manufacturing Company against Harriet W. Johnson. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Merle I. St. John, for appellant.

Edmund T. Oldham, for respondent.

PER CURIAM. We are convinced from an examination of the evidence in this case that the trial justice was correct in awarding judgment for the plaintiff. The court below, however, made an error in giving judgment for plaintiff for the sum of \$59 upon the first cause of action. The amount conceded by the parties upon the trial upon that cause of action was but \$52.21.

The judgment is therefore modified, by reducing the amount of recovery to the sum of \$155.21, and, as modified, affirmed, with costs.

HALVORDSON v. GROSSMAN.

(Supreme Court, Appellate Term. December 12, 1907.)

1. SALES—CONTRACT—DELIVERY—TIME.

In an action for the value of a suit of clothes ordered by defendant, but not delivered, evidence held insufficient to warrant a finding that it was agreed that the suit should be finished for Easter.

2. SAME—PLACE OF DELIVERY—TENDER.

Where a contract for a suit of clothes to be made for defendant specified no place of delivery, plaintiff was not required to tender the clothes, which were to be paid for at plaintiff's store; that being the proper place for delivery.

Appeal from Municipal Court, Borough of Manhattan, Twelfth District.

Action by Martin E. Halvordson against George Grossman. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Stimson & Williams (George M. Thompson, of counsel), for appellant.

James, Schell & Elkus (Frederick Mellor, of counsel), for respondent.

PER CURIAM. The plaintiff sued to recover the value of a suit of clothes, ordered by the defendant, but which was never delivered. The price agreed upon was \$65. The defendant had a judgment in the court below. The undisputed testimony shows that the defendant went to plaintiff's place of business and ordered and was measured for a suit of clothes. He stated that he wanted them for Easter; but it does not appear that it was expressly agreed that they should be ready by that time. Shortly after Easter the defendant went to the plaintiff's store, the clothes were tried on, and they required some slight changes. The plaintiff testifies that:

"It was to be all ready on the following Wednesday. The suit was ready at that time, but Mr. Grossman never came in."

The defendant claims that the judgment should be affirmed for the reasons, first, that the plaintiff failed to prove performance on his part, in that the suit was to be finished in time for Easter; and, second, that the plaintiff did not deliver or tender delivery. The evidence does not establish any agreement between the parties that the suit should be finished by Easter, and the defendant seems not to have considered that to have been the understanding, as he called for a fitting after that date.

As to the delivery it is true that one of the plaintiff's employes testified that it was the plaintiff's custom to deliver goods ordered at the residence of the person who ordered them when completed. But the plaintiff testified that the reason he did not so deliver them was that:

"It was understood that the suit was going to be paid for in the store. I don't sell goods C. O. D."

The evidence does not show that the defendant was to be notified, after the last fitting, when the clothes would be ready, as the defendant testifies that there was no necessity for him to go to the store again so far as fitting him was concerned, and, as before stated, plaintiff swore the clothes were to be ready the following Wednesday, and were ready on that day. There being no place of delivery agreed upon, the store of the plaintiff would be the proper place, where the defendant would be required to call for the goods. *Scott v. Miller*, 114 App. Div. 6, 7, 99 N. Y. Supp. 609. There is nothing in the evidence upon which it could be said that it became a question of fact as to where delivery was to be made.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

(56 Misc. Rep. 637.)

BROWN v. INTERBOROUGH RAPID TRANSIT CO.

(Supreme Court, Appellate Term. December 12, 1907.)

CARRIERS—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—ACTS OF CARRIER'S EMPLOYEES.

Plaintiff boarded defendant's north-bound car, and, falling asleep, was carried several blocks beyond his destination. He then crossed the street to another station to catch defendant's south-bound car, which he persisted in getting on without paying his fare. The trainmen by force kept him off the train. *Held*, that defendant was not liable for the assault, having fully performed its contract when it carried plaintiff on its north-bound train to his destination, after which it was under no obligation to furnish him a return passage free of charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1121.]

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Louis Brown against the Interborough Rapid Transit Company. From a judgment for plaintiff, defendant appeals. Reversed, and complaint dismissed.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Charles A. Gardiner (William E. Weaver, of counsel), for appellant. Henry Lieb, for respondent.

GUY, J. The plaintiff brought this action and recovered a judgment upon a complaint setting forth in substance that while the plaintiff was a passenger on one of the defendant's north-bound trains he was assaulted by the employes of the defendant; the gravamen of the cause of action being a breach of contract of carriage by the defendant. The facts appearing upon the trial are substantially undisputed and are briefly as follows:

On March 19, 1907, the plaintiff boarded one of the defendant's elevated railroad trains at Eighth street and Second avenue; his destination being 121st Street Station. When the train reached 121st street the plaintiff was asleep; and he remained on the train until it reached 129th street, at which station he left the train. He then crossed the street to another station in order to reach the defendant's south-bound cars, for the purpose of taking a south-bound train to be carried back to his destination, which he had missed while asleep. When he attempted to board the south-bound train, he was stopped by one of the defendant's employes, who inquired if the plaintiff had a ticket. The plaintiff answered: "No; I do not need any ticket." He persisted in his attempt to get on the south-bound train without paying any fare. The defendant's employes in charge of the train resorted to force to prevent the plaintiff from boarding the train.

It is clear that at the time the alleged assault was committed the relationship of carrier and passenger between the parties had ceased to exist, and the defendant was engaged in an attempt to obtain passage upon a south-bound train with the avowed intent of paying no fare. The defendant had fully performed its contract when it carried the plaintiff on its north-bound train to his destination, and was

under no obligation to furnish him a return passage free of charge. The case of *Busch v. Int. R. T. Co.*, 110 App. Div. 705, 96 N. Y. Supp. 747, has no application to the case at bar.

Judgment reversed, with costs, and complaint dismissed. All concur.

(56 Misc. Rep. 670.)

SOMMESE v. FLORENCE DISTILLING CO.

(Supreme Court, Appellate Term. December 12, 1907.)

1. COURTS—MUNICIPAL COURT—JURISDICTION—FOREIGN CORPORATIONS.

Municipal Court Act, Laws 1902, p. 1496, c. 580, § 20, declares that the provisions of the Code of Civil Procedure are not to be deemed applicable to the Municipal Court when in conflict with the provisions of that act. Section 1, subd. 18 (page 1489) provides that the jurisdiction of the Municipal Court extends to actions against a foreign corporation having an office in New York City. Subdivision 3 of section 25 (page 1497), which section specifies the several districts in which actions in that court must be brought, after providing that, where all the parties reside out of the city, the action may be brought in any district, declares that no person who shall have a place in the city for the regular transaction of business shall be deemed a nonresident within the act. *Held*, that the Legislature intended simply to provide that, where a nonresident should have a place of business in New York City, such place of business should be deemed his residence for the purpose of determining in what district an action to which he was a party should be tried, if the Municipal Court had jurisdiction, and not to confer on the court jurisdiction over a nonresident defendant in an action of which it would otherwise not have jurisdiction; and hence the Municipal Court has no jurisdiction over foreign corporations, except those who are parties to actions of which the court has jurisdiction independent of such provision as to residence and who have a place for the transaction of business in New York City, and its jurisdiction does not extend to an action against a foreign corporation by a nonresident on a cause of action arising out of the state, such action not coming within Code Civ. Proc. § 1780, specifying cases in which a foreign corporation may be sued by a nonresident.

2. STATUTES—CONSTRUCTION—"PERSONS."

A corporation is included in the term "person," as used in the statutes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 277.

For other definitions, see Words and Phrases, vol. 6, pp. 5322-5335; vol. 8, p. 7752.]

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by Carmine Sommesse against the Florence Distilling Company. From a judgment for plaintiff, defendant appeals. Reversed. Argued before GILDERSLEEVE, P. J., and BRUCE and GUY, JJ.

Francis Colety, for appellant.

Bloch & Hoffman, for respondent.

GILDERSLEEVE, P. J. The plaintiff obtained judgment, and the defendant bases its appeal on the ground that the court below had no jurisdiction over the case, for the reason that the plaintiff is a non-resident, defendant is a foreign corporation, and the cause of action

arose out of the state. Section 1780 of the Code of Civil Procedure provides, among other things, that:

"An action against a foreign corporation may be maintained by * * * a nonresident in one of the following cases only: (1) Where the action is brought to recover damages for the breach of a contract made within the state, or relating to property situated within this state, at the time of the making thereof. (2) Where it is brought to recover real property situated within the state, or a chattel which is replevied within the state. (3) Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state."

The case at bar comes within none of the subdivisions above quoted of section 1780 of the Code. At the end of the case, however, it was conceded on the record that defendant has "a place for the regular transaction of its business at 11 Broadway, in the borough of Manhattan, city of New York." Section 20 of the Municipal Court act (Laws 1902, p. 1496, c. 580) provides, in substance, that, while the provisions of the Code are in general applicable to the Municipal Court, they are not to be deemed applicable when in conflict with the provisions of the Municipal Court act. Section 25, subd. 3, of the Municipal Court act (Laws 1902, p. 1497, c. 580), provides among other things that:

"No person who shall have a place in said city for the regular transaction of business shall be deemed a nonresident under the provisions of this act."

A corporation is included in the term "person," as used in the statutes. See *Scharmann v. De Palo*, 66 App. Div. 29, 30, 72 N. Y. Supp. 1008; *Goldzier v. Central R. R.*, 43 Misc. Rep. 667, 88 N. Y. Supp. 214. Section 1, subd. 18, of the said act provides that the jurisdiction of the Municipal Court "extends to actions against * * * a foreign corporation having an office in the city of New York." It was stated by this court in the case of *Goldzier v. Central R. R.*, 43 Misc. Rep. 667, 88 N. Y. Supp. 214:

"A foreign corporation, being a nonresident in fact, becomes, for the purpose of conferring jurisdiction, by fiction of the law a resident of the city, if it has a place therein for the regular transaction of business."

That case involved the question of the proper place of trial in an action brought by a nonresident plaintiff against a foreign corporation having a place of business within the city, and it was held that in such an action the trial was properly removed, upon the application of the defendant, to the district where it had its place of business. Title 2 of the Municipal Court act begins with section 25, and that section is entitled: "In What District Brought." It contains five subdivisions, specifying the several districts in which actions in that court must be brought. Subdivision 3, after providing that " * * * where all the parties reside out of said city the action may be brought in any district," continues thus:

"No person who shall have a place in said city for the regular transaction of business shall be deemed a nonresident under the provisions of this act."

It is clear that the Legislature intended to provide simply that, where a nonresident shall have a place of business in this city, such place of business shall be deemed his residence for the purpose of determining

in what district the action shall be tried; and it was not the intent of the Legislature to confer jurisdiction upon the Municipal Court over a nonresident defendant in an action of which, except for such provision as to residence, the court would have no jurisdiction. Further than this we should not go. The effect of upholding the jurisdiction of the Municipal Court, under the circumstances presented in the case at bar, would be to hold that that court has a greater jurisdiction than the Supreme Court. Such a result, certainly, could not have been intended. The meaning of the Legislature must be construed to have been that, where the Municipal Court has jurisdiction of the cause of action, such jurisdiction would extend to a foreign corporation having a place for the transaction of business within this city. *Progressive Power Co. v. Bridge Co.*, 14 Misc. Rep. 23, 35 N. Y. Supp. 130. In the case at bar it had no jurisdiction over the cause of action, which arose out of the state, and its jurisdiction did not extend to the defendant.

Judgment reversed, with costs, and complaint dismissed. All concur.

MEYERS v. WEBER et al.

(Supreme Court, Appellate Term. December 12, 1907.)

MASTER AND SERVANT—ACTION FOR COMMISSIONS—QUESTION FOR JURY.

Whether plaintiff was entitled to commissions on sales made for defendants in excess of the amount admitted by defendants' answer *held*, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Master and Servant, § 122.]

Appeal from City Court of New York, Trial Term.

Action by Harry H. Meyers against David W. Weber and another. From a judgment of dismissal, plaintiff appeals. Reversed, and new trial granted.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

• Isaac V. Schavrien, for appellant.

Davis & Kaufmann, for respondents.

GUY, J. Appeal from judgment for costs entered upon dismissal of complaint by the court. The action is for commissions upon goods alleged to have been sold by plaintiff for defendants. Plaintiff's employment is admitted, and the rate of compensation he was to receive; also the fact that some sales were made by him for the defendants. The answer admits that sales were made by plaintiff for defendants to the amount of \$8,113.08, upon which the plaintiff was entitled to be paid \$202.82 commissions, of which amount \$164.07 is still due, which amount was tendered to the plaintiff, and he refused to accept the same.

The plaintiff testified to further sales, somewhat vague in amount, but aggregating about \$34,000. He also called as a witness one Goldfinger, a former bookkeeper of the defendants, who testified that in 1902 one of the defendants gave him a list of customers and asked him to figure out, from the ledger in which the account of the plaintiff and

of the customers to whom he sold were kept, the amount of the commissions due to plaintiff; that he did make such calculation and submitted the list to said defendant, who went over it and struck out certain names, objecting that the amount was too high; that the witness figured it again and gave it to said defendant, who told him to notify the plaintiff to come up; and that said defendant stated that he would pay Meyers \$520 odd, and no more. Upon this evidence, constituting an admission of indebtedness, taken together with the other evidence in the case, the plaintiff was clearly entitled to go to the jury, and the court erred in dismissing the complaint.

The judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

REID V. JACKSON'S BAGGAGE EXPRESS.

(Supreme Court, Appellate Term. December 12, 1907.)

JUDGMENT—BY DEFAULT—OPENING DEFAULT—REQUISITES OF AFFIDAVIT ON MOTION.

Where defendant moves to open a default, his motion papers must contain a copy of the proposed answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 80, Judgment, §§ 317, 318.]

Appeal from City Court of New York, Special Term.

Action by Mary Parker Reid against Jackson's Baggage Express. From an order granting defendant's motion to open a default, plaintiff appeals. Reversed, and motion denied, without prejudice.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Gustav Goodman, for appellant.

Dana Wallace, for respondent.

PER CURIAM. Plaintiff sued defendant for the loss of two trunks, for which she claimed \$2,000. Defendant allowed its time to answer to expire, and a judgment by default was entered against defendant on the claim. Defendant moved to open the default, which motion was granted, on payment of \$10 costs and disbursements. From the order granting the motion plaintiff appeals.

The motion papers are defective, in that they fail to contain a copy of the proposed answer. *Schumpp v. Int. St. Ry. Co.*, 81 App. Div. 576-577, 81 N. Y. Supp. 366; *Meyer v. City of New York*, 80 App. Div. 584, 80 N. Y. Supp. 774; *Allen v. Fowler*, 45 App. Div. 506, 61 N. Y. Supp. 325.

The order is reversed, with \$10 costs and disbursements, and the motion is denied, with \$10 costs, but without prejudice to a new motion in the court below.

ATWOOD-RAVEN CO. v. HANAUER et al.

(Supreme Court, Appellate Term. December 12, 1907.)

CONTRACTS—CONSTRUCTION—CONDITIONS PRECEDENT.

Under a contract whereby one party agreed to make for the other paper boxes which were to have on them a certain picture or design, and providing that the design was first to be submitted to the party for whom the boxes were to be made for approval, the approval of the design was not a condition precedent to the complete acceptance of the contract, but a mere incident in the carrying out of the contract.

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by the Atwood-Raven Company against William Hanauer and another, doing business under the name of New York Coat Front & Pad Company. Judgment for defendants, and plaintiff appeals. Reversed, and a new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Roy M. Hardy, for appellant.

Maurice L. Rippe, for respondents.

PER CURIAM. Upon the trial of this case the court below dismissed the complaint at the close of the plaintiff's case. In considering the case all the testimony of the plaintiff must be taken as true. The plaintiff and the defendants entered into an executory contract in writing, by the terms of which the plaintiff agreed to make and deliver to the defendants at an agreed price 12,000 paper boxes of a certain size. The boxes were to have upon them a certain picture or design, and the design was to be submitted to the defendants for their approval before the plaintiff was to begin the manufacture of the boxes. The plaintiff prepared a plate, which he testified he submitted to one of the defendants, the other not being in their place of business at the time, and was told by the defendant to whom the design was submitted to leave it, as he (defendant) could not decide on it without consulting his (defendant's) partner. The value of such design was \$75, for which plaintiff then took a receipt. The boxes could not be made until the defendants approved, or, as the witness said, O. K'd, the design. Subsequently the defendants notified the plaintiff that they had got a cheaper quotation on the boxes, and notified the plaintiff that they would not take the boxes. Plaintiff showed his loss of profits and a readiness and ability to perform the contract on his part.

The learned trial justice held that the approval of the design was a condition precedent to the complete acceptance of the contract. We do not consider that the evidence shows such to be the case. The order had been given and accepted, and was complete in its terms. The preparation and approval of the design was a mere incident in the carrying out of the contract. There is no claim made that the plaintiff failed to submit a satisfactory design. Moreover, it appears that the design submitted was in the hands of the defendants, awaiting their

approval, when they declined to permit the plaintiff to go on with his contract.

The judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event.

(56 Misc. Rep. 615.)

APPLEBAUM v. BONAGUR.

(Supreme Court, Appellate Term. December 12, 1907.)

1. COURTS—MUNICIPAL COURTS—SETTING ASIDE VERDICT—EXTENDING TIME OF MOTION.

The time limited by Municipal Court Act, Laws 1902, p. 1563, c. 580, § 254, for a motion to set aside a verdict or vacate a judgment, cannot be extended under the guise of a motion for a reargument.

2. APPEAL—RIGHT LOST BY ACCEPTING COSTS.

Receiving and retaining by plaintiff's counsel of the costs imposed by the order setting aside a verdict preclude appeal from the order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 991.]

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Harry Applebaum against Vincent Bonagur. From an order setting aside a verdict, plaintiff appeals. Dismissed.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Robert Loudon, for appellant.

Menken Bros., for respondent.

PER CURIAM. The plaintiff herein appeals from an order vacating a judgment and setting aside the verdict of a jury. The case was tried and a verdict rendered in favor of the plaintiff on April 24, 1907. The defendant thereupon made a motion to set aside the verdict, which motion was denied. Subsequently, and on May 2, 1907, the defendant made a motion for a reargument of the motion theretofore made to set aside the verdict, and the court granted said motion, and on May 7, 1907, an order was entered setting aside the verdict and vacating the judgment, and the case was set down for trial on May 22, 1907, upon payment of the sum of \$10 costs to the plaintiff within 10 days.

Upon the hearing of the motion for reargument, the plaintiff urged that more than 5 days had elapsed after the rendition of the judgment, and that under section 254 of the Municipal Court act (Laws 1902, p. 1563, c. 580) the motion could not be entertained. In this position the plaintiff was undoubtedly correct. The defendant could not, under the guise of a motion for a reargument, extend the limitation prescribed by section 254, supra, in which a motion to set aside the verdict of a jury or vacate a judgment must be made, and the order herein would have to be reversed, were it not that it is conceded that the plaintiff's attorney received, accepted, and retained the \$10 costs imposed by the terms of the order setting aside the verdict, and is thereby precluded from bringing this appeal. *Logeling v. N. Y. El. R. R. Co.*, 5 App. Div. 198, 38 N. Y. Supp. 1112; *Platz v. City of Cohoes*, 8 Abb. N. C. 393.

Appeal dismissed, with \$10 costs.

(56 Misc. Rep. 873.)

BURMEISTER et al. v. KOSTER et al.

(Supreme Court, Special Term, New York County. November, 1907.)

1. CHATTEL MORTGAGES—VALIDITY—AFTER-ACQUIRED PROPERTY.

Defendant gave a mortgage on goods and fixtures, with an agreement that he might sell the goods in the ordinary course of business. The mortgagee, on default, took possession. *Held*, that the mortgage was invalid as to creditors so far as it related to property acquired by the mortgagor in the ordinary course of business between the date of the mortgage and the time the mortgagee took possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 393-404.]

2. FRAUDULENT CONVEYANCES—CHATTEL MORTGAGE.

A creditor of a chattel mortgagor, who, after possession was taken by the mortgagee for default, obtains a judgment against the mortgagor for a debt due before such possession was taken, may attack the mortgage as fraudulent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 365, 366.]

Action by Charles H. Burmeister and others against Charles Koster and others to set aside a chattel mortgage as in fraud of creditors and for the appointment of a receiver. Judgment for plaintiffs.

Frederick M. Harris, for plaintiffs.

C. F. Goddard, for defendants.

BISCHOFF, J. There is no substantial dispute as to the facts, and the question presented in this action is whether the mortgage made by the defendant Shulz and one Hurley to the defendant Koster was avoidable at the suit of these plaintiffs, who obtained their judgment after possession was taken by the mortgagee under the terms of the mortgage, but for a debt due from the mortgagors prior to the taking of possession. The mortgage covered a grocery store, the stock of groceries and provisions, and other chattels therein contained, as well as certain fixtures and a horse and wagon used in the business, and covered after-acquired property which might come into the possession of the mortgagors in the course of their continuance of the business; it being also agreed that the mortgagors might sell the stock of groceries upon the premises "in the usual and ordinary course of business." The plaintiffs furnished goods to the mortgagors during the months of January and February, 1907. On February 25, 1907, the defendant Koster took possession of the store and the chattels therein contained, by virtue of the mortgage; and thereafter the plaintiffs reduced their claim to judgment.

It is contended by the defendant Koster that the mortgage cannot be attacked by these plaintiffs, in that they were not judgment creditors at the time when possession was taken by the mortgagee; and the case of *Mathews v. Hardt*, 79 App. Div. 570, '80 N. Y. Supp. 462, is cited in support of the proposition. Whatever question may have existed, upon the authorities, as to the right of a creditor to attack a chattel mortgage, such as this, where the mortgage was expressed to cover after-acquired chattels, so far as the right of action has been

made to depend upon the obtaining of judgment upon the debt prior to the mortgagee taking possession, the point is certainly set at rest by the recent decision of the Court of Appeals in *Zartman v. First National Bank*, 189 N. Y. 267, 82 N. E. 127. It was directly held, in that case, that creditors whose claims accrued before possession was taken under such a mortgage may reach the property thus taken, notwithstanding that judgment in an action at law to perfect the right to assail the transfer was not obtained until afterward; that a creditor's knowledge of the existence of the mortgage and of the fact that it was made to cover after-acquired property in no way operates as an estoppel, upon the theory that his goods were delivered to the mortgagor with notice that they might be taken by the mortgagee, since the further clause in the mortgage giving the right to the mortgagor to dispose of the stock would also be notice to the creditor that the property thus in the hands of the mortgagor was all subject to the claims of creditors and could be disposed of to pay them; that the property acquired by the mortgagor in the ordinary course of business between the date of the mortgage and the date of the taking of possession by the mortgagee may be reached by creditors; but that property so taken possession of by the mortgagee, and which was actually present when the mortgage was made, could not be reached, nor could profits acquired after the taking of possession be reached, if the business was continued. In view of the conclusion expressed by the Court of Appeals, and its approval of the grounds stated by the Appellate Division when affirming the judgment in that case (109 App. Div. 406, 96 N. Y. Supp. 633), there can be no question that these creditors may enforce their rights, notwithstanding that the judgment upon the debt was obtained after the taking of possession by the mortgagee; and to the extent that the case of *Mathews v. Hardt*, supra, would appear to hold otherwise, the latter authority must be deemed to have been overruled.

For the reasons stated, the plaintiffs are entitled to judgment declaring the mortgage void as to property coming into the hands of the mortgagors between the date of the mortgage and the time of the mortgagee's possession, but not as to property which was actually covered by the mortgage when made. Form of decision and judgment, containing appropriate provisions for an accounting and receivership, may be submitted upon notice of settlement.

Judgment accordingly.

FEUST v. CRAIG.

(Supreme Court, Appellate Term. December 12, 1907.)

1. LANDLORD AND TENANT—RECEIPT AS LEASE.

A receipt for rent, reciting that within a week the landlord will give and the tenant will take a written lease covering a specified term at a fixed rental, operated as a lease for the term named, where the tenant entered and remained in possession for over three months and no further written lease was made, and may be enforced notwithstanding the stipulation for the execution of a more formal contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 55, 56.]

2. SAME—TENANT'S ABANDONMENT—LANDLORD'S DUTY.

Where a tenant abandons the premises, the landlord need not relet them on the tenant's behalf.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 792, 793.]

3. SAME—PREMISES SURRENDERED AND ACCEPTANCE.

To be binding, the acceptance of a surrender of leased premises must be by the lessor or some one authorized by him to accept, and merely handing the keys to one not shown to be authorized to receive them does not constitute of itself a surrender and acceptance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 867.]

4. SAME—EFFECT OF AGENT'S ACT.

The mere taking of keys to premises from the tenant by the landlord's agent does not, in the absence of other acts showing an intent to accept the surrender, establish a valid surrender and acceptance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 867.]

5. SAME.

After the tenant's abandonment, a landlord's re-entry upon the premises and attempts to relet them in his own name, though not authorized to do so by the lease, is evidence tending to show an acceptance of a surrender of the premises, but does not show it as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 867, 870.]

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action for rent by Sigmund Feust against Horatio Craig. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Benjamin Patterson, for appellant.

Maurice Sichel, for respondent.

GILDERSLEEVE, P. J. The action is to recover the sum of \$135, being the rent of a store in a tenement house owned by plaintiff for the months of May, June, and July, 1907, at the monthly rent of \$45. Defendant, upon hiring the premises and paying the first month's rent, received the following receipt, which was made in duplicate and signed by both parties, viz.:

"Received of Mr. Horatio Craig \$45 for rent * * * from the 15th day of December, 1906, to the 15th day of January, 1907. It is also agreed that within one week from date a written lease will be given by the landlord and taken by the tenant from the 15th day of December, 1906, to the 1st day of May, 1908, at the same rent; i. e., \$45 per month, payable in advance."

No further written lease, however, was ever given. Defendant entered into possession, and continued there until April 30, 1907, when he moved out. Previous to such moving there had been some correspondence between the parties, in which defendant notified plaintiff of his intention of moving on or before the 1st of May, 1907, although the plaintiff stated that he refused to release defendant from the lease. We think the receipt, above quoted, operated as a lease for the term therein mentioned, notwithstanding the provision therein for a formal

lease, which was never made; for where a valid contract has been made, by which the parties understand that their rights are fixed, such a contract may be enforced, although there may be a stipulation that a more formal contract shall be executed. *Arnold v. Rothschild*, 37 App. Div. 569, 56 N. Y. Supp. 161; *Pratt v. H. R. Co.*, 21 N. Y. 308; *Sanders v. Pottitzer*, 144 N. Y. 209, 214, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757.

It will be observed, however, that the receipt contains no agreement permitting the landlord to re-enter and relet the premises on defendant's behalf. It appears from the testimony of plaintiff that he rarely visited the premises himself, and it was from a Mrs. Murphy that defendant received the keys of the premises in the first instance. Who Mrs. Murphy was, or what position she occupied, is not shown; nor did she testify at the trial, though apparently in court. Upon leaving the premises defendant delivered the keys to this Mrs. Murphy, who apparently accepted the same, although what was said is not shown. A short time after the departure of defendant, plaintiff entered upon the premises, put up a sign "To Let," and endeavored to rent the said premises, but unsuccessfully. The landlord was under no obligation to relet the premises on defendant's behalf. *Underhill v. Collins*, 132 N. Y. 271, 30 N. E. 576; *Matter of Ludeke*, 33 App. Div. 399, 54 N. Y. Supp. 121; *Clendinning v. Lindner*, 9 Misc. Rep. 682, 30 N. Y. Supp. 543; *Matter of Hevenor*, 144 N. Y. 271, 39 N. E. 393; and, as we have seen, there was no agreement between the parties permitting the landlord to re-enter and relet the premises.

Defendant claims that the acceptance of the keys by Mrs. Murphy upon defendant's leaving the premises, and the re-entry of the landlord upon the premises after their abandonment by defendant, and his efforts to relet the same, show a rescission of the lease by a surrender and acceptance. In the correspondence, previous to the abandonment of the premises by the defendant, plaintiff distinctly refused, as we have said, to rescind the lease or relieve defendant from his liability thereunder; but such refusal, having taken place some time before the abandonment, is not decisive, if plaintiff's subsequent acts show an acceptance, as he could have changed his mind in that regard. The acceptance of a surrender must be by the lessor or some one authorized by him to accept the same, and simply handing the keys to one who is not shown to have had authority to receive them does not constitute of itself a surrender and acceptance. *Baylis v. Prentice*, 75 N. Y. 604; *McAdam on Landlord & Tenant* (3d Ed.) pp. 1274, 1276; *Johnson v. Doll*, 11 Misc. Rep. 345, 32 N. Y. Supp. 132. As we have seen, the status of Mrs. Murphy is in no way indicated, and the only evidence of authority on her part to accept the keys is the fact that it was from her that defendant originally received them. Assuming, however, that she was the agent of the landlord, the mere taking of the keys by her from the tenant would not of itself, in the absence of other acts showing an intention to accept the surrender, establish a valid surrender and acceptance. *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. 576; *McAdam on Landlord & Tenant* (3d Ed.) 1276.

Inasmuch, however, as there was no provision in the contract authorizing him to do so, defendant's re-entry upon the premises and

attempts to relet the same in his own name, after the abandonment of the premises by defendant, is evidence tending strongly to show an acceptance on his part of the surrender of the premises by the defendant; and, had the plaintiff succeeded in reletting the premises in his own name to another tenant for a different period of time than that mentioned in the contract with defendant, it would seem that such a situation, unqualified by other conditions, would have created a surrender and acceptance by operation of law. *Gray v. Dairy Co.*, 9 App. Div. 115, 41 N. Y. Supp. 73; *Id.*, 162 N. Y. 395, 56 N. E. 903, 49 L. R. A. 580, 76 Am. St. Rep. 327; *Crane v. Edwards*, 80 App. Div. 335, 80 N. Y. Supp. 747. In the case, however, of *Dorrance v. Bonesteel*, 51 App. Div. 131, 64 N. Y. Supp. 307, the court, by Smith, J., use this language:

"But, whatever may be the rule in case of an actual reletting, the acceptance of a surrender has never been found, as a matter of law, to arise from a mere attempt to relet the premises."

In *Chapman on Landlord & Tenant*, p. 497, it is said that:

"Where a landlord accepts the keys of the demised premises and deals with them as his own, the jury may find that he intended to resume possession and to discharge the tenant from his obligation as lessee. This result has been held to follow, for example, where the landlord not only re-entered and relet the premises, but made alterations and repairs therein, though it would not necessarily follow from these facts."

It cannot be said that the facts in the case at bar create a surrender and acceptance by operation of law, and the question remains to be considered: Should the court, sitting as a jury, have found as a matter of fact, established by a preponderance of proof, that there was an acceptance by plaintiff of the surrender by defendant of the said premises? On one side we have the testimony of defendant, corroborated in a strong measure by the acts of the plaintiff subsequent to the abandonment of the premises by defendant; and on the other side we have the denial of plaintiff that he accepted the surrender of the premises by defendant. It seems to us, upon the whole case, that the ends of justice would best be served by a new trial, where the status and authority of Mrs. Murphy can be made to appear more definitely, and more light thrown on what took place when the keys were delivered to her. If it be shown that she was the agent of the plaintiff, who, it will be remembered, rarely visited the premises himself, and that she freely and definitely accepted the surrender as such agent, an important alteration in the situation would be thereby created.

The judgment is reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

(56 Misc. Rep. 360.)

CITY OF NEW YORK V. RICE.

(Supreme Court, Special Term, New York County. November, 1907.)

1. MUNICIPAL CORPORATIONS—ENCROACHMENT IN STREETS—POWER TO PERMIT.

Neither the assembly of the city of New York nor the park commissioner can, in streets lying within 350 feet of a public park, permit an encroachment of a permanent character therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1433.]

2. SAME—NUISANCE—ENCROACHMENT IN STREET—ABATEMENT.

A wall 8 feet high, constituting part of a stoop and entrance to a residence, and extending beyond the building line, is a nuisance, which the city may abate by an action in equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1502–1505.]

Action by the city of New York against Isaac L. Rice to restrain maintenance of a certain wall on Riverside Drive. Judgment for plaintiff.

George O'Reilly, for plaintiff.

Norman S. Johnson, for defendant.

BISCHOFF, J. The plaintiff brings this action to obtain a judgment restraining the maintenance of an ornamental wall erected by the defendant upon certain real estate owned by him and situated upon Riverside Drive at its intersection with Eighty-Ninth street, which premises he occupies as a residence. It appears that in the year 1889 the defendant purchased the plot of land so situated, and caused plans to be prepared for the erection of a dwelling house and for the improvement of the plot in such manner that a terrace was to be maintained, surrounded by a wall upon Riverside Drive and upon Eighty-Ninth street. In November, 1889, the defendant obtained from the municipal assembly of the city of New York a permit "to erect up to and upon the stoop line of the said premises at Eighty-Ninth street and Riverside Drive, a terrace wall approximately eight feet high, to be composed of rough stone faced with marble or limestone, such terrace wall to constitute a part of the architectural motive of the stoop and entrance leading to the said contemplated residence." In the month of January, 1900, after the work had been commenced on the wall and after it had been mainly completed, the defendant obtained from the park commissioner a permit to maintain the wall; and the question presented in this action is whether, by virtue of these permits, the structure could lawfully be maintained.

There is no question that the wall was of a permanent character and intended to be so, no less than was the defendant's residence itself; nor is there any dispute that the line of the wall extended up to and somewhat beyond the limits of the stoop line upon both Riverside Drive and Eighty-Ninth street. The projection of this structure into the street extends beyond the authorized building line, for buildings as such, approximately 6 feet on Eighty-Ninth street and approximately 7 feet on Riverside Drive; and, unless the permits referred to serve to legalize the erection and maintenance of the wall,

it undoubtedly amounts to a nuisance, because an appropriation of a substantial part of the city's streets, in violation of existing provisions of law relating to the manner in which the line of buildings upon the streets are restricted. In general, an ordinance of the municipality, or a permit granted by an agent of the municipality pursuant to an ordinance, which purports to authorize the permanent erection of a structure upon the public street in such manner as to encroach upon the use of the street by the public for its ordinary purposes, must be deemed void and ineffective to protect the person who acts thereunder against a demand by the city that the obstruction be removed (*McMillan v. Klaw & Erlanger*, 107 App. Div. 407, 95 N. Y. Supp. 365; *City of New York v. Knickerbocker Trust Company*, 52 Misc. Rep. 223, 102 N. Y. Supp. 900); but it is claimed that in the present case the permit granted to the defendant by the park commissioner in the year 1900 sufficed to authorize the erection of this wall, because, in the case of streets lying within 350 feet of a public park, jurisdiction to determine the lines of curb of the streets and the matter of erections and projections thereon was vested and is still vested in the park department, or the park commissioners, according to the designation employed in the different statutes.

In my opinion the distinction suggested cannot aid the defendant. The powers of the park department under the consolidation act (Laws 1882, p. 194, c. 410, § 688) and under the charter of 1897 (Laws 1897, p. 213, c. 378, § 612) in relation to the use of streets adjacent to the public parks was considered by the Court of Appeals in the case of *Ackerman v. True*, 175 N. Y. 353, 67 N. E. 629; and the conclusion was expressed by the court that the authority which resulted in the park department to regulate the matter of erections and projections upon these streets did not extend to an encroachment upon the streets of a permanent character, such as would amount, more or less, to the taking of the street for uses other than those of a public highway. In the case referred to the encroachment sought to be authorized took the form of an extension of the building line; and I can find no reasonable ground for distinction between an encroachment of that character and the structure erected by the defendant in the present case. One, in its general character, is as permanent as the other, and, if it might be said that an ornamental wall seven or eight feet high might be built beyond the building line, the power to permit such an encroachment could not well be limited to a wall of any height; and the result would be the same, so far as the public rights are concerned, whether the encroachment be in the form of a substantial inclosing wall or of the outer wall of a house. The case of *Wormser v. Brown*, 149 N. Y. 163, 43 N. E. 524, relied upon by the defendant, where the court upheld a permit to erect a bay window upon premises within the jurisdiction of the park department, was distinguished in *Ackerman v. True*; and the ground of distinction, as adopted in the latter case, is quite clearly such as to render it unavailing now as an authority in support of the defendant's claim in the present action. If the question is to be determined with regard to the similarity of the facts in the case at bar to the facts in the *Ackerman* or the *Wormser* Cases, respectively, and without regard to the general principles announced

in the Ackerman Case as applicable to the whole subject, my conclusion must be that the structure in the present case more nearly approaches an extension of the building line than a mere projection upon an established building line, and that the later expression of judicial opinion in the Ackerman Case controls the disposition of the controversy between the parties before me.

The provisions of the charter of 1901, referred to by the defendant as granting broader powers to the park commissioners than were possessed by them under the prior statutes, in effect at the time of the matters which were the subject of the litigation in *Ackerman v. True* and in *Wormser v. Brown*, do not really affect the case. The permit obtained in the year 1900 by this defendant was, as I must hold, void and of no effect. Thus the fact that it was not revoked gives it no added virtue; and, if the charter of 1901 did give broader powers to the park commissioners, those powers, until exercised, could be of no benefit to the defendant. If the power to permit the maintenance of this wall existed, as is contended, under these later statutory provisions (Charter 1901, Laws 1901, p. 28, c. 466, § 50), discretion of a judicial nature was to be exercised by the commissioners; and, without the exercise of that discretion, the mere fact that the power existed to exercise it could not, of course, afford a warrant for the defendant's maintenance of a structure not expressly authorized by law. It is proper to note, however, that the provisions of the charter of 1901 upon this subject were considered by the court in *Ackerman v. True*, supra, and it was held:

"The Legislature did not intend thereby to confer upon a member of the park board the right to permit an abutting owner upon any of the streets of the city, whether within any park or outside, to encroach upon the street by the erection of permanent and substantial structures thereon."

I find no reason for holding that the plaintiff should be restricted to such remedy as exists by law in the form of an arbitrary removal by it of the structure which is claimed to constitute a public nuisance. Upon the facts presented in this case, resort to equity appears to be a more orderly procedure; and the power of the court to grant equitable relief in such a case is not well open to question. *Wheelock v. Noonan*, 108 N. Y. 179, 15 N. E. 67, 2 Am. St. Rep. 405; *Village of Oxford v. Willoughby*, 181 N. Y. 160, 73 N. E. 677. My conclusion is that, whatever may have been the opinion of the park department or of its commissioner at the time of the erection of this wall, as to the artistic beauty of the structure and as to its desirability in connection with the existing plan and embellishment of Riverside Drive, permission to the defendant to erect and maintain the wall could not lawfully be granted by the permit in evidence, and that there should be judgment for the plaintiff for the relief demanded in the complaint, but without costs.

Form of decision may be presented substantially as proposed by the plaintiff, with the addition of findings proposed by the defendant and noted by me as "found" upon findings submitted and left with the clerk. Judgment for plaintiff, without costs.

WEISINGER et al. v. BROWNSTEIN et al.

(Supreme Court, Appellate Term. December 12, 1907.)

1. SALES—CONTRACT—PARTIES TO WHOM CREDIT GIVEN—PROMISE TO ANSWER FOR DEBT OF ANOTHER.

In an action for goods sold and delivered, one of the plaintiffs testified that P., a third person, asked for certain goods, and said that B., one of the defendants, would guarantee payment. The witness went to B., who refused to guarantee at the time, but subsequently sent word that he would be responsible for \$100. Another plaintiff testified that B. agreed to be responsible for \$100, but not for more; that it was before any goods were delivered to P.; that B. and his partner, the other defendant, agreed to be responsible up to \$100, and if P. did not pay the bill they would pay it. B. testified that he said he would be good for the bill to be sent on a certain date, and that he would pay for any goods P. did not pay for. *Held*, that the intent of the parties was not a sale and delivery, with credit given to defendants, but that the sale and delivery and credit were to P., and defendants merely contracted to pay the debt in case of P.'s default.

2. FRAUDS, STATUTE OF—PLEADING STATUTE AS DEFENSE—NECESSITY.

The statute of frauds is a defense, and must be pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 863.]

3. SALES—ACTIONS FOR PRICE—PLEADING AND PROOF—VARIANCE.

Where a complaint is for goods sold and delivered, and the evidence establishes merely a promise to answer for the default of another in case he fails to pay for goods purchased by him, the variance is fatal, and defendant is not called upon to controvert the proof offered, or to plead the statute of frauds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1025-1043.]

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Joseph Weisinger and another against Joseph Brownstein and another. From a judgment for plaintiffs, defendants appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Jacob Gordon, for appellants.

Bennett G. Siegelstein, for respondents.

GUY, J. Appeal from judgment in favor of the plaintiffs for balance alleged to be due for goods sold and delivered to defendant. The answer is a general denial. One of the plaintiffs testified that:

"Perlmutter came up to me, and asked me I should give him goods; and I told him I can't give him any. He says he will give me a guarantee for it. I asked him who is guaranteeing, and he said Brownstein. Then I went to Brownstein and Javetz, and said if he will be guarantee for the goods; and he said, 'no,' he don't want any."

He also testified that subsequently Brownstein sent a man and "told me I should give him the goods; that he is responsible for a hundred dollars;" that the goods were delivered to Perlmutter in Philadelphia.

Joseph Weisinger, another plaintiff, testified Brownstein said:

"I should give his brother-in-law for a hundred dollars worth of goods, and he would not be responsible for more. If he would not pay, I will pay. That

was before I sent any goods. The first time I saw Brownstein and Javetz, they said they would be responsible up to \$100, and if this man in Philadelphia didn't pay the bill, they would pay the bill."

Benjamin Brownstein, the defendant, testified:

"I said to the plaintiff: 'I am good for this bill, which you will send December 6th. Any goods the man don't pay, I will pay for it.'"

Max Perlmutter, called as a witness for defendants, testified:

"I have asked them, they should give me goods. They have answered me, they can't give me any except I will give them a guarantee."

The witness further testified that he bought only \$185 worth of goods, and paid \$34 on account, and paid two other bills C. O. D.; that the goods were shipped direct to him, and the bills were made out to him and sent to him; that he gave an order for goods himself by mail. "I was going to pay for these goods, but I have not got it."

On all the evidence it seems clear that it was not the intention of the parties that goods should be sold and delivered and credit given to defendants, but that such sale and delivery and credit were to Perlmutter; the defendants merely contracting to pay such debt of Perlmutter in the event of his default of payment.

The defendant moved to dismiss the complaint, and now seeks to have the verdict set aside on the ground that such an oral contract is void under the statute of frauds. The defendant, however, cannot avail himself of this defense, for the reason that it is not pleaded in the answer. It is now well settled by the decisions of this state that the statute is a defense, and, unless pleaded, is not available to the defendant to defeat the action. See *Crane v. Powell*, 139 N. Y. 379, 34 N. E. 911. In *Matthews v. Matthews*, 154 N. Y. 291, 48 N. E. 531, *Andrews, C. J.*, says:

"It is plain, upon the view that the statute of frauds does not make an oral contract within its terms illegal, but only voidable at the election of the party sought to be charged, that such election must be manifested in some affirmative way. * * * One of the rules established by the English judicature act, as amended in 1873, ordained that 'where a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract, and not of its legality or its sufficiency in law, whether with reference to the statute of frauds or otherwise.' * * * The statutory rule enacted by the English judicature act was regarded by this court in *Crane v. Powell* as declaring the true rule independently of statute. The mere denial in the answer in the present case of the contract alleged in the complaint did not, therefore, raise any question under the statute of frauds; and it could not be raised upon objection at the trial to the proof of the oral contract, for the very conclusive reason that the statute must be pleaded before the validity of the contract on that ground can be assailed."

The defendant appellant also contends that the action was for goods sold and delivered to the defendants and the proof failed to establish such cause of action. The complaint alleges that heretofore, and on the 1st day of December, 1906, plaintiffs at the special instance and request of defendants sold and delivered goods, wares, and merchandise of the agreed and reasonable value of \$148.20, for which defendants promised and agreed to pay. The evidence of the plaintiffs fails utterly to establish such agreement, or such alleged sale and delivery.

to the defendants. The defendants were not called upon under such an allegation to controvert proof offered of an agreement on the part of the defendants to answer for the debt of another, or to plead the statute of frauds. The plaintiffs having failed to establish the cause of action alleged in the complaint, it was error on the part of the trial justice to render judgment in favor of the plaintiffs.

Judgment reversed, and new trial ordered, with costs to appellants to abide the event. All concur.

(122 App. Div. 172.)

FIRST NAT. BANK OF SYRACUSE v. CITY OF SYRACUSE et al.

(Supreme Court, Appellate Division, Fourth Department. November 13, 1907.)

CONTRACTS—CHANNEL IMPROVEMENT—CONSTRUCTION—RIGHT TO EXTRA COMPENSATION.

A contract to improve a creek channel, requiring the contractor to do the bailing and draining for a lump sum, was based on an estimate of 43,500 cubic yards of excavation and a previous notice to bidders that the estimates were to be considered only as approximate. In doing the work it became necessary to excavate 84,676 yards. *Held*, that for work done fairly within contemplation of the contract the contractor may not claim additional compensation for bailing and draining, and that he may not claim increased compensation for such work under a provision that, if the alterations should increase the amount, the increase should be paid for according to the quantity actually done at a fixed price; there being no showing as to the quantity of bailing and draining, beyond that originally required, necessitated by the increased excavation, and there being no price fixed for such work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1071-1080.]

Spring and Robson, JJ., dissenting.

Appeal from Special Term.

Action by the First National Bank of Syracuse against the city of Syracuse and Thomas F. Moore. From a judgment for plaintiff, defendants appeal; and from a judgment dismissing Moore's claim against the city, Moore appeals. Affirmed.

The following is the opinion of Andrews, J., at Special Term:

The plaintiff is entitled to the relief demanded in the complaint, with costs. Section 15, c. 418, p. 521, of the Laws of 1897 does not apply under the circumstances shown in this case. As between the defendant Moore and the city, the latter must succeed.

During the year 1902 the city of Syracuse desired to improve the channel of Onondaga creek. On August 14th it issued a notice to contractors. In that notice it was stated that the "estimate of quantities is to be considered only as approximate," that bidders were required to form their own judgment of the quantities and character of the work, that the contractor should have no claim against the city by reason of any variation between the quantities of the approximate estimate and the quantities of the work as done, and that the bids would be computed and canvassed by the quantities mentioned in the following estimate. Then appeared various items: (a) All bailing and draining; (b) clearing; (c) 43,500 cubic yards excavation; (d) 800 cubic yards embankment; (e) 1,000 cubic yards riprap. On September 2d Mr. Moore submitted his bid: (a) For bailing and draining, the sum of \$10,000; (b) for all clearing, the sum of \$500; (c) for excavation, the sum of 28 cents per cubic yard; (d) for embankment, the sum of 25 cents per cubic yard; (e) for riprap, the sum of \$2 per cubic yard; (f) for all work done by written order of the com-

missioner of public works, its actual reasonable cost to the contractor, as determined by the commissioner, plus 15 per cent. of said cost. On November 5th the contract between the city and Mr. Moore was executed. The latter agreed to complete the work and furnish all the labor, machinery, tools, and material to do everything required to improve Onondaga creek in the manner and under the conditions and requirements hereinafter specified and in accordance with the plans of the city engineer as exhibited at the letting. It was agreed between the parties that the quantities of work to be done and the materials to be furnished as given in the accompanying notice to the contractors are only for the purpose of comparing on a uniform basis the bids offered for the work under the contract; and it was agreed that the board of contract and supply reserved the right to increase or diminish the above-mentioned quantities, or any of them, as might be deemed necessary by the commissioner of public works. It was further agreed that the city engineer might make alterations in the line and grade, and the commissioner in place, form, position, dimension, or material of the work herein contemplated, or of any part thereof, either before or after the commencement of construction. "If such alterations diminish the quantity of work to be done, they shall not constitute a claim for damages or for anticipated profits on the work that may be dispensed with. If they increase the amount of such work, such increase shall be paid for according to the quantity actually done, and at the price established for such work under the contract; or, in case there is no price established, it shall be paid for at its actual reasonable cost as determined by the commissioner, plus 15 per cent." The contract further provided that in the item "bailing and draining" there should be included the necessary machinery, labor, power, materials, cofferdams, or other appliances to so far remove all water, ice, or snow from the work as to enable it to be thoroughly done and inspected. The prices Mr. Moore was to be paid for such work corresponded with the prices specified in his bid. Mr. Moore proceeded with the work, but for some reason the amount of excavation shown in the plans was so far increased by the city that it amounted to 84,676, instead of 43,500, yards. The contractor claims that his bid of \$10,000 for bailing and draining was based upon the estimate of 43,500 yards of excavation, and when the excavation was practically doubled the amount of bailing and draining required was also greatly increased, and that the amount allowed him for such item should be also increased in the like proportion. This claim is based upon the provision that, if the alterations in the line, grade, and dimension of the work contemplated in the contract increase the amount of such work, such increase shall be paid for according to the quantity actually done and at the price established for the work under the contract.

The first answer to this proposition is that there is no evidence in the case of the quantity of bailing and draining beyond that originally required which was necessitated by the increased excavation, and, further, that there is no price established for such work under the contract. The price for excavation at 28 cents per cubic yard is established. But it cannot fairly be said that the amount to be paid for additional bailing and draining can be fixed by dividing the \$10,000 bid therefor by 43,500, the approximate amount of cubic yards of excavation contemplated, and that the quotient is the price per cubic yard for such work. If the contractor is entitled to anything for this item, it is the actual reasonable cost of the additional bailing and draining, plus 15 per cent.; and there is no evidence in the case as to what such cost is. But, as I interpret the contract, there is another answer fatal to Mr. Moore's claim. His agreement was to do all the bailing and draining necessitated by the excavation which the contract required for \$10,000. This might be more or less than the amount originally estimated. The city had the power to make such alterations. The bid was put in with this in mind. If the total excavation had been decreased, the contractor was still entitled to \$10,000; so of an increase in this same item. I do not hold that an increase might not be so great as to constitute extra work under this contract. If so, the contractor would be entitled to recover compensation for the bailing and draining entailed thereby. I do not even hold that the increase in the present case was not so great as to be outside of the contemplation of the contract. But that question, in view of the pleadings, is not here. All that I hold is that for work done fairly within

the contemplation of the contract executed by the parties no additional compensation can be allowed under the item of bailing and draining.

Proper findings may be prepared, and, if not agreed upon, will be settled upon five days' notice.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, KRUSE, and ROBSON, JJ.

Walter W. Magee, Corp. Counsel, for appellant city.

King, Waters & Page, for appellant Moore.

Lewis & Crowley, for respondent.

PER CURIAM. Judgment affirmed, with costs to the respondent bank against the appellant city of Syracuse, on opinion of Andrews, J., delivered at Special Term.

SPRING, J. (dissenting). I concur with the conclusion of the learned trial justice that the city is liable to the plaintiff. The claim of Moore for bailing and draining, and that was the only item really in controversy between him and the city, was dismissed, "but not upon the merits." It is that part of the judgment which I think constitutes error.

Specifications had been prepared for the improvement of Onondaga creek. The item of bailing and draining was one of those contained in these specifications; and, in brief, this term denoted the excavating of a ditch or channel in the bed of the creek to carry off the water so that the men engaged in the improvement could carry on the work, and according to the specifications it included "the necessary machinery, labor, power, materials, cofferdams, or other appliances to so far remove all water, ice, or snow from the work as to enable it to be thoroughly done and inspected." Kelley's bid for this work was \$10,000. In the notice to the contractors it was estimated that there would be 43,500 cubic yards of excavation. When the work was completed the actual amount of work excavated was about twice the amount estimated, and the contractor, Moore, seeks to recover for this increase. The notice to contractors referred to contained this provision:

"The following estimate of quantities is to be considered only as approximate, and bidders are required to form their own judgment of the quantities and character of the work, by personal examination of the ground where it is to be done and of the specifications and drawings relating to it, or by such other means as they may prefer."

The counsel for the city claims that the bid was a lump sum for doing all the bailing and draining, whatever might be the quantity, and that the provision quoted precludes any recovery by the contractor for the extra amount of work imposed by the additional excavation. That construction might prevail for any slight variation either increasing or lessening the quantity of labor performed; but, if there was a substantial difference in the amount done, it is to be considered in fixing the amount of compensation. Clause F of the contract reads as follows:

"It is further agreed that the said engineer may make alterations in the line and grade, and the commissioner in place, form, position, dimensions, or

material of the work herein contemplated, or any part thereof, either before or after the commencement of construction. If such alterations diminish the quantity of work to be done, they shall not constitute a claim for damages or for anticipated profits on the work that may be dispensed with. If they increase the amount of such work, such increase shall be paid for according to the quantity actually done, and at the price established for such work under the contract; or, in case there is no price established, it shall be paid for at its actual reasonable cost as determined by the commissioner, plus 15 per cent. of said cost."

The work is fairly within the scope of this provision. The answer served by the defendant Moore makes no reference to any claim for bailing and draining. There is a count for extra work, but apparently it does not pertain to this demand, because the averment is upon a claim recognized by the city by part payment. Upon the trial the defendant did not proceed upon the assumption that he was entitled to recover the reasonable cost incurred by him in consequence of the increased excavation. His claim was that the item for bailing and draining was for a certain price per yard, and, as the amount excavated increased, there was a proportional addition to the compensation. We think this is not a reasonable deduction. There was no proof as to the added cost, and before any recovery can be had there should be clear proof that there was a substantial extension to the labor performed due to the largely increased excavation.

Upon the trial the defendant Moore proved by experts that where a bid of a lump sum is made for bailing and draining "the amount and quantities are reasonably approximate," and that the compensation varied with the change in the quantity of earth excavated from the estimate. This evidence was objected to, but no question was raised that the claim was not within the answer, or that the measure of damages sought to be adopted was improper. The court dismissed the claim, but not upon the merits. The trial judge held very properly that there was no proof justifying the conclusion that the extra expense of the work was regulated ratably by the enlargement of the quantity of earth removed. If the defendant city had objected on the ground that the claim was not covered by the answer, or that the proper measure of damages was not adopted, an amendment might have been allowed, and the claimant might have proceeded according to section F of the contract. We think the claim should not have been dismissed. The note and assignment held by the bank are to be delivered to the city upon payment of the amount due the bank. Quite a large sum has been found due to Moore which can be applied toward the payment of the note by the city, leaving a considerable balance unpaid. The controversy between him and the city over the bailing and draining item can be readily determined in this action without much expense, and if any sum is found due Moore the two claims can be adjusted and judgment awarded for the difference.

The appellant Moore appealed from that part of the judgment which directed the bank to assign and deliver to the city the note against him and any collateral held as security for the note. This is a very proper direction. The city is in the situation of a surety for Moore, and is subrogated to all the rights of the bank upon paying Moore's debt. The judgment in favor of the plaintiff should be affirmed, with costs.

Judgment dismissing the claim of the defendant Moore against the city for bailing and draining should be reversed, and a new trial ordered, but without costs to either party, as the defendant Moore only succeeds in part, with leave to him to apply for an amendment to his answer, if he is so advised.

ROBSON, J., concurs.

(56 Misc. Rep. 366.)

GORDON v. ILLENSWORTH et al.

(Supreme Court, Special Term, New York County. November, 1907.)

1. COVENANTS—ACTION FOR BREACH—ANSWER.

Plaintiff sued several grantors on covenants of warranty in a deed in which all joined, alleging eviction as to one-eighth of the property. *Held*, that the fact that a mortgage given to the particular grantor of such one-eighth interest for the price thereof was, on the death of the grantor, purchased for less than its face by the plaintiff from his administrator, who misapplied the price, was not a complete defense.

2. SAME—PARTIAL DEFENSE—ANSWER.

In an action against several grantors on covenants of warranty, in a deed in which all are joined, on an alleged eviction from one-eighth of the property, an alleged tender by the grantors to the plaintiff before the eviction of the price of such one-eighth part, with interest, is not a partial defense as to plaintiff's costs and expenses thereafter incurred in an action to evict him.

Action by Henry Gordon against Elizabeth Illensworth and others. Demurrer to defenses interposed separately in answers of three defendants. Sustained.

George H. Taylor, Jr., for plaintiff.

Edward P. Lyon, for defendant W. P. Illensworth.

Charles A. Clark, for defendant Elizabeth Illensworth.

Percival C. Smith, for defendants Catherine Illensworth and others.

BISCHOFF, J. The plaintiff sues upon the defendants' covenants of title, of warranty, and of quiet enjoyment; his claim being based upon an ouster as to one-eighth of the property conveyed to him. For a separate defense it is alleged, in substance, that the common source of the title to the premises conveyed to the plaintiff was Harriet M. Kemp, who died seised of the premises and leaving a last will and testament whereby she made certain provisions for the disposal of her property, these provisions being set forth in the defense referred to; that at the time of the sale to the plaintiff it was supposed by the sellers that the provisions of the will of Harriet M. Kemp gave to John B. Mee, one of the plaintiff's four grantors, an undivided one-fourth part of the premises; that on the purchase by the plaintiff of the premises he gave back to John B. Mee a bond and purchase-money mortgage for \$5,000 for his full share of the purchase money on the basis of his owning one-fourth of the fee; that John B. Mee died, and letters of administration were issued to his wife, Emma B. Mee, upon her giving a bond in the sum of \$100, "and the said bond and mortgage so wrongfully given for \$5,000, as aforesaid, thereupon came

into her possession"; that the plaintiff and his agents, in order to get control of said bond and mortgage so given for John B. Mee's supposed one-fourth interest in the fee, "and so place it that it could not be offset in case of a suit over the title, by collusion and connivance with the said Emma B. Mee, who has no means whatever, and at a discount of at least \$600, took over the said bond and mortgage in the name of a third person, and so held it during the pendency of the suit mentioned in the complaint." The suit referred to was one which resulted in the determination of the title, so far as to affect John B. Mee's right to convey the premises to the extent of one-eighth, and the determination of which suit resulted in the ouster of which the plaintiff complains. The defense contains further allegations to the effect that, but for the purchase of the bond and mortgage by the plaintiff, it could and should have been a complete offset to the claim of Herbert B. Mee, the claimant, for the one-eighth interest referred to, "or at least the administratrix of said John B. Mee could have been brought in and compelled to make good said Herbert B. Mee's loss by surrender and cancellation of said mortgage or otherwise, but that, by reason of said wrongful and collusive purchase of said bond and mortgage, the administratrix of said John B. Mee has entirely dissipated the purchase price, and defendants are without recourse in the premises."

The loss to the defendants, through the transaction thus set forth, arises from the fact that the administratrix of John B. Mee misappropriated the proceeds of the sale of the mortgage, and from the further fact that her bond as administratrix was insufficient for the purpose of protecting persons interested in the estate against loss; but the plaintiff had nothing to do with either circumstance, and the allegation of his collusion with the administratrix relates wholly to his buying back the mortgage from her at a discount of \$600 and taking an assignment of the mortgage to a third party. It was certainly open to the plaintiff to discharge his own debt, and his purchase of the mortgage violated no duty owing from him to his grantors. He paid \$4,400 to the administratrix, who was entitled to receive it, and the resulting loss to the creditors of the estate—including these particular defendants—is traced by the averments of the defense to no wrongful act of his. If the assignee of the mortgage merely holds the title for the plaintiff, as is alleged, then the plaintiff has paid his debt; otherwise, he still owes it to the assignee, the present holder of the bond, and at best it may be said that the discount of \$600 from the face of the mortgage represents a lessening of the consideration paid by the plaintiff to John B. Mee—one of the grantors—to that extent. In this aspect, however, the facts would relate simply to the reduction of damages sustained through the ouster, the damages being measured by the purchase price, and no complete defense to the action would be apparent. The matter is not pleaded as a partial defense; and, since the allegations fail to set forth a complete defense, the demurrer is to be sustained. It is to be noted that the general averments of collusion and connivance, as well as the characterization of the mortgage as one "so wrongfully given for \$5,000," are related to no substantial averments of fact, and their presence in the pleading does not in any way

strengthen the defense, which, for the reasons stated, is insufficient in substance.

The demurrer is also directed to a partial defense based upon the fact that, immediately upon the commencement of the suit by Herbert B. Mee against the plaintiff, set forth in the complaint, the defendants offered and tendered to the plaintiff the consideration paid by him for the premises set forth in the complaint, together with interest, costs, and expenses by him incurred, and asked a reconveyance of said property, but that the plaintiff refused to accept the offer or make a reconveyance. As stated in the answer, the theory of this partial defense is that any cost and expenses incurred by the plaintiff after the tender were voluntarily incurred by him. In my opinion, the partial defense is clearly insufficient. Obviously, the plaintiff was under no duty to give up his purchase at the first hint of litigation. He was entitled to keep what he had bought until ousted, relying upon the defendants' covenants of warranty and of quiet enjoyment; and his right to rely upon those covenants did not in any way depend upon the defendants' election to take back the property upon the assertion of a hostile title. If this partial defense were to be upheld, a grantor's covenants would practically amount to nothing, since the burden would be cast upon the grantee, in every case, to determine at his own risk, in advance of a suit which affected his possession, whether the title thus warranted was good or bad; and the law places no such duty upon him.

The demurrers are, therefore, severally sustained, with costs, with leave to the defendants to amend upon payment of costs within 20 days.

Demurrers severally sustained, with costs, with leave to defendants to amend upon payment of costs within 20 days.

MOORE v. MARTINE

(Supreme Court, Appellate Term. December 12, 1907.)

1. APPEAL—REVIEW—SCOPE—EVIDENCE NOT DISCLOSED.

Where an appeal from a judgment on a referee's report does not disclose the evidence, the referee's findings will be presumed to have been based upon sufficient evidence, and the appellate court will only determine whether the conclusions of law are warranted within the pleadings by the facts found.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3762.]

2. REFERENCE—FINDINGS—BASIS.

Findings must be upon the issues of a case, and a referee should not allow a claim forming a cause of action distinct from the one on which issue was taken.

3. APPEAL—PRESUMPTIONS.

In an action for "money loaned," the referee found that plaintiff loaned defendant money "and advanced or expended * * * money" for him. *Held*, on appeal, that no evidence being disclosed, and no objection to the testimony appearing, it must be assumed the finding was based upon testimony admitted either properly or without objection, and that the facts proved a good cause of action without objection, and the case may be disposed of as though the pleading had been amended on the trial to conform to the proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reference, § 3762.]

4. SAME—REVIEW—FINDINGS—RECONCILIATION.

Though a referee's findings are apparently inconsistent, the appellate court should reconcile them, if possible, and give effect to the referee's real intent in making them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3769.]

5. REFERENCE—FINDINGS—SUFFICIENCY.

Where, in an action for money, the referee found that plaintiff loaned "various sums of money to the defendant, and advanced or expended various sums" for him, as set forth in a schedule, which set out various items, without showing whether they were for money lent or for money advanced or expended, and concluded that defendant owed plaintiff the gross sum claimed, there was sufficient compliance with Code Civ. Proc. § 1022, requiring a referee's report to state separately the facts found and the conclusions of law, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reference, § 134.]

Appeal from City Court of New York.

Action by Clara L. Moore against Randolph B. Martine. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

William L. Flagg, for appellant.

Herman J. Witte, for respondent.

GILDERSLEEVE, P. J. This is an appeal from a judgment entered on the report of a referee in favor of plaintiff. As the case on appeal does not contain any of the evidence, the Appellate Term cannot review the case on the facts, but must consider only the alleged errors of law raised by the exceptions to the report. All the findings of fact of the referee will be assumed to be based upon sufficient evidence, and we have only to determine whether the conclusions of law are warranted, within the pleadings, by the facts found. *Billings v. Russell*, 101 N. Y. 226, 4 N. E. 531; *Norton v. Matthew*, 11 Misc. Rep. 711, 31 N. Y. Supp. 1131; *Stoddard v. Whiting*, 46 N. Y. 627.

The only two exceptions urged on the appeal are that the report does not state the facts separately, as required by section 1022 of the Code of Civil Procedure and that the facts found are not within the pleadings. The complaint alleges that:

"On October 10, 1904, defendant was indebted to plaintiff in the sum of \$1,400 on account for money lent by the plaintiff to said defendant at different times and in various amounts between October 10, 1901, and January 22, 1904, inclusive, which said sum the defendant promised to repay on demand, with interest."

The complaint also alleges a demand and nonpayment. The answer is a general denial, except that it admits the making of a demand by plaintiff and the nonpayment by defendant. The issues were tried before the referee, who in his report found as follows:

"(1) That the plaintiff, between the 10th day of October, 1901, and the 25th day of January, 1904, loaned various sums of money to the defendant, and advanced or expended various sums of money for the defendant, at his request, as set forth in the schedule hereto annexed and marked 'A,' and at or about the several times therein specified. (2) That no part of the amount so loaned, advanced, or expended has been paid, although duly demanded."

The schedule annexed to the report gives some 38 items, but does not state as to any one of them whether it is an item for money lent or an item for money advanced or expended for defendant. The conclusion of law, set forth in the report, is as follows:

"(1) That defendant is indebted to the plaintiff in the sum of \$1,400, and that the plaintiff is entitled to judgment for that amount, with interest on the sums specified from the respective dates on which the same were loaned or expended to the entry of judgment herein, together with the costs and disbursements of the action, to be taxed."

Taking the facts, as found to be based upon sufficient evidence, as we must where the case on appeal does not contain the testimony, we see that the conclusion of law is warranted by such facts. There remain, however, to be considered the questions: (1) Are the findings of fact within the pleadings? and (2) does the report comply with the requirements of the Code with respect to stating the facts separately?

Defendant urges that claims for money lent "and money advanced or expended for" are separate causes of action requiring different forms of pleading and involving distinct defenses, and that the allegations of the complaint do not cover a claim for "money advanced or expended for" defendant, but simply set forth a cause of action for money loaned, and that consequently evidence as to money advanced or expended would have been inadmissible under the pleading, and the referee could not find legally for plaintiff on that claim. It is true that findings must be upon the issues of the case, and that a referee should not allow a claim which was a cause of action distinct from the one on which issue was taken. In the case at bar, we are, of course, unable to say whether the testimony, upon which the finding for "money advanced or expended for defendant" was based, was admitted without objection at the trial; but certainly no exception in that regard is before us, and we are to assume when the case on appeal contains none of the evidence, that the finding of the referee is based upon testimony either properly admitted or at least admitted without objection. We may therefore conclude that, while the complaint may not have covered the case as proved, the facts in the case proved a good cause of action, without objection to the evidence; and the rule is settled, in such cases, that the case on appeal may be disposed of as though the pleading had been amended on the trial to conform with the proof. *Tisdale v. Morgan*, 7 Hun, 583; *Howell v. Grand Trunk R. R. Co.*, 92 Hun, 427, 36 N. Y. Supp. 544; *Tyng v. House Co.*, 58 N. Y. 313. Even when the findings of the referee are apparently inconsistent, it is the duty of the appellate court to reconcile them, if possible, and to give effect to the real meaning and intent of the referee in making them. *Health Department v. Purdon*, 99 N. Y. 237, 1 N. E. 687, 52 Am. Rep. 22.

Defendant further urges that the referee should have stated separately how much he found due for money loaned and how much he found due for money expended or advanced. It has been held that the report of the referee, appointed to hear and determine the issues arising in an action, which does not state the facts found and conclusions of law, as required by section 1022 of the Code, is insufficient to constitute the basis of a valid judgment. *Lederer v. Lederer*, 108 App.

Div. 228, 95 N. Y. Supp. 623. The section of the Code in question provides as follows:

"The decision of the court or the report of a referee, upon the trial of the whole issues of fact, must state separately the facts found and the conclusions of law," etc.

It seems to us that the referee in the case at bar has sufficiently complied with the requirements of the statute. The evidence is presumed to have shown that plaintiff loaned, advanced, or expended for the defendant the sum of \$1,400, as set forth in the schedule annexed to the report, which fact is stated in the first finding of fact. The evidence also presumably showed that no part of these sums so loaned, advanced, or expended for defendant has been paid, although duly demanded, which fact is stated in the second finding of fact. Then the referee sets forth separately his conclusions of law that defendant is indebted to plaintiff in said sum of \$1,400 and that plaintiff is entitled to that amount, with interest, etc. We fail to see any sufficient reason for disturbing the judgment, which should be affirmed, with costs.

Judgment affirmed, with costs. All concur.

(56 Misc. Rep. 876.)

CONRAD v. CONRAD.

(Supreme Court, Special Term, New York County. November, 1907.)

ACTION—DIVORCE—COMPLAINT—JOINDER OF CAUSES.

Though, under Code Civ. Proc. § 1770, a defendant in divorce can set up a counterclaim consisting of a cause of action either in divorce or separation, plaintiff cannot, in a complaint for divorce, unite both causes of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 387.]

Action by Reine Conrad against George T. Conrad for divorce. Demurrer to complaint sustained.

May & Jackson, for plaintiff.

Ornstein & Levy, for defendant.

BLANCHARD, J. The complaint sets forth the adultery and the cruel conduct of the defendant, and asks for a decree of divorce or, in the alternative, a decree of separation. The defendant demurs, alleging that there is a misjoinder of causes of action in the complaint. Zorn v. Zorn, 38 Hun, 67, expressly holds that causes of action in divorce and separation cannot be united in the same complaint. This case has never been overruled, and seems, therefore, controlling in the present case. The court held in Zorn v. Zorn that such a joinder of causes of action was in violation of section 484 of the Code of Civil Procedure, which provides that causes of action of certain enumerated classes may be united, and that the causes of action may be united only when arising out of the same transaction or connected with the same subject of action and consistent with each other.

The plaintiff contends that, since section 1770 of the Code of Civil Procedure permits a defendant to set up against an action for divorce or separation a counterclaim consisting of a cause of action either in

divorce or separation, he may join both causes of action in his complaint. It has been held at Special Term that this section permits the defendant to join both causes of action in a counterclaim (*Spahn v. Spahn*, 12 Abb. N. C. 169); but, in so far as the defendant is permitted to join both these causes of action in his counterclaim, the practice rests solely upon the authority of section 1770, which refers only to counterclaims and has no application to complaints (*Mason v. Mason*, 34 Civ. Proc. R. 193, 94 N. Y. Supp. 868). It is difficult to see why the same practice which governs the joinder of causes of action in the counterclaim should not be extended to the complaint. The cases upon which *Zorn v. Zorn*, supra, rested were determined by considerations which would seem quite as applicable to counterclaims as to complaints. In those cases the courts stated that the cause of action for divorce prayed for a judgment dissolving the marriage contract, while the cause of action for separation contemplated the continued existence of the marriage contract. It seems, however, that this circumstance does not necessarily make the causes of action inconsistent, but rather shows that for the breach of the marriage contract two alternative remedies are demanded; one which will result in the dissolution of the contract, and the other which will result in its continuance with certain changes. Similarly, the cases upon which *Zorn v. Zorn* rested were largely determined by the manifest reluctance of the courts to subject the defendant to "an inquiry into the history of the domestic life of the parties to make out the charge of habitual cruelty or other indecent and outrageous conduct, and this, too, upon the mere contingency that such proof might be wanted if the other charge of adultery did not succeed." *Johnson v. Johnson*, 6 Johns. Ch. 163. See, also, *Smith v. Smith*, 4 Paige, 92; *McIntosh v. McIntosh*, 12 How. Prac. 289; *Henry v. Henry*, 17 Abb. Prac. 411; *McNamara v. McNamara*, 9 Abb. Prac. 18. This consideration, however, seems quite as applicable to complaints as to counterclaims. The reasoning of these cases above mentioned was questioned in a dictum in *Doe v. Roe*, 23 Hun, 19, 23; but this dictum was disregarded in *Zorn v. Zorn*, supra.

Although the rule of *Zorn v. Zorn*, supra, does not impress the court as being wholly satisfactory, it seems that that decision is controlling, and that the demurrer to the complaint herein must accordingly be sustained.

SOBOL v. UNION RY. CO. OF NEW YORK.

(Supreme Court, Appellate Division, First Department. December 13, 1907.)

STREET RAILROADS—COLLISIONS WITH PEDESTRIANS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

In an action for the death of a pedestrian struck by a street car, evidence held not to show decedent's freedom from contributory negligence, nor negligence of the company.

Patterson, P. J., dissenting.

Appeal from Trial Term.

Action by Solomon Sobol, administrator of Joseph Sobol, deceased, against the Union Railway Company of New York. From a judgment

for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed, and new trial granted.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Bayard H. Ames, for appellant.

Frederick S. Martyn, for respondent.

LAUGHLIN, J. This is a statutory action to recover for the death of Joseph Sobol, alleged to have been caused by the negligence of the defendant. On the evening of the 14th day of July, 1904, at about half-past 7 o'clock, the decedent, who was 9 years and 5 weeks of age, was struck by a north-bound car of the defendant on Third avenue, between 155th and 156th streets, and sustained injuries which resulted in his death.

We are of opinion that the evidence is insufficient to sustain the verdict. It does not appear that the decedent exercised proper care for his own safety or that the motorman of the defendant was negligent. 155th street intersects Third avenue on the west, but does not cross it. The distance between 155th and 156th streets is 200 feet. The decedent resided with his parents at No. 3032 Third avenue, which is on the east side, nearly midway between 155th and 156th streets. He had attended school three or four years, and was a bright, careful boy, and had been for a long time accustomed to play in the street. The plaintiff called four eyewitnesses to the accident. Mr. Stedman, who was standing at the southwest corner of 156th street and Third avenue, testified that it was very light; that he saw the boy leaving the easterly curb in front of No. 3036, which would be two doors north of his residence, and run southerly toward the track; that he was "traveling not very fast, and on a little run"; that the north-bound car had then just passed 155th street, "going at a good rate of speed—I should say just a good rate of speed"—and he admitted that he testified before the coroner that the speed was 6 miles an hour; that he heard no bell until after the car struck the boy, but would not swear that it was not rung; that he should judge that the boy was about 15 feet from the car when he stepped on the track, and he admitted that he testified before the coroner that decedent stepped upon the track within 5 feet of the car; that he saw the motorman try to stop the car when 15 feet from the boy, or 15 to 20 feet from where the accident occurred, and had so testified before the coroner; that the car went about a car length and a half after striking the boy, and he admitted testifying on this point before the coroner that it only went about 15 feet after striking the boy. He also admitted that he made a statement in writing to the defendant as to how the accident occurred, and that in answer to the question, "Please give full account of the accident as witnessed by you," he had written:

"The boy ran from curb to car track. Motorman had no time to stop car, because it was so unexpected."

One Kimball, who resided on the east side of the avenue, opposite 155th street, testified that he was leaning out of his window upstairs, looking out on the avenue, and saw decedent about midway between

the curb and rail of the track, nearly in the middle of the block "on a little run"; that the car was then within 15 feet of decedent; that "the car seemed to be going a pretty good rate of speed," which he judged to be between 12 and 15 miles per hour, or the ordinary rate there; that the car was within 12 or 15 feet of the boy when he stepped on the track. This witness made a statement in writing to the company, in which he stated that there was no carelessness or neglect on the part of the conductor or motorman, so far as he knew; that the car was going at the medium rate of speed, and "struck a boy, who ran out from the curb directly in front of the car. The motorman applied brake, and stopped his car as quickly as he could. * * * As far as I know, the motorman was not to blame."

One Bokomy, who was standing at the northeast corner of Third avenue and 155th street, testified that he saw the boy about half way between the curb and the track in front of No. 3034 "going on a dog trot," and saw the car one-half a car length or a car length south of 155th street; that the car continued going very fast until the accident; that he heard no bell; that "when I saw him he was running a little bit fast to get by the car"; that when he saw the boy he noticed another boy running after him, but he could not say how far behind; and that the car passed between him and the boy, so that he did not see it strike the boy.

One Blake, who was standing at the southeast corner of 156th street and Third avenue, testified that he saw the decedent standing on the curbstone about 100 feet south of him, and run diagonally north from the curbstone towards 156th street, and that another boy was running after him, about 10 feet behind; that when he saw the boy running from the curbstone the car was about 75 or 100 feet from decedent and was coming quite fast; that the boy ran to the middle of the track, and turned around and tried to get off again, and was struck; that "the car was 20 feet away from him when he stepped into the track"; that the car was about 20 feet away from the boy when he was on the center of the track and turned; that he saw the motorman make no effort to stop the car until he was a few feet away from the boy, when he tried very hard to stop it; that the distance from the curb to the track was 10 feet, and the boy was about 2 feet on the track when he was struck; that it appeared to him that the car went about 75 feet while the boy was going 12.

The evidence introduced in behalf of the plaintiff does not indicate whether the boy saw the car, or made any effort to discover whether a car was approaching from either direction. It is unnecessary to review the evidence introduced in behalf of the defendant. It does not aid the plaintiff; for it tends to show that the boy ran into the side of the car, and did not get upon the track in front of it. It is clear that the plaintiff failed to sustain the burden devolving upon him of showing that the decedent was free from contributory negligence and that his death was due to the negligence of the defendant. The fact that a boy was following the decedent does not materially aid the plaintiff's case. There is nothing to indicate that the decedent was obliged to run across the track, and, as he led the way, it was incumbent upon him to pay some attention to his surroundings. But

for the testimony of Blake there would be no evidence tending to show that the motorman should have discovered the position of the boy in time to avoid injuring him, and it is inconsistent with the testimony of the other three witnesses called by plaintiff.

It follows that the judgment and order should be reversed, and a new trial granted, with costs to appellant to abide the event. All concur, except PATTERSON, P. J., who dissents.

WACK v. TOBIN et al.

(Supreme Court, Appellate Division, First Department. December 13, 1907.)

MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE APPLIANCES.

An employé, engaged in unloading ties from a vessel, was injured by a tie falling out of a bundle while being hoisted from the vessel. Around each bundle was put a chain, with a hook at the end, catching around the standing part of the chain. The hook did not slip from the chain, and there was nothing to show that the chain did not run through it readily, so as to tighten up on the bundle. There was evidence that the chain did not tighten up as well as another chain sometimes used, but there was nothing to show that this was the fault of the hook or chain. Ties sometimes slipped out of a bundle, no matter what chain was used. *Held* not to show that the employer furnished unsafe appliances, in violation of Employer's Liability Act, Laws 1902, p. 1748, c. 600.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 173-199.]

Appeal from Trial Term.

Action by Adam Wack against John J. Tobin and another. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Reversed, and new trial granted.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

John J. Delany, for appellants.

Herbert C. Smyth, for respondent.

SCOTT, J. The defendant appeals from a judgment entered upon a verdict for plaintiff, and from an order denying a motion for a new trial. The defendants are stevedores by whom plaintiff was employed, and the action is brought under the employer's liability act. Laws 1902, p. 1748, c. 600. At the time of his injury plaintiff was one of a gang employed in unloading railroad ties from a sailing vessel. The ties were in the hold of the vessel. They were put together in bundles, and around each bundle was put a chain with a hook at the end; the hook catching around the standing part of the chain (not in a link), so that as the bundle was hoisted its weight tended to tighten the chain and hold the bundle together. The ties were to be loaded on a freight train standing on the dock, and a platform ran along the dock; its top being level with the floors of the cars. Each bundle of ties were hoisted out of the hold by steam power, and swung over the platform. The plaintiff's duty was to stand on the platform and guide the bundles, so that the ties would be dropped at the desired spot. The plaintiff's account of how the accident happened is as follows:

"When this sling of ties came within the range of my sight, as the sling of ties came up, it struck the rigging of the high side of the ship; and it was my duty to stand out on the bridge to receive this here sling, and as it came across me it struck the top of the box car, and one of them came out the same as an arrow would come out of a bow, and it struck me in the limb and broke it."

The plaintiff sues under the employer's liability act; the particular fault charged against defendants being that they furnished an unsafe appliance for use in the work, in that the hook at the end of the chain was too small, that it was more open, and that it had a shorter bend than a hook sometimes used. We are unable to find in the case any evidence that the hook was defective, or that it had any peculiarity which can be said to have led to the accident. It does not appear that it slipped from the chain, or that the chain would not run through it readily, so as to tighten up on the bundle when the weight came on it. It does appear that some of the men complained to the foreman about the chain, and said that it did not draw as well as another. There was some evidence that the chain did not tighten up as well as another chain sometimes used; but there is nothing to show that this was the fault of the hook, or of any peculiarity in chain or hook which any witness could point out. It appeared that ties sometimes slipped out of the bundle, no matter what chain was used; and it is quite evident that the swinging of the bundle of ties against the rigging was sufficient to account for this particular accident. We think that plaintiff failed to show that the appliance was unfit.

The judgment and order will be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

(56 Misc. Rep. 604.)

GORDON et al. v. OSK et al.

(Supreme Court, Appellate Term. December 12, 1907.)

DISCOVERY—APPLICATION—PETITION—AFFIDAVIT.

Application for an order for inspection of papers to enable plaintiffs to frame their complaint having been based on affidavits only, instead of on a petition verified by affidavit, as required by Code Civ. Proc. § 805, the court has no power to enter the order thereon.

Appeal from City Court of New York.

Action by Abraham Gordon and another against Barnet Osk, impleaded with another. From an order, defendant Osk appeals. Reversed.

Argued before GILDERSLEEVE, P. J., and BRUCE and GUY, JJ.

Frankenthaler & Sapinsky, for appellant.

Kuntz & Oppenheim, for respondents.

GILDERSLEEVE, P. J. Plaintiffs claim to have a cause of action against the defendants for brokers' fees earned in bringing about an exchange of property, and that in order to cheat plaintiffs out of their commissions defendants had the contract of sale made in the name of a third party as a dummy, which third party afterwards transferred the exchanged property to defendants. As plaintiffs have never seen

the contract of sale, and are unable to state the values placed upon the exchanged properties or the amount of the commission to which they are entitled, and are unable to state the date of said contract, they moved for an inspection of said contract in order to frame their complaint, and from the order granting the same defendants appeal.

The application was based on affidavits only, whereas section 805 of the Code of Civil Procedure requires the application to be based upon a petition verified by affidavit, and failure to do so deprives the court of any power to enter an order thereon. *Lee v. Winans*, 99 App. Div. 297, 90 N. Y. Supp. 960; *Hirshfield v. Rosenthal*, 51 Misc. Rep. 644, 99 N. Y. Supp. 912.

The order must be reversed, with \$10 costs and disbursements, and the motion denied, without prejudice to a new application for a discovery in the court below. All concur.

(56 Misc. Rep. 328.)

JONES v. GOULD et al.

(Supreme Court, Special Term, New York County. November, 1907.)

1. PLEADING—SUPPLEMENTAL ANSWER—WHEN ALLOWED.

Defendant moved for leave to serve a supplemental answer, alleging that after action brought a judgment had been entered in the Supreme Court for plaintiff against defendants in another action, brought after the present action on the same cause of action and praying for the same relief, and that the judgment was unreversed and a bar to the action. *Held*, that the motion would be granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 787.]

2. SAME—PROCEDURE.

Where a party moves for leave to serve a supplemental answer, and annexes an affidavit to the motion papers of what is alleged to be the proposed supplemental answer, it is sufficient, if the order to show cause is for leave to serve a supplemental answer "substantially in the form of" that annexed to the moving papers.

Action by John S. Jones against George J. Gould and others. Application for leave to serve supplemental answer. Granted.

See 105 N. Y. Supp. 1123.

David McClure, for plaintiff.

Pierce & Greer (Rush Taggart, of counsel), for George J. Gould.

FITZGERALD, J. This is an application for leave to serve a supplemental answer. The answer which it is desired to serve alleges that since the institution of the above-entitled action a judgment has been entered in this court in favor of the plaintiff against the defendants in another action instituted in this court subsequent to the above-entitled action between the same parties and upon the same alleged transaction and praying for the same relief, which said judgment stands unreversed and unmodified and is a bar to this action and to the prosecution thereof. While it is true, as was held in *Ratzer v. Ratzer*, 2 Abb. N. C. 461, and *Groshon v. Lyon*, 16 Barb. 461, that where there are two proceedings pending between the same parties for the same cause of action the pendency of the proceeding first com-

menced is a defense to the one last commenced, and that in such a case leave to file a supplemental answer in the action first commenced will not be granted where the matter proposed to be pleaded, being a decision in the second action, cannot be a bar to the first action, and while upon a motion for leave to serve a supplemental answer the court will follow the course pursued in *Barrowcliffe v. Cummins*, 53 Hun, 636, 6 N. Y. Supp. 228, by determining, after an examination of the pleadings and issues, the question of law whether the matter adjudicated in the case which has been tried is the identical matter which will be determined in the case to be tried, yet in cases of doubt, where the decision or judgment in the second action may be a bar to the first action, the court should not deny the right to serve a supplemental pleading setting up such decision or judgment, but should permit the same, leaving the matter for determination by the trial court. As was said in *Purdy v. Manhattan R. Co.*, 11 Misc. Rep. 394, 395, 32 N. Y. Supp. 275:

"Under section 544 of the Code the right to serve a supplemental pleading is not to be withheld, where timely asserted, unless it be shown that the object of the application is to obtain delay, or is not otherwise in good faith, or unless the proposed pleading is manifestly frivolous (*Williams v. Hays*, 53 Hun, 630, 5 N. Y. Supp. 667; *Mitchell v. Allen*, 25 Hun, 543), or does not present a doubtful question (*Morel v. Garely*, 16 Abb. Prac. 269; *Lyon v. Isett*, 34 N. Y. Super. Ct. 41; *Tift v. Bloomberg*, 49 N. Y. Super. Ct. 323). Where a supplemental answer cannot be a bar, it will not be allowed (*Ratzer v. Ratzer*, 2 Abb. N. C. 461); but when there is some doubt as to the question it should not be determined upon the motion for leave to serve the pleading, but upon the trial (*Hoyt v. Sheldon*, 4 Abb. Prac. 59)."

In the case last cited it was held that where it cannot well be decided, except upon a hearing of the whole case, whether, as between the parties to the action, it would be inequitable to give effect to the defense desired to be pleaded, if proved, and the court is competent to dispose of that question at the hearing as may be just, a supplemental answer will be allowed. The court said in that case, with respect to a release which the defendant desired to plead, that:

"To deny this application is to prejudge the question as to the legal effect of the release and the equities of the parties," and "we do not think it would be a proper exercise of discretion to deny the defendant an opportunity to establish the release and present the question whether it is in law a bar to the action."

In both of the actions brought by the plaintiff against the defendants the latter are named in the titles individually, and in the prayers for relief judgment is asked against them individually, though in the allegations of the complaint in action No. 2, which has been tried, claim is made that they were the agents or trustees of a syndicate of individuals, to whom no reference is made in the complaint in action No. 1, now pending. Under these circumstances, and under the authority of *Purdy v. Manhattan R. Co.*, supra, this court, upon this motion, should not undertake to positively and finally determine, to the detriment of the defendants' rights upon the trial, that the judgment in the second action is not a bar to the plaintiff's claim in the first action, and deny to the defendants the right of presenting by proper pleading that question to the trial court, by which it may be fully heard

and determined. It is true, as the plaintiff contends, that it was held in *Diehl v. Beck*, 61 App. Div. 570, 70 N. Y. Supp. 818, that a party asking leave to serve an amended or supplemental pleading must attach the proposed pleading to his moving papers, and that the order to show cause prays for the entry of an order permitting the defendants to serve a supplemental answer "substantially in the form of" that annexed to the moving papers; yet both the court upon this motion and the plaintiff are fully apprised of the supplemental pleading which the defendants desire to serve, since the moving affidavit alleges that Exhibit C, annexed to the moving papers, is a copy of the proposed supplemental answer which it is desired to serve, and not merely something substantially similar thereto. It appears to me that the application is not untimely; that it is not made to obtain delay, since the defendants themselves request that the case should retain its regular place upon the day calendar for trial; that it is not made in bad faith; and that the pleading proposed to be served is not manifestly frivolous.

Under these circumstances, in connection with the reasons above stated, the motion should be granted.

(56 Misc. Rep. 321.)

NICHOLS et al. v. EMMETT.

(Supreme Court, Special Term, New York County. November, 1907.)

1. PROCESS—SUBSTITUTED SERVICE—AFFIDAVIT.

Defendant moved to vacate an order authorizing substituted service of summons and service made thereunder. It did not appear from the papers on which the order was founded, as required by Code Civ. Proc. § 435, that defendant was within the state when the order was granted, or had avoided service, or that proper effort had been made to serve her personally. *Held*, that the motion would be granted.

2. SAME.

A motion for substituted service must be based on proof that at the time it was granted defendant was within the state and avoiding personal service, and an affidavit of plaintiff's attorney that plaintiff was in the state, founded on knowledge and belief, was insufficient, where the sources of such knowledge and belief were not stated.

3. SAME—AVOIDANCE OF SERVICE.

Evidence *held* insufficient to show defendant had avoided service, so as to authorize order for substituted service.

Action by James W. Nichols and Sarah A. Nichols against Emily Emmett. Motion to set aside order authorizing substituted service of summons. Motion granted.

Paul M. Crandell, for plaintiffs.

Origen S. Seymour, for defendant.

FITZGERALD, J. This is a motion to vacate and set aside an order authorizing substituted service of summons and the service made thereunder, on the grounds, specified in the notice of motion, that it does not appear from the moving papers that the defendant was within the state when the order was granted, or that she had avoided service

so that personal service could not be made, or that proper and diligent effort had been made to serve her personally.

Substituted service, as it is called, is authorized, and the proof to obtain an order therefor is prescribed, by section 435 of the Code of Civil Procedure. In *Smith v. Fogarty*, 6 Civ. Proc. R. 366, 370, 371, it was held that such service is by section 437 of the said Code assimilated to service by publication, and application to the court and the same kinds of proofs are necessary in cases of the former as in cases of the latter method of service. The proceeding to obtain service by publication is purely a statutory one, and the statute must be strictly followed. *Wilson v. Lange*, 40 Misc. Rep. 676, 83 N. Y. Supp. 180; *Young v. Fowler*, 73 Hun, 179, 25 N. Y. Supp. 875; *Whiton v. Morning Journal Assn.*, 23 Misc. Rep. 299, 50 N. Y. Supp. 899; *Kendall v. Washburn*, 14 How. Prac. 380. To authorize substituted service upon a defendant resident of this state section 435 requires the presentation to the court in the form of an affidavit of a person not a party to the action or of the return of the sheriff of the county of defendant's residence of satisfactory proof that proper and diligent effort has been made to serve the summons upon the defendant, and that the place of his sojourn cannot be ascertained, or, if he is within the state, that he avoids service, so that personal service cannot be made. As was said in *Maiello v. Maiello*, 42 Misc. Rep. 266, 268, 86 N. Y. Supp. 543, the said section provides for two contingencies only; or, as appears more fully from the opinion in *Ottman v. Daly* (City Ct. N. Y.) 7 N. Y. Supp. 897, the section is special in its nature, intended only as a means of reaching runaway defendants whose place of sojourn cannot be ascertained after proper and diligent effort, and those who remain at home in the state, but avoid service of process, and should not be successfully invoked against a defendant whose place of sojourn could be ascertained or who did not avoid service.

In this case no claim whatever is made that the place of the defendant's sojourn could not be ascertained, and the right to the order must therefore be based upon satisfactory proof of the fact that the defendant was when the order was granted within the state, and that she was then avoiding service so that personal service could not be made. In the affidavit made by the plaintiff's attorney, upon which the order was granted, there is no proof, no statement of fact, showing that the defendant was then within the state. One of the plaintiffs and his attorney saw her within the state; but that was more than four months before the order was obtained. There is no proof that either of those persons, or any one else, saw her within the state subsequent to that occasion, although such proof might have been obtained from the unnamed "people in the neighborhood" referred to in the attorney's affidavit, who told him "that she rarely leaves the house" or "that she seldom comes out." The plaintiff's attorney himself states that the defendant is a woman of wealth. She could well afford a vacation, and it is not improbable that the summer months which comprised the period between the date when she was seen at the window of her residence and the date of the order were spent out of the city, and perhaps state. It is true that the attorney says in his affidavit that the defendant was within the state to the best of his knowledge and belief; but,

as he does not state the sources of his knowledge and belief, that allegation is insufficient. *Wolter v. Liebmann*, 52 Misc. Rep. 517, 102 N. Y. Supp. 487; *Maiello v. Maiello*, supra; *Wallace v. Baring*, 21 App. Div. 477, 48 N. Y. Supp. 692; *Martin v. Aluminum Comp. Plate Co.*, 44 App. Div. 412, 60 N. Y. Supp. 1010.

Furthermore, it does not satisfactorily appear that the defendant has avoided service. No intimation of a purpose or desire to serve a summons upon the defendant was given by the plaintiff's attorney to any person until but three days before application was made for the order. It was not then given to the defendant herself, but to her cousin, who opened the door of the residence for the plaintiff's attorney. There is no proof that such intimation was thereupon conveyed to the defendant, or that her cousin's statement that she could not be seen or refusal to tell the attorney anything were authorized by the defendant. Even assuming that the purpose and desire of the plaintiff's attorney to serve a summons upon the defendant were then for the first time communicated to the latter, there is no proof of any subsequent avoidance of such service.

Motion granted. No costs.

(56 Misc. Rep. 851.)

TIM v. BERRICK.

(Supreme Court, Special Term, New York County. November, 1907.)

JUDGMENT—CORRECTION—NAME OF PLAINTIFF.

In an action plaintiff's name was David, but by mistake he was designated in all of the papers as Louis. *Held* that, no substantial right of the defendant being affected by an amendment substituting the right name, it would be allowed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 601.]

Action by David Tim against Max Berrick. Motion to amend judgment and other papers. Granted.

David Tim, for plaintiff.

Steuer & Hoffman, for defendant.

GREENBAUM, J. The papers on these motions were received from the clerk's office a few days ago, although it appears from the file marks that they had been referred to me by Mr. Justice Dowling on August 29, 1906. It appears to be conceded that an order was entered on April 22, 1903, substituting David Tim in place of the previous plaintiff, Louis Tim, and amending "all the papers and pleadings herein" so as to read "David Tim," as plaintiff; that subsequently the case was duly noticed for trial and the cause placed upon the calendar in the name of "David Tim," plaintiff; that thereafter the case was regularly reached upon the calendar for trial, and, no one appearing for defendant, an inquest was taken before me and judgment thereafter erroneously entered as though "Louis Tim" were the plaintiff, instead of "David Tim," who then was the substituted plaintiff, and in whose name the action then stood upon the calendar. It must be obvious that upon the foregoing state of facts the inquest was properly

taken against the defendant, and the correction of the clerical error in amending the judgment so as to contain the name of "David Tim," instead of "Louis Tim," cannot work an injury against defendant, unless, as he claims, his right to appeal from the judgment has thereby been lost.

Defendant asserts that there was no proof upon the inquest of the reassignment of the claim from Louis Tim to David Tim, and hence an appeal would result in a defeat of the judgment. No evidence has been submitted to me of the omission to prove the reassignment; but, assuming that an appeal from the judgment would be successful, I fail to understand how the right of defendant to appeal has been interfered with, in view of defendant's statement that a copy of the judgment had never been served on defendant's attorneys. Code Civ. Proc. §§ 1341, 1294. As the motion to set aside the judgment is not based upon any facts excusing defendant's default, but rests solely upon alleged irregularities, there is no alternative but to deny defendant's motion. As for the plaintiff's motion, it is apparent that the entry of a judgment in an action entitled "Louis Tim" was inadvertent, and that the judgment should have been in the name of "David Tim." No substantial right of the defendant is affected by an allowance of the amendment, and under the power expressed in section 723 of the Code of Civil Procedure permitting such amendments the motion to amend is granted.

The plaintiff having stipulated in his brief to reduce the judgment to the extent of the unauthorized costs, which defendant claimed were taxed against him, the judgment may be further amended by reducing the amount thereof accordingly.

(56 Misc. Rep. 353.)

MANHATTAN RY. CO. v. ASTOR et al.

(Supreme Court, Special Term, New York County. November, 1907.)

EMINENT DOMAIN—POWER OF ELEVATED ROADS.

The term "railroad corporation," as used in General Railroad Act, Laws 1890, p. 1083, c. 565, § 4, includes elevated railroads; and such railroads have power to acquire land necessary for their maintenance and accommodation.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 5909-5911; vol. 8, p. 7778.]

Proceedings by the Manhattan Railway Company against John J. Astor and others to condemn real estate. Decree for plaintiff.

C. A. Gardiner, for plaintiff.
Skinner & Bernant, for defendants.

NEWBURGER, J. Defendants are the owners of the premises sought to be condemned, one parcel of which is situated at the southeasterly corner of the Bowery and Houston street, and the other parcel at the southwesterly corner of the Bowery and Houston street. An elevated road has been operated along the Bowery and Third avenue and in front of the premises owned by the defendants since the year

1878. Plaintiff now proposes to erect and maintain two stairways in connection with two stations now in use on the east and west side of the Bowery and Houston street, for the purpose of affording means of approach and exit for the passengers. The traffic at the stations referred to is so great that the present stairways are not sufficient. There appears to be no question that the improvements contemplated are necessary; but the defendants question the authority of the plaintiff. It has been held that the term "railroad corporation," as used in General Railroad Act, Laws 1890, p. 1083, c. 565, § 4, includes elevated railroads, and that such elevated railroads have power to acquire lands as may be necessary for its maintenance and accommodation.

Plaintiff is entitled to a decree. Submit decree and findings upon notice.

(56 Misc. Rep. 370.)

HOLLAND v. GROTE et al.

(Supreme Court, Special Term, New York County. November, 1907.)

1. PLEADING—ANSWER—CONCLUSIONS.

It is no defense to an equitable action to allege that plaintiff has an adequate remedy at law; it being a conclusion only.

2. LIMITATION OF ACTIONS—PLEADING.

In an equitable action, an answer alleging that the cause of action was barred because suit was not commenced within 10 years after the cause of action accrued is insufficient, where the complaint does not show on its face that such period of limitation has expired, and the answer does not allege facts establishing such expiration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 683.]

3. PLEADING—DEMURRER.

On a demurrer to an answer, the court may determine the sufficiency of the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 540-542.]

4. FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—PLEADING.

Plaintiff sued to set aside a conveyance of real property as in fraud of creditors, and the complaint alleged that the conveyance was without consideration and with intent to defraud plaintiff's assignor and other creditors of the grantor, all with the knowledge of the grantee. Held to sufficiently allege the insolvency of the grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 775.]

Action by James H. Holland against Augustus H. Grote and others. On demurrer to answer. Sustained.

Otto V. Schmidt, for plaintiff.

William C. Rosenberg, for defendants.

BISCHOFF, J. This is a judgment creditor's action to reach the proceeds of the sale of certain real property conveyed by the defendant judgment debtor to his codefendant, Ida F. Grote, without consideration, and by her conveyed to an innocent purchaser. The defendant Ida F. Grote interposes three separate defenses, to each of which the plaintiff has demurred for insufficiency of substance. These de-

fenses are that the complaint does not state facts sufficient to constitute a cause of action, that the plaintiff has an adequate and complete remedy at law, and that the cause of action alleged in the complaint "did not accrue to the plaintiff or his assignor within 10 years from the commencement of this action."

The question of the sufficiency of the complaint, while it cannot properly be raised by a defense, so styled, is involved in the determination of this demurrer to the answer, under the familiar rule that a demurrer reaches the first bad pleading. The remaining defenses, however, are quite clearly insufficient; and the demurrer must be sustained, unless it is to be held that, because of some insufficiency of statement in the complaint, the demurrer to the answer is to be overruled as a whole. The defense that the plaintiff has an adequate remedy at law amounts to a conclusion merely; and, in view of the averments of the complaint, there can be no question that the character of the action is equitable, if any cause of action at all exists. The cause of action being purely equitable in its nature, a defense that the plaintiff has an adequate remedy at law is insufficient, and its insufficiency is properly to be raised by demurrer, as was held in *Edmonds v. Stern*, 89 App. Div. 539, 85 N. Y. Supp. 665. See, also, *Golden v. Health Dept.*, 21 App. Div. 420, 47 N. Y. Supp. 623; *Olivella v. New York & H. R. R. Co.*, 51 App. Div. 612, 64 N. Y. Supp. 1145; *Id.*, 31 Misc. Rep. 203, 64 N. Y. Supp. 1086.

The further defense to the effect that the cause of action is barred because suit was not commenced within 10 years after the cause of action accrued is insufficient, because the effect of such a defense is simply to invite the court's scrutiny of the complaint to determine whether, upon the face of the pleading, the asserted cause of action is open to the defense of the statute of limitations, in view of the allegations as to the accruing of that cause of action. If, from the allegations of the complaint, it appears that the defense of the statute of limitations is insufficient as a matter of necessity, a demurrer to the defense will lie; the mere statement of the defense being no more than the averment of legal conclusion. *Gray Lithograph Co. v. American W. T. D. Co.*, 44 Misc. Rep. 206, 88 N. Y. Supp. 857. Here the complaint alleges the issuance of execution on the 7th day of June, 1907, and its return unsatisfied on the 26th day of the same month. The cause of action accrued at the time when an execution issued upon the judgment was returned unsatisfied (*Weaver v. Haviland*, 142 N. Y. 534, 37 N. E. 641, 40 Am. St. Rep. 631; *Baker v. Potts*, 73 App. Div. 31, 76 N. Y. Supp. 406), and the plaintiff had six years from that date within which to commence his action (Code Civ. Proc. § 382, subd. 5; *Weaver v. Haviland*, supra). While the judgment was obtained in the year 1888, the plaintiff was not required to allege the fact that leave of court had been obtained prior to the issuance of the latter execution; since the defect, if any, is one which should be corrected upon motion. *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 69, 57 N. E. 168, 79 Am. St. Rep. 565. It therefore appears from the face of the complaint that the action was commenced in time, and if, because of the issuance and return unsatisfied of a prior execution, which is not referred to in the complaint, the cause of action accrued within some period anterior to

six years before the date of the commencement of the action, the necessary facts should be set up by the defendant to support the plea of the statute of limitations.

Upon the subject of the sufficiency of the complaint, it is contended by the defendant that the pleading is fatally defective because of the absence of an averment that the judgment debtor was at the time of the conveyance insolvent, or that he was unable to pay his debts at the time of the rendition of judgment. Upon this point it suffices to say that the general averment in the complaint to the effect that the transfer was made without consideration and with intent to hinder, delay, and defraud the creditors of the grantor, and particularly to defraud this plaintiff's assignor, all of which was with the knowledge of the grantee, has been held to include an allegation of insolvency. *Kain v. Larkin*, 141 N. Y. 144, 36 N. E. 9. The reason for the ruling, as announced in the case cited, was stated to be that the general averment of an intent to hinder, delay, and defraud includes every element of a fraudulent transfer, and suffices to admit proof of the fact of insolvency and of such other evidentiary facts as may be incidentally involved, without their express averment.

The demurrer is therefore sustained, with costs, with leave to the defendant to amend within 20 days upon payment of costs.

Demurrer sustained, with costs, with leave to defendant to amend within 20 days upon payment of costs.

UNIVERSAL CUTTER CO. v. EMDEN et al.

(Supreme Court, Appellate Term. December 12, 1907.)

1. COURTS—MUNICIPAL COURTS—PROCEDURE—APPEAL—PRESUMPTIONS.

Where no objection appears by the record on appeal to have been made to an adjournment of a case by the Municipal Court, it will be presumed that such adjournment was by consent.

2. SAME—TRANSFER TO ANOTHER DISTRICT.

The only authority given the Municipal Court to transfer the trial of an action from one district to another, except on consent of the parties, is where the district in which the action is brought is not the proper district; and the application for such transfer must be made upon or before the joinder of issue.

3. SAME—JURISDICTION.

Where a municipal court had jurisdiction of the matter of and the parties to an action, which should have been tried in another district, and defendant voluntarily appeared, and an adjournment by consent was had, and no objection made to the justice's right to try the case, jurisdiction to proceed with the action was conferred upon the court, and the justice erred in retransferring the action to the original district when the parties appeared before him on the day set for trial.

4. APPEAL—NOTICE OF APPEAL—SPECIFICATION OF ERRORS—INTERLOCUTORY PROCEEDINGS.

Where the Municipal Court erred in transferring an action to another district, and defendant raised the question by objection when the case was called for trial in such district, and judgment was had against defendant, and he appeals from the judgment alone, without specifying in his notice of appeal the order of transfer, the Appellate Term, on account of his fail-

ure to so specify, is powerless under the express provision of Code Civ. Proc. § 1801, to review such order.

5. SAME—PLEADING—AMENDMENT.

It is mandatory upon the Municipal Court to allow a pleading to be amended at any time, if substantial justice will be promoted thereby, even though the amendment change the entire cause of action.

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by the Universal Cutter Company against Jacob Emden and another. From a judgment for plaintiff, defendants appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Joseph Wilkenfeld, for appellants.

M. A. Lesser, for respondent.

GILDERSLEEVE, P. J. This action was originally begun in the Eleventh District Municipal Court, and the trial commenced in that district on May 21, 1907. It was adjourned until May 29th for completion. On that day the defendants were not able to proceed, owing to the absence of the defendants' attorney, and a judgment in favor of the plaintiff was rendered. On May 31, 1907, the defendants' attorney obtained an order to show cause why his alleged default should not be opened. This order was returnable June 5th before a justice other than the one before whom the case had been partially tried. This motion was granted, and an order entered which provided, among other things, that the case should be transferred to the Twelfth District Municipal Court, in which district the judge before whom the case had been partially tried was then sitting, the trial there to be completed. On June 12, 1907, the case came up in the Twelfth District Court, and was adjourned to June 21st. On this last-named day the parties appeared, and the defendants objected to proceeding with the trial in the Twelfth District, claiming that the court had no jurisdiction to try the case. An order was then made remanding the case to the Eleventh District, and the clerk of that court was directed to place the case upon the call calendar for June 25, 1907. On June 27, 1907, the case was called in the last-named District Court, and the defendants objected to its being tried there, upon the ground that the court had lost jurisdiction. The several motions to dismiss were denied, and the case proceeded to trial de novo before the justice then sitting in the Eleventh District.

The action was brought to recover the amount of certain installments alleged to be due on the purchase price of a cutting machine sold by the plaintiff to the defendants. The pleadings were verified, and the defendants set up as separate defenses (1) that the machine was taken by them on trial, to be returned if unsatisfactory, and that after such trial it proved unfit, and that it was returned to plaintiff; (2) that, if any contract or agreement of sale was made, it was obtained by means of false and fraudulent statements made by the plaintiff; and (3) that the plaintiff was a foreign corporation doing business within this state without having obtained the certificate required by law. Upon the trial the defendants moved to amend their answer by setting up a

breach of warranty. This motion was denied, and the defendants excepted. The plaintiff had a judgment, and the defendants appeal from the judgment alone.

The appellants urge three grounds for reversal: (1) That the court lost jurisdiction of the case by transferring the action to the Twelfth District without the defendants' consent; (2) that the plaintiff, being a foreign corporation, could not maintain this action without first obtaining a certificate from the Secretary of State permitting it to do business within the state; and (3) that the court below erred in not permitting the defendants to amend their answer.

We may assume that the Eleventh District was the proper district in which the case should be tried, and that without the consent of the defendants it could not be transferred to another district. Nevertheless the defendants appeared in the Twelfth District on the day fixed by the terms of the order, without raising any objection, and the case was adjourned, presumably by consent, from June 12th to June 21st. We say presumably by consent, for the reason that no objection appears in the record as having been made to such adjournment, and in the absence of affirmative proof that an objection was made it will be presumed that such adjournment was by consent. Section 193, Municipal Court Act; *Wood v. Spofford*, 29 Misc. Rep. 357, 60 N. Y. Supp. 492; *Clemens v. Werner Co.*, 52 Misc. Rep. 110, 101 N. Y. Supp. 755. The Municipal Court had jurisdiction of the subject-matter and of the parties (*Schiller v. Hardenburg*, 52 Misc. Rep. 482, 102 N. Y. Supp. 529, 530), and the voluntary appearance by the defendants on June 12th conferred jurisdiction upon the court to proceed with the action (*Berliner v. M. Zimmermann Co.*, 54 Misc. Rep. 246, 104 N. Y. Supp. 407). On June 21st, when the parties again appeared before the court, the trial should have proceeded, and we think that the justice erred in sending the case again to the Eleventh District. In the case of *Federal Sign Electric Co. v. Bloyen*, 53 Misc. Rep. 294, 103 N. Y. Supp. 205, we held that the only authority given to the Municipal Court to transfer the trial of an action from one district to another, except on consent of the parties, is where the district in which the action is brought is not the proper district, and the application for such transfer must be made upon or before the joinder of issue. Subdivision 4, § 25, Municipal Court Act (Laws 1902, p. 1497, c. 580).

While it is true, that in the case at bar the action was brought in the proper district, nevertheless the failure to object to the case being tried in the Twelfth District on June 12th was equivalent to a consent, and waived any question of the right of the justice sitting in that district to proceed with the trial, which he should have done. The defendants herein are in no position, however, to avail themselves of this error. It is true that they raised the question by objection when the case was called for trial in the Eleventh District, and urged that the order transferring the case from the Twelfth District was invalid; but that alone was not sufficient. The appeal, as before stated, is taken from the judgment alone. If the defendants desired to have had the orders, which they now criticise, reviewed by this court upon appeal, they should have so specified in their notice of appeal; and, not hav-

ing done so, this court is powerless to review them. Section 1301, Code Civ. Proc.

As to the second point urged by the appellant, the evidence does not show that the plaintiff was doing business within this state, so as to require a certificate before it could maintain an action. *Vaughn Machine Co. v. Lighthouse*, 64 App. Div. 138, 71 N. Y. Supp. 799; *Cummer Co. v. Insurance Co.*, 67 App. Div. 151, 73 N. Y. Supp. 668. We think, however, that the court below should have permitted the defendants to amend their answer. It has been held that it is mandatory to allow a pleading to be amended at any time, if substantial justice will be promoted. *King v. Dorman*, 26 Misc. Rep. 133, 55 N. Y. Supp. 876; *Steinhardt v. Eisen* (Sup.) 84 N. Y. Supp. 232. And it is no objection that the amendment changes the entire cause of action. *Bunke v. N. Y. Tel. Co.*, 46 Misc. Rep. 97, 91 N. Y. Supp. 390, affirmed 110 App. Div. 241, 97 N. Y. Supp. 66, affirmed 188 N. Y. 600, 81 N. E. 1161.

Judgment reversed, and new trial ordered, with costs to appellants to abide the event. All concur.

DUFFY v. MEYER.

(Supreme Court, Appellate Division, First Department. December 13, 1907.)

1. EVIDENCE—PAROL EVIDENCE—WRITTEN INSTRUMENT—CONTRADICTION.

In an action for deceit in the sale of certain corporate bonds and stock, an instrument reciting that defendant had received from plaintiff \$10,000 on account of the price of 20 allotments of stock and bonds of a certain company, each allotment consisting of 1 bond and 20 shares of stock of said company, was a mere receipt, and not a contract, and defendant was entitled to contradict it by parol.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1829-1842.]

2. SAME—SCOPE OF RULE.

The rule that parol evidence is inadmissible to contradict a written contract is inapplicable in an action for deceit in inducing plaintiff to enter into a contract by false representations and fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2005-2020.]

Appeal from Trial Term.

Action by Joseph A. Duffy against Arthur L. Meyer. Motion for a new trial by defendant on exceptions ordered to be heard in the first instance by the Appellate Division, and appeal from an order granting an additional allowance. Motion granted. Order reversed.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAUGHLIN, HOUGHTON, and LAMBERT, JJ.

Abraham Benedict, for appellant.

Edward W. S. Johnston, for respondent.

LAMBERT, J. The complaint alleges as a cause of action that the defendant, with intent to cheat and defraud the plaintiff, falsely and fraudulently represented to this plaintiff that the North American Lumber & Pulp Company was a corporation duly organized under the laws

of New Jersey; that it had property of the value of its capital stock, and that the company had issued bonds secured by a mortgage covering its property, and that said bonds were valid existing obligations of said company, and were reasonably worth the face value thereof, and that the said defendant then had in his possession 20 allotments of stock and bonds of said North American Lumber & Pulp Company, each allotment consisting of 1 bond and 20 shares of stock of said company, each bond being of the par value of \$1,000 and each share of stock of the par value of \$100; that acting and relying upon such false and fraudulent representations of the defendant the plaintiff paid \$10,000 upon the purchase price of said bonds and stocks; that the representations were false, and the other allegations necessary to a cause of action for the fraud, the defendant never being able to deliver the said bonds and stocks. For a second cause of action the plaintiff alleges the payment of the same \$10,000 on account of the purchase of the same stocks and bonds, and a refusal of the defendant to repay the same on demand, and his theory is that the defendant thus converted the money.

In the disposition of this case it is not material to consider whether this last cause of action was one in tort or on contract; for the court, by directing a verdict on both causes of action, and the judgment being in accord with such direction, it is clear that there must be a reversal of the same. Upon the trial of the action the defendant offered to prove a series of facts relating to the transaction between the parties, which, if believed, would negative, or tend to negative, the plaintiff's theory of fraud; but all of this evidence, notwithstanding the plaintiff's theory of fraud, was excluded on the ground that a certain receipt given by the defendant to the plaintiff constituted such a written contract as could not be varied by parol evidence. The receipt is as follows:

"New York, March 27, 1902.

"This is to certify that I have this day received from Joseph A. Duffy ten thousand dollars on account of the purchase price of twenty allotments of the stock and bonds of the North American Lumber & Pulp Company, each allotment consisting of one bond and twenty shares of stock of said company, which said allotments are deposited with me subject to the payment of the balance of the purchase price thereof of ten thousand dollars with interest."

This receipt was signed by the defendant only, and it seems to us clear that this is not such a mutual contract as is contemplated by the rule under which the defendant's evidence was excluded. It does not bind the plaintiff to do anything. It does not pretend to be an agreement between the parties. It is purely and simply a receipt for a sum of money on account, and in an action based upon tort it would be a strange rule if the plaintiff could be permitted to hide behind this receipt and prevent the defendant from showing a state of facts which, if believed, might constitute a complete defense. There is no fraud alleged in reference to this receipt. The evidence offered by the defendant tended to show that the name of the company was inadvertently inserted in the receipt, and that the plaintiff was fully aware of the exact transaction which was contemplated, and which the defendant was at all times prepared to perform. Fraud is never to be presumed.

It must be proved, and, where there is a charge of fraud in relation to a transaction, evidence relating to the transaction, and which has a tendency to show that it is free from fraudulent intent, is clearly competent, even though it should vary the language of a more formal contract than the one now before the court.

The rule relied upon by the court below would probably be applicable to an action upon a contract, because it is conclusively presumed that the parties expressed their intention in the writing; but it has no application in an action where the plaintiff charges fraud in the procuring of the contract. That is an issue going to the integrity of the party. It is quasi criminal, and he has a right to go to the jury upon the question of fraud, after all of the facts connected with the transaction have been placed in evidence. If there was no fraud in the representations, or by concealment of facts on the part of the defendant, prior to the giving of this receipt, then there is nothing fraudulent in the transaction, and it was proper to show that the plaintiff, in taking the receipt, understood that he was not to have the particular stock mentioned, but another stock having relation to this company. The rule is that the jury is to determine, as a question of fact, whether there has been any representations or concealment of facts by the party charged with the fraud, and whether the representations were false and relied upon as an inducing element of the fraud alleged and relied upon. 14 Am. & Eng. Ency. of Law, 206; *Bigler v. Atkins*, 7 N. Y. St. Rep. 235, 239, affirmed on opinion below 118 N. Y. 671, 23 N. E. 1145. In the case cited the court say that, before the plaintiff could recover against the defendant, the law required the—

“further fact to be established that the defendant knew the representations to be untruthful, or at least that he did not know them to be truthful, and that they were made with intent to deceive the plaintiff, and in that manner induced him to purchase the ship when he would not have done so if the truth had been known to or discovered by him.”

It follows that the transactions had by the parties relating to the sale and purchase of the stock mentioned was the subject of both material and competent evidence, and that it was reversible error to exclude it over the objection and exception of the defendant. The exceptions should be sustained, and the motion for a new trial granted, with costs to defendant to abide the event. This disposes of the order granting an extra allowance.

The order should therefore be reversed.

McLAUGHLIN and LAUGHLIN, JJ., concur. PATTERSON, P. J., concurs in result.

HOUGHTON, J. (concurring). The first cause of action alleged is for fraud and deceit, and the second for conversion by refusal to repay the \$10,000 which plaintiff had been induced to part with by defendant's alleged fraud. Both causes of action, therefore, are in tort, and the rule that a written contract cannot be varied by parol evidence has no application. The action is not upon the contract itself, but for a wrong perpetrated against plaintiff. The contract is evidence of that wrong, and very cogent evidence; and the defendant may, and

probably will, have great difficulty in inducing a jury to believe that bonds other than the ones stated in the writing were to be delivered. But nevertheless he has the right to make proof of that character. False representations may be verbal, or they may be in writing. The fact that they are reduced to writing does not conclude the person who signs the writing from proving that the representations were modified by parol, or that wholly different representations were made and relied upon by the party who claims to have been defrauded. The writing is evidence of a highly probative kind, but it is not conclusive.

For these reasons, I concur in the result.

(56 Misc. Rep. 609.)

RICHMAN v. BONEWUR.

(Supreme Court, Appellate Term. December 12, 1907.)

1. COURTS—MUNICIPAL COURTS—MOTION—COSTS—TIME FOR PAYMENT.

On February 15th an order, based upon an affidavit and order to show cause, was made opening defendant's default, upon the ground of excusable neglect, on condition that he deposit the amount of the judgment in court on or before February 15th, and pay plaintiff \$10 costs, and setting the case for trial on March 7th. The amount of the judgment was paid into court on February 15th, but the costs imposed were not paid. On February 19th, without any change in conditions, another order was entered, which did not vacate the order of February 15th, but stated that the motion to open the default was granted upon payment of \$10 costs and depositing the amount of the judgment with the clerk of the court, the costs and deposit to be made on or before February 15th; otherwise, denied, with \$10 costs. An order of February 20th directed the clerk to pay over \$60.68 "now on deposit with him" to plaintiff's attorney. Defendant's motion to vacate the orders of February 19th and 20th, and to open his default, was denied. It appeared that his attorney was present on March 7th, the time fixed for the trial by the order of February 15th, and for the first time learned that the order of February 19th had been entered, and that defendant's deposit had been paid over to plaintiff; and it also appeared that no notice of application for the order of February 19th, nor notice of its entry, had been served upon him. *Held* that, since the order of February 15th did not require that the costs should be paid on that date, defendant's attorney had at least a reasonable time after service upon him of a copy thereof and notice of its entry in which to pay them.

2. SAME—OPENING DEFAULT—PAYMENT—STATUTORY PROVISIONS.

The effect of the order of February 15th, accompanied by the deposit of the amount of the judgment in court, was to vacate the judgment already given; and, that order not being vacated by the order of February 19th, the direction to pay the money on deposit to plaintiff's attorney was unauthorized, since under the express provisions of Municipal Court Act, Laws 1902, p. 1563, c. 580, § 256, the court may, as a condition for opening a default, require defendant to deposit the amount of the judgment into court, and the amount must remain on deposit until plaintiff's right thereto has ripened into a judgment.

3. SAME—JUDGMENT—DEFAULT—VACATING DEFAULT.

Since the default was opened by the order of February 15th on the ground of excusable neglect, and the same conditions existed when the order of February 19th was made, it was error to deny defendant's last motion to vacate the orders of February 19th and 20th, and open his default.

4. SAME—COSTS—FAILURE TO PAY.

Defendant's failure to pay the \$10 costs was not ground for depriving him of his day in court, since the costs imposed and unpaid could be included in the judgment for plaintiff, if he were successful.

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by Charles Richman against Solomon Bonewur. From orders denying a motion to open his default, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Herman J. Rubenstein, for appellant.

Samuel Rosenberg, for respondent.

GILDERSLEEVE, P. J. The defendant appeals from two orders of the Municipal Court denying his motion to open his default, the facts relative to which are as follows: On February 15, 1907, an order was made, based upon an affidavit and order to show cause, opening the default of the defendant herein upon the ground that such default was caused by "excusable neglect," upon condition "that the defendant deposit the amount of the judgment in the court on or before February 15, 1907, and pay to the plaintiff the sum of \$10 costs," and the case was by said order set down for trial on March 7, 1907. On February 19, 1907, four days after the making of this order, another order was entered which contained the following recital:

"Ordered that the said motion to open the default is hereby granted, upon the payment by the defendant of the sum of \$10 costs, and the defendant to deposit the amount of the judgment herein with the clerk of this court. The said costs and the said deposit to be made on or before the 15th day of February, 1907; otherwise, denied, with \$10 costs."

This last order appears to have been based upon an affidavit, made by the plaintiff's attorney, to the effect that on the 11th day of February 1907, a motion was made by the defendant to open his default, which motion was granted upon the payment of \$10 costs to the plaintiff and the deposit by the defendant with the clerk of the amount of the judgment on or before February 15, 1907, and that on the last-mentioned day the defendant did deposit the amount of the judgment, but had not paid the \$10 costs imposed, and therefore the plaintiff asked that the defendant's motion be denied. At the foot of this order is another order, dated February 20, 1907, directing the clerk of the court to pay over the sum of \$60.68 "now on deposit with him" to the plaintiff's attorney. The defendant's attorney promptly obtained an order to show cause why the order of February 19th and the order directing the clerk to turn over the amount on deposit should not be vacated, and why the action should not be restored to the calendar, and the default of the defendant be opened. This motion was denied.

In the affidavit used by the defendant's attorney on the last motion he testified that he appeared on March 7, 1907, the time fixed for the trial of the action by the order of February 15th, and then learned for the first time that the order of February 19th had been entered, and that the money deposited by the defendant had been paid to the plain-

tiff's attorney. He further testified that no notice of an application for the order of February 19th, nor notice of its entry, had ever been given or served upon him; and this is not disputed by plaintiff. It will be observed that the order of February 15th, although it required the deposit of the amount of the judgment on that day, it did not require that the costs should be paid on February 15th, and the defendant's attorney had, in the absence of any direction in the order, at least a reasonable time after service upon him of a copy thereof and notice of its entry in which to pay said costs. The order of February 15th was not vacated by the order of February 19th, and this last order was made without notice, and contained provisions impossible to be complied with. Those provisions required the defendant's attorney to deposit the amount of the judgment and costs on February 15th, four days prior to the making of the order, and it set the case down for trial on February 27, 1907, although the case had already been set down for trial on March 7, 1907, by the order of February 15th.

The effect of the order of February 15th, accompanied by the deposit of the amount of the judgment into court, was to vacate the judgment already entered. That the plaintiff's attorney and the court so regarded it is evidenced by the fact that the order of February 19th fixed a day for trial, and if the judgment still remained in force another trial would be unnecessary. That being so, the direction to pay the money on deposit to the plaintiff's attorney was wholly unauthorized. Section 256 of the Municipal Court act (Laws 1902, p. 1563, c. 580) provides that the court may, as a condition for opening a default, require the defendant to deposit the amount of the judgment into court; but that amount, however, must remain on deposit with the clerk until the right of the plaintiff thereto has ripened into a judgment, and its payment to the plaintiff's attorney prior to that time cannot legally be directed by the court. Not the slightest reason is shown for a denial of defendant's last motion to vacate the order of February 19th and to permit him to have his day in court. The court had previously opened the default by its order of February 15th on the ground of "excusable neglect," and so far as appears the same condition of affairs existed when the order of February 19th was made.

The reason given by the court below, that the defense of usury interposed by an indorser did not require a disturbance of the judgment, is not sustained by the record. The pleadings seem to have been oral, and indorsed upon the summons is the following: "G. D. B. of P. Payment." If those characters mean anything, the defense would seem to have been a general denial and payment; and so far as appears by the record there is no defense of usury. Even if the defendant had absolutely refused to pay the \$10 costs imposed, he could not have been deprived of his day in court. The costs imposed and unpaid could be included in the judgment in favor of the plaintiff, if successful. *Farber v. Flauman*, 30 Misc. Rep. 627, 62 N. Y. Supp. 784; *Fallon v. Crocicchia*, 52 Misc. Rep. 503, 102 N. Y. Supp. 541, 543.

Orders reversed, and new trial ordered, with costs to appellant. All concur.

(56 Misc. Rep. 681.)

SIDGEL et al. v. DUBINSKY et al.

(Supreme Court, Appellate Term. November 14, 1907.)

1. COURTS—MUNICIPAL COURTS—APPEAL—RECORD—EVIDENCE—DOCUMENTS.

In an action in the Municipal Court on a note against the maker and indorser, plaintiffs offered in evidence the note and rested, whereupon the indorser moved to dismiss on the ground that plaintiffs had failed to prove notice of protest to the indorser, which motion was denied. In the record on appeal by the indorser there was a notice of protest issued by a notary public in due form, and on the back of the same appeared "Pliffs Ex. 1," with initials. There was nothing in the minutes to show that the exhibit marked as evidence was introduced. *Held*, that the notice of protest so marked would not be held to be a part of the record, furnishing proof that notice of protest was duly given the indorser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2318.]

2. BILLS AND NOTES—EVIDENCE—NOTICE OF PROTEST.

Failure to prove notice of protest to an indorser is fatal to recovery against the indorser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 996-1050.]

3. SAME—NOTICE OF PROTEST—DILIGENCE IN SERVICE.

Under the express provisions of Negotiable Instruments Law, Laws 1897, p. 741, c. 612, § 174, if notice of protest is given by mail, it must be deposited in the post office in time to reach the indorser on the day following, where the parties reside in the same city.

4. SAME—EVIDENCE—PRESUMPTION OF DILIGENCE.

The presumption of due diligence in the service of a notice of protest may be rebutted, whether or not an affidavit has been served under Code Civ. Proc. § 923, providing that unless an indorser, with his answer, or within ten days after the service thereof, serves an affidavit that he has not received notice, the certificate of a notary public of the presentment by him for acceptance or payment, or of the protest for nonacceptance or nonpayment, or of the service of notice thereof, is presumptive evidence of the facts certified.

5. SAME—SUFFICIENCY.

Evidence in an action on a note *held* not to show the giving of notice of protest to an indorser in a manner sufficient to charge her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1840-1846.]

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Jacob Siegel and another against Dora Dubinsky and Morris D. Dubinsky. Judgment for plaintiffs, and Dora Dubinsky appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and FITZGERALD and GOFF, JJ.

Henry M. Flateau, for appellant.

Samuel Fine, for respondents.

PER CURIAM. This action was brought upon a promissory note made by one Morris Dubinsky to the order of the plaintiff, and indorsed by the defendant Dora Dubinsky. Dora Dubinsky, the indorser, alone defended. The complaint alleged the maturing of the note, the presentation for and refusal of payment, the protesting of the

same, and duly giving of notice of protest to the defendant Dora Dubinsky. This allegation was denied, and the issue in the case was solely whether the notice of protest had been properly given. At the opening of the trial the plaintiffs' attorney said:

"The signature of the promissory note is admitted, and I offer the note in evidence and rest. Note marked 'Plaintiffs' Exhibit 1.'"

The defendant thereupon moved to dismiss the complaint upon the ground that the plaintiffs had failed to prove their case, and had failed to prove that notice of protest was duly given to the indorser. This motion was denied, and exception taken thereto by the defendant. It will be seen that, although the attention of the plaintiffs' attorney was specially called to his omission to prove the giving of a notice of protest, he made no effort to supply the defect.

There is in the record a notice of protest, issued by a notary public in due form, etc., and upon the back of the same, written in pencil, appears the words: "Pliffs Ex. 1. L. W. H."—and we are asked to hold that this certificate, so marked, is a part of the record, and furnishes the necessary proof showing that a notice of protest was duly given to the defendant. This would be adopting a practice dangerous in the extreme. It is well known that the records from the Municipal Courts are on file in the office of the clerk of the Appellate Term for several days prior to the time of the hearing, and that all interested parties must, in order to ascertain if the same is correct and to prepare for the argument thereon, have access to them during certain hours of each day. Unless, therefore, the minutes taken upon the trial clearly show that exhibits, seemingly properly marked as evidence, are actually offered as such in open court and by the court directed to be so marked, missing links in evidence might be surreptitiously supplied and much evil ensue. We do not wish to be understood as intimating that this was done in the case at bar. On the contrary, we believe that the plaintiffs' attorney inadvertently omitted to formally offer the notice of protest in evidence and have it marked and so appear in the minutes. This omission, however, would warrant the direction of a new trial.

Aside from this, there is another equally fatal defect in the plaintiffs' proof. There is no evidence that a notice of protest was ever sent in any way to the defendant indorser by any person other than the notary. Assuming that his notice of protest is in evidence, that notice simply shows, not that it was mailed by him to any address of the defendant, but was mailed to her in care of the plaintiffs. There is no evidence in the case from which it could be presumed that the defendant was at the plaintiffs' residence or at their address, nor does the notice contain the reputed residence of the defendant. The defendant, it is true, did receive a notice of protest, mailed two days after the note became due and received by her three days thereafter, and any presumption that the notary used due diligence in obtaining the proper address of the defendant and mailing thereto a notice of protest is overcome by this proof. If the plaintiffs, upon receipt from the notary of the notice of protest, promptly mailed it to the defendant, it does not so appear in the testimony. To show due diligence

in mailing a notice of protest, it must be shown that, if service is made by mail, it was deposited in the post office in time to reach the indorser in the usual course on the day following, where the parties reside in the same city. Section 174, Negotiable Instruments Law (Laws 1897, p. 741, c. 612).

The presumption of due diligence may be rebutted, without regard as to whether or not an affidavit under section 923, Code of Civil Procedure, has been served. *Meise v. Newman*, 76 Hun, 341, 27 N. Y. Supp. 708. That section simply declares that in the absence of an affidavit the notice of protest is presumptive evidence, etc. The testimony, as it is recorded, fails to show the giving of any notice of protest to the defendant in a manner sufficient to make her legally chargeable as an indorser. Doubtless this can be given upon a new trial.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

HAVANA ELECTRIC RY. CO. v. CENTRAL TRUST CO. OF NEW YORK.

(Supreme Court, Appellate Division, First Department. December 13, 1907.)

MORTGAGES—CONSTRUCTION—TRUSTEES IN TRUST DEEDS.

Plaintiff, having two mortgages on its property, executed to defendant as trustee a consolidated mortgage, greater in amount than the sum of the other two, and providing that a certain amount of the bonds secured thereby should be reserved by defendant to retire the first mortgage bonds when called for by plaintiff, and that defendant should hold such retired first mortgage bonds as a further security for the payment of the consolidated mortgage bonds until all the first mortgage bonds were either paid or presented to it, whereupon the first mortgage should be satisfied of record, and any of the reserved consolidated mortgage bonds remaining delivered to plaintiff. *Held*, that plaintiff was not entitled under the terms of the consolidated mortgage to demand the delivery of consolidated mortgage bonds upon the surrender of first mortgage bonds, which had been paid and canceled under a sinking fund provision in the first mortgage, but only on the surrender of enforceable first mortgage bonds.

Laughlin, J., dissenting.

Submission of controversy by the Havana Electric Railway Company against the Central Trust Company of New York. Judgment for defendant.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

George B. Covington, for plaintiff.

Arthur H. Van Brunt, for defendant.

SCOTT, J. This controversy, submitted upon an agreed case, has regard to the construction to be given to certain clauses contained in a mortgage executed by plaintiff to the defendant as trustee. The plaintiff is a corporation owning certain property and franchises and operating a street railway in the city of Havana, Cuba. It has executed three mortgages upon its property and franchises to secure three issues of bonds. The first mortgage, to secure an issue of \$5,000,000 of bonds, was given to the United States Mortgage & Trust Com-

pany as trustee on July 20, 1899. The second, to secure an issue of \$1,000,000 of bonds, was given to the Morton Trust Company as trustee on November 13, 1900. The third, concerning which this controversy has arisen, to secure \$10,000,000 of bonds, was given to the present defendant as trustee on May 10, 1902. This last mortgage, known as the "consolidated or refunding mortgage" (and hereafter referred to as the "consolidated mortgage"), was designed to provide for refunding the first and second mortgages, and to provide for meeting certain other outstanding indebtedness of the plaintiff, and to furnish funds for necessary expenditures by the company. The seventh article of the consolidated mortgage specifies the various purposes for which the bonds to be secured by it are to be issued, and the amount of such bonds to be issued for each purpose. Subdivision 2 of that article deals with the subject of refunding the first mortgage bonds, and it is as to the construction of that subdivision that we are now called upon to pass. The first clause of that subdivision reads as follows:

"\$5,250,000, face value, of the bonds secured hereby, shall be reserved to be executed from time to time, and to be authenticated by the trustee when and as called for by the company, and used only for the purpose of exchange for or retirement of, the present outstanding first mortgage bonds of the company amounting to \$5,000,000, such first mortgage bonds bearing date July 20th, 1899, redeemable at \$1,050 and interest for each \$1,000 face value, until such first mortgage bonds shall be paid, and the mortgage securing the same canceled."

This clause, standing by itself, merely provides for the reservation of the necessary number of bonds to provide for the exchange for or retirement of the first mortgage bonds, without stating how such exchange or retirement is to be effected, or under what terms or conditions the consolidated bonds are to be executed and issued to the plaintiff. The details are furnished by the succeeding clauses of the subdivision as follows:

"The trustee shall authenticate and deliver such bonds to the company, for the purpose aforesaid, in the following manner: The trustee shall authenticate and deliver to the company bonds to the amount of \$1,050, face value, for each \$1,000 of said 5 per cent. first mortgage bonds, with all unmatured coupons attached that the company may present to it. * * * The trustee shall immediately stamp on the first mortgage bonds so presented to it the following: 'This bond has been deposited with the Central Trust Company of New York, trustee, pursuant to the provision of a mortgage or deed of trust executed to it by the Havana Electric Railway Company, bearing date the 10th day of May, 1902'—and the said trustee shall hold the said first mortgage bonds so presented to it as a further security for the payment of the bonds hereby secured until all the bonds of that issue shall be presented by the company, or until the same shall be paid, and in either event the said bonds shall thereupon be canceled, and the mortgage securing the same satisfied of record, and upon the cancellation of said mortgage the trustee shall authenticate and deliver to the company any of said \$5,250,000 of said bonds hereby secured that may not have been theretofore authenticated and delivered."

Provision is then made whereby, if the company shall elect to call and redeem the first mortgage bonds, pursuant to a provision in that mortgage, and shall desire to anticipate the authentication of the consolidated bonds, it may do so by paying to the trustee cash at the rate of \$1,050 for each \$1,000 of bonds called, the trustee to

hold and use the money to meet and pay the called bonds when presented. This particular controversy arises over the presentation by plaintiff to defendant on January 18, 1907, of \$120,000, face value, of first mortgage bonds, which had been paid and canceled under a sinking fund provision in the first mortgage, and the refusal of defendant to accept the canceled bonds so presented, and to authenticate and deliver for them \$126,000 of consolidated bonds. The sinking fund provision contained in the first mortgage, and above referred to, required the railway company to pay to the trustee named in said mortgage certain sums annually to be applied either to the purchase of, or to the payment and redemption of said first mortgage bonds, and in either case it was provided that said bonds so bought or paid should "be forthwith canceled by the trustee and surrendered to the company." The \$120,000 of bonds presented to defendant for exchange had been thus canceled.

The plaintiff's contention is that, considering the scheme of refunding as a whole, and, so considering, finding that it was a part of the scheme that consolidated bonds should be substituted for first mortgage bonds as the latter for any reason ceased to be outstanding obligations of the company, the intention of the consolidated mortgage would be carried out if consolidated bonds were to be issued as fast as and in place of first mortgage bonds that by the operation of the sinking fund were taken up and canceled. The defendant, on the other hand, contends that its duties and obligations, acting as trustee for all the consolidated bondholders, are limited and defined by the terms of the mortgage under which it acts; that, if there be any real or apparent inconsistency between the general scheme of refunding and the letter of the refunding or consolidated mortgage, the latter must control; and that under the terms of that mortgage it is not permitted to issue consolidated bonds in exchange for canceled first mortgage bonds, but only for live, valid, and enforceable first mortgage bonds, because any other construction would defeat and impair to some extent the security provided by the mortgage for the holders of the consolidated bonds. The provisions of the consolidated mortgage from which we have already quoted at length are very specific, not at all ambiguous, and appear to bear out the contention of the defendant. Indeed, these provisions are consistent only with an intention that the first mortgage bonds to be delivered to defendant in exchange for consolidated bonds shall be live, valid, enforceable bonds, and that they shall remain such in defendant's hands until the entire first mortgage issue shall have been exchanged or paid off. They are to be held by the trustee "as a further security for the payment of the (consolidated) bonds hereby secured." It is evident that a paid and canceled bond could furnish no "further security" to the holders of the consolidated bonds. Except as an evidence that it had been paid, it would have no force or effect whatever. On the other hand, a live and enforceable bond might in case of foreclosure afford valuable security to the holders of bonds secured by a third mortgage, in allowing them to participate in the lien of the first mortgage to a greater or less extent. What this additional security would amount to we cannot tell; but whatever it

would be, whether great or small, the consolidated bondholders are entitled by their contract to its benefit.

If it be said that under this construction new bonds cannot be issued in place of first mortgage bonds paid off and canceled under the sinking fund clause, the ready answer is that this very contingency seems to have been foreseen and provided for by the consolidated mortgage. The surrendered first mortgage bonds are to be held as further security "until all the bonds of that issue shall be presented by the company, or until the same shall be paid," and upon the cancellation of the first mortgage following upon either of these events the trustee is to deliver any of said authorized issue that may not have already been authenticated and delivered. The plain meaning of these provisions is that it was contemplated that some live, enforceable first mortgage bonds would be surrendered and exchanged for consolidated bonds; that other first mortgage bonds would be paid off and canceled, but not exchanged, so that, when all the first mortgage bonds had been either exchanged or paid off, there would remain to be issued consolidated bonds equivalent in amount to the first mortgage bonds that had been paid off. Furthermore, the provision that all the exchanged first mortgage bonds shall be held until all of such bonds have been either presented for exchange or paid, and then canceled, is quite inconsistent with a construction which would permit bonds already canceled to be presented for exchange. The provisions for exchanging first mortgage bonds for consolidated bonds to which we have referred are the only ones contained in the mortgage which defines the defendant's duties. If it had been desired to provide that consolidated bonds should be issued in place of first mortgage bonds paid off and canceled by the sinking fund, nothing would have been easier than to have said so. The consolidated mortgage does not say so in terms, nor by any fair construction of its language. That the plaintiff now finds that it has assumed an onerous burden, in providing for the security of its consolidated bondholders, is no reason why these holders should be deprived of any part of the security secured to them by their contract.

We are therefore of the opinion that this controversy must be determined in favor of the defendant, and that it is entitled to a judgment that the plaintiff is not entitled, under the terms of the consolidated mortgage, to demand the authentication and delivery to it of \$126,000 of consolidated mortgage bonds upon the surrender to defendant of \$120,000 of canceled first mortgage bonds.

PATTERSON, P. J., and INGRAHAM and CLARKE, JJ., concur.

LAUGHLIN, J. (dissenting). As I view it, the contract embodied in the consolidated mortgage is ambiguous, whether it be construed as claimed by the plaintiff or as claimed by the defendant; and the proper construction is to be ascertained by a consideration of all of its provisions. At the time the mortgage was made the entire issue of \$5,000,000, face value, first mortgage bonds, was outstanding, and it was by the second subdivision of the seventh article of the con-

solidated mortgage, quoted in part in the prevailing opinion, expressly provided that consolidated bonds of the face value of \$5,250,000, should be reserved "and used only for the purpose of exchange for or retirement of" the then outstanding issue of first mortgage bonds. It was further therein provided that the consolidated bonds thus reserved were to be executed from time to time and to be authenticated by the trustee "when and as called for by the company." The value in consolidated bonds at which the outstanding issue of first mortgage bonds was to be redeemed was fixed at \$1,050, face value, of consolidated bonds for each \$1,000, face value, of first mortgage bonds, which would make the entire issue of outstanding first mortgage bonds equal the issue of consolidated bonds reversed to be issued in exchange for or retirement thereof. At the time the parties executed the consolidated mortgage, they were presumably familiar with the provisions of the first mortgage under which the first mortgage bonds were issued. That mortgage contained, in clause 15 thereof, a sinking fund provision by which the plaintiff obligated itself to deposit with the trustee for the bondholders on the 1st day of January, 1903, and annually thereafter until the maturity of the bonds, the sum of \$32,000 and an additional sum equal to the interest for one year on the principal of the bonds acquired and canceled by the trustee for the sinking fund. It was provided that the trustee should apply the sinking fund toward the purchase of bonds secured thereby at the rate of \$1,050 per bond, the bonds so purchased "to be forthwith canceled by the trustee and surrendered to the company," and to the payment and redemption at the same valuation of the principal and interest of bonds secured thereby selected for retirement as therein provided, the bonds so purchased and redeemed to be likewise canceled by the trustee and surrendered to the company. It was further provided that the payments required to be made by the company to the trustee on account of the sinking fund might be made in bonds on the basis of \$1,050 and accrued interest per bond, and that bonds thus delivered to the trustee by the company in fulfillment of the sinking fund agreement should likewise be canceled and surrendered to the company.

Now the parties knew that it was inevitable that under these provisions of the first mortgage large numbers of bonds would be canceled, and yet, as has been seen, they expressly provided for the exchange of the entire issue of first mortgage bonds for consolidated bonds. This indicates that it was not intended to limit the exchange of consolidated bonds to an exchange for live first mortgage bonds. In view of the great number of canceled first mortgage bonds that would naturally be in the hands of the plaintiff from time to time, it is, I think, reasonable to infer that, if the general unqualified provisions for the exchange at the instance of the company of consolidated bonds for first mortgage bonds was to be limited to live bonds, a provision to that effect would have been inserted. The majority of the court infer that live bonds were intended merely because it is provided that the bonds should be stamped and held as security, and because, moreover, there is a general clause that after all of the

first mortgage bonds have been canceled and paid, the plaintiff shall be entitled to the balance, if any, of the issue of consolidated bonds reserved to be exchanged for first mortgage bonds. I am of opinion that such inference does not fairly follow from these clauses of the mortgage. It was intended, of course, to have the trustee hold uncanceled as security for the third mortgage bondholders any first mortgage bonds received in exchange for consolidated bonds, which at the time of their reception by the trustee were live securities; and so the provisions for stamping them and for holding them as security were incorporated. It is of no significance, I think, that those clauses were not expressly limited to live bonds; for the parties must have understood that there would be no object in thus stamping canceled bonds which had ceased to be security, and that they could not, as against the holders of outstanding first mortgage bonds, by any declaration or agreement incorporated in the third mortgage, revive canceled bonds and give them force and effect as live securities. If the parties intended that the plaintiff was to hold this vast amount of canceled first mortgage bonds without receiving in exchange therefor consolidated bonds, and was to be compelled to maintain the two sinking funds, the one under the first mortgage and the other under the consolidated mortgage, what is quite similar, but relates to the consolidated bonds, without having the benefit of the use of the consolidated bonds, to which concededly it will be entitled after the payment of the first mortgage, until the time of such payment, then I think they would have incorporated in their agreement a provision clearly indicating that intent. It is manifestly the duty of the trustee to safeguard the interests of the consolidated mortgage bondholders.

It is claimed that it is to their advantage to deprive the plaintiff of the right to the use of the consolidated bonds in place of canceled first mortgage bonds until the first mortgage is paid in full. It is impossible to decide, upon this record, whether that be so or not. We only know that such a construction of the agreement will require the plaintiff to take from its earnings more funds and appropriate the same to the maintenance of both sinking funds than if it be permitted to personally exchange canceled bonds for consolidated bonds; for, if it were permitted to receive consolidated bonds in exchange for canceled as well as live first mortgage bonds, it could use the same under the provisions of the consolidated mortgage sinking fund clause in maintaining that sinking fund, or could negotiate the same and realize thereon, which would enable it to have a greater working capital, or a capital that would enable it to make greater improvements for the proper development of its lines. Neither the first nor second mortgage bondholders could be affected by the question as to whether the plaintiff shall be permitted at this time to exchange the canceled bonds for consolidated bonds, or shall be required to wait until all first mortgage bonds are paid; and the only possible theory upon which the consolidated mortgage bondholders may be prejudiced by allowing the exchange at this time is in the event of a foreclosure before the exchange would otherwise be made, and of there being a surplus for distribution among the consolidated mortgage bondholders, but in-

sufficient to pay them in full, in which case there would be a greater number of consolidated mortgage bondholders to share in such distribution. I doubt if this possibility of injury entered into the minds of the contracting parties, and, in view of the far greater injury to the plaintiff by being deprived of the present use of the bonds, I am of opinion that the consolidated mortgage should not be construed as depriving the plaintiff of the right to exchange the canceled first mortgage bonds for consolidated bonds until after the payment of all outstanding first mortgage bonds. The insertion of the clause in the consolidated mortgage requiring the trustee to deliver to the plaintiff any unexchanged consolidated mortgage bonds reserved to be issued in exchange for first mortgage bonds after the payment and discharge of the first mortgage is explainable upon the theory that it may have been thought that some of the canceled first mortgage bonds be lost or destroyed so that an exchange could not be made.

For these reasons, therefore, I think the plaintiff should have judgment on the submission.

LAING v. PELTON WATER WHEEL CO.

(Supreme Court, Appellate Division, First Department. December 13, 1907.)

1. SALES—ACCEPTANCE—INSPECTION—WAIVER.

A manufacturer sold goods to a buyer, who resold to a third person for use in a foreign country. On the delivery of the goods an employé of the buyer inspected them and reported that they were defective. An agent of the manufacturer stated that the goods were all right and requested that they be shipped to the foreign country. After they reached the foreign country the third person rejected them, and the manufacturer wrote to the buyer that the goods would be made satisfactory and guaranteed such results. *Held*, that the manufacturer waived acceptance on delivery, and postponed inspection until the arrival of the goods in the foreign country, and was estopped from claiming that his implied warranty as manufacturer did not survive delivery.

2. SAME—BREACH OF IMPLIED WARRANTY—TENDER OF GOODS—ESTOPPEL.

A seller, who waived acceptance on delivery to the buyer, reselling to a third person for use in a foreign country, and who postponed inspection until arrival of the goods in the foreign country, and who required an actual installation of the goods in the foreign country before admitting that a proper inspection was possible, was estopped from insisting on a tender back of the goods, on the buyer demanding damages for breach of implied warranty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1227.]

Appeal from Judgment on Report of Referee.

Action by William T. Laing against the Pelton Water Wheel Company. From a judgment for plaintiff, entered on the report of a referee to hear and determine, defendant appeals. Modified and affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Strauss & Anderson (Frederick E. Anderson, of counsel), for appellant.

Simpson, Werner & Cardozo (Benjamin N. Cardozo, of counsel), for respondent.

CLARKE, J. This is an action on an assigned claim by the Carroll-Porter Boiler & Tank Company to the plaintiff to recover a balance of \$9,369.28, with interest, on a contract for the manufacture and sale of merchandise consisting of riveted steel pipes made and delivered by the plaintiff's assignor to the defendant between the 3d day of June, 1898, and the 28th day of August, 1900. The defense is the breach of an implied warranty that the pipe in question, being a manufactured article, should be merchantable and reasonably adapted to the use for which it was intended, to wit, the carrying of water under high pressure for the purpose of furnishing power for what are known as hydro-electric installations in the republic of Mexico. The defendant in its answer admits the sale of the merchandise in question, but sets up, as and by way of offset or counterclaim, that the defendant was compelled to lay out and expend large sums of money on the alteration and repair of the pipe and its accessories in order to make the same, as far as possible, answer the purpose for which it was intended, and in replacing large portions thereof with new pipe where the pipe was so imperfect as to make it impossible to make the same water-tight; that the said defendant was thereby greatly hindered and delayed in the carrying out of contracts for the purpose of which said pipe and accessories had been ordered, all to the damage of the defendant in the sum of \$11,500, which said sum the defendant offsets and counterclaims against the alleged cause of action in the complaint set forth.

There were two kinds of pipe contracted for—a flanged pipe for the bulk of the installments, and a slip-joint pipe for an installation known as the "San Miguel." So far as the flanged pipe is concerned we are satisfied with the conclusion of the learned referee. A different question is presented in regard to the slip-joint pipe. The contract provides that the pipe should be delivered f. o. b. in New York, and the directions were to deliver on lighters alongside the ship. The defendants testified that they sold the pipe to a certain Mexican concern, and delivery to it was made by the transfer of the bill of lading, so that delivery to the defendants and delivery by them to their vendee was a simultaneous act. Mr. Doswell, an employé of the defendant, sent by them from time to time to inspect the pipe, examined the pipe for the San Miguel line on the lighter alongside the Southern Pacific steamship dock. He observed that the slip joints were not made in a proper manner, that the plates were not sheared parallel with the rivets, that too much lap was left on them, and his impression was that, with the way the slip joints were made, it would not be possible to make a tight joint of the pipe. He reported the condition of the pipe to Mr. Kunze, the manager of the defendant, and subsequently made a second inspection with Mr. Ticer, the sales agent of the plaintiff's assignors. Mr. Kunze testified that, when Ticer returned after looking at the pipe with Doswell:

"He said that Doswell had greatly exaggerated the situation; that the pipe, while it was a rough job, was all right; to go ahead and ship it. He said he was confident we would have no trouble. * * * I said: 'Very well; we will do so, but if there is any trouble you will have to make good.' He said

there would be no trouble. The pipe was all right. He requested me to go ahead and ship the pipe."

Ticer testified that he received a letter from Kunze, written on September 13, 1899, giving him Doswell's report on the pipe, and thereafter examined it himself. Ticer wrote to plaintiff's assignors September 16, 1899, in regard to this pipe:

"This pipe is not a good job by any means. * * * I must say that your interests will suffer greatly if you are not here Monday morning to examine this pipe before shipment. I feel sure that many claims will result, and that Pelton will not pay you in full for this job until they have gotten settlement out of their customer."

He wrote again on September 18th:

"I have already told you the condition that I found the pipe in on personal examination of it, and I have found nothing more to add. I have arranged with Pelton to ship it forward, and when it reaches destination Mr. Kunze will be down there himself, and if the work is not right will notify you, and you must make it so, or he will be obliged to do it at your expense. * * * Now that is all that there is in Mr. Kunze's contention in the matter, and he would be glad to have the pipe go through without any trouble; but if it does not, and defective workmanship is clearly demonstrated, what can he do but to look to you to make it right? Such will undoubtedly be his course of action in the matter."

It seems to me that, taking all of this testimony together, there was a waiver of acceptance upon delivery, and that the time for inspection was postponed until the pipe should arrive in Mexico. After it reached Mexico there were renewed complaints of the condition of this pipe. On December 4, 1899, Ticer telegraphed: "Customer rejected 1474"—the San Miguel job. On December 5, 1899, plaintiff's assignor wrote:

"If the pipe is not yet in position, they have no way of telling what the leaks will amount to. * * * For a man to go on the ground as their superintendent has and condemn work without trying it is not very great proof of his supposed experience."

Thereafter Mr. Porter, of Carroll-Porter Company, plaintiff's assignor, went personally to Mexico with an employé and worked for some time installing this line. While he was there plaintiff's assignors wrote to defendant January 5, 1900:

"There is no question in our mind but that this pipe will be made perfectly satisfactory, and we can guarantee such results. Such being the case, coupled with the fact that we are making shipments on your other contracts right along, we would ask that you as early as possible send us, if not settlement for old accounts, an amount which would be equivalent."

The line never did hold water. New material had to be bought and substituted to some extent; and the defendants, in making the line good, expended various sums of money. The referee has found that the difference between the value of the San Miguel line as it was and as it would have been if said defects had not existed was \$1,121.02. It seems to me, taking all the facts together, that the plaintiff's assignors waived acceptance upon delivery in New York, and postponed inspection, and insisted upon actual installation of the line, and that under these circumstances they are estopped from

claiming that the implied warranty of a manufacturer did not survive delivery in this port upon the lighter, and are likewise estopped from insisting upon a tender back of the pipe line, which they required should be actually installed in Mexico before they would admit that proper inspection was possible.

Under the facts as here developed, the judgment should be modified, by reducing the amount thereof by \$1,121.02, the sum found by the referee, and, as so modified, affirmed, without costs to either party. All concur.

(57 Misc. Rep. 10.)

PEOPLE ex rel. LEHIGH VALLEY RY. CO. v. CITY OF BUFFALO.

PEOPLE ex rel. BUFFALO CREEK R. CO. v. SAME.

(Supreme Court, Trial Term, Erie County. December 17, 1907.)

1. MUNICIPAL CORPORATION—PUBLIC IMPROVEMENTS—SHIP CANAL—CONTRACT—EXECUTION—TIME.

A contract involving over \$25,000 for the dredging of the Buffalo ship canal was drawn September 27, 1906, on which date it was signed and acknowledged by the contractor. The contractor's bond was executed on the same day, and the contract was approved by the corporation counsel on the following day by the comptroller on the 29th, and by the bureau of engineering on October 9, 1906. Immediately thereafter the contractor began the work, which was prosecuted under the inspection of the city's officers, though the contract was not signed by the commissioner of public works until July 6, 1907. An assessment roll taxing one-half of the cost of the work against property benefited was filed February 25, 1907, and confirmed July 2d following. *Held*, that the contract was prematurely entered into, in violation of Buffalo City Charter, § 408, providing that no contract for any improvement costing more than \$500 shall be entered into until the assessment therefor shall have been made, confirmed, and delivered to the treasurer, and that such assessment was, therefore, subject to attack in a proper proceeding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1065.]

2. SAME—REVIEW OF ASSESSMENT—CERTIORARI—PETITION—OBJECTIONS.

Under Code Civ. Proc. § 2127, providing that a petition for certiorari "must show a proper case for" issuing the writ, a relator's petition to review a special assessment, alleging that it was illegal, incorrect, erroneous, and void, because it was not made in compliance with the statutes of the state, nor with the general provisions of law for the levy of assessments for improvements in the city of Buffalo, was insufficient to raise the objection that the contract for the improvement was prematurely entered into before the assessment was levied, in violation of Buffalo City Charter, § 408.

3. SAME—PUBLIC IMPROVEMENTS—ASSESSMENTS—BENEFITS.

Where relators owned property on a private ship canal, which was connected with a public canal maintained by a city, relators' property was benefited by and assessable for the dredging and improvement of the city canal, though it had not been assessed for prior similar improvements.

4. SAME—FRONT-FOOT RULE.

An assessment of property for canal improvement at a uniform rate per front foot was not objectionable, in the absence of proof that the benefits to relators' property were not as assessed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1113-1116.]

Certiorari by the people, on the relation of the Buffalo Creek Railroad Company, and by the people, on the relation of the Lehigh Valley Railroad Company, against the city of Buffalo, to review special assessments levied by such city to collect one-half of the expenses of dredging the city's ship canal. Writ dismissed.

Moot, Sprague, Brownell & Marcy, for Buffalo Creek R. Co.

Kenefick, Cooke & Mitchell, for Lehigh Valley Ry. Co.

Louis E. Desbecker and S. F. Moran, for city of Buffalo.

BROWN, J. Some years ago the city ship canal, extending from near the mouth of the Buffalo river southerly to the private canal of the Buffalo Creek Railroad Company, was dredged to the depth of 23 feet, and annually thereafter the city of Buffalo maintained that depth by dredging and removing the annual deposit of mud and silt therefrom, assessing the expense thereof, one-half upon the assessable property in the city at large and one-half by local assessment upon the properties benefited by such expenditure. No part of such local assessment, however, has heretofore been levied upon the properties of either of the relators herein. On May 7, 1906, the common council of the city of Buffalo, under the authority of the provisions of the charter empowering it to put and maintain in navigable condition the city ship canal, voted that it intended to order the dredging of the canal to the completed contract depth for the maintenance of its channel in accordance with plans and specifications which were then on file in the bureau of engineering. On June 11, 1906, the commissioner of public works reported to the common council that the lowest bid received by him for the doing of the work was that of the Buffalo Dredging Company, at 29½ cents per cubic yard. On July 30, 1906, the common council directed the commissioner of public works to contract with the Buffalo Dredging Company for doing such work at that price; and on said July 30, 1906, the same body ordered the board of assessors to spread a local assessment of \$12,500, being one-half of contract price of such work, upon the real estate benefited by such improvement in proportion to the benefits resulting therefrom. In pursuance of such authority the board of assessors prepared an assessment roll in which the property of the relator the Buffalo Creek Railroad Company was assessed at the sum of \$1,114.33, and the property of the relator the Lehigh Valley Railway Company was assessed at the sum of \$1,952.14. The properties of the relators upon which such assessments were levied abut on a private ship canal constructed and operated by them, being about 5,000 feet long and connecting with the southern end of the city ship canal, of approximately of the same width and depth. These abutting properties are now and for many years have been used and occupied by the relators for commercial and transportation purposes by railroad, dock, and storage facilities; access thereto by lake vessels and other craft from the Great Lakes and the Buffalo harbor being solely had through the water way of the city known as the "city ship canal." This assessment roll was on February 25, 1907, filed in the office of the city clerk. The relators objected to their assessments. The

common council duly confirmed the same. On July 2, 1907, it was delivered to the comptroller, who gave it the number of 12,568, and within the proper time the relators instituted these proceedings to test its validity. The writs of certiorari were issued upon the petitions of the relators, in each of which it is alleged:

"That said assessments are illegal, incorrect, erroneous, and void, for the reason that they were not made * * * in compliance with the statutes of the state of New York, nor in compliance with the general or special provisions of law for the levying of assessments for required improvements in the city of Buffalo."

It is also alleged that the assessments are illegal because the properties of the relators are assessed at greater sums than the benefits received, that the assessments are unequal, and that a large amount of property benefited by said improvement has been omitted from the assessment roll. The return of the defendant denies these allegations, and alleges that the assessments are valid and legal.

The issues thus raised were brought on for trial at the Erie September Equity Term; trial being commenced on October 31, 1907, and causes submitted on November 26, 1907. At the commencement of the trial counsel for the defendant moved to dismiss the writs upon the ground that the petitions do not allege that assessment roll is void for the reason that the contract to do the work of dredging was entered into before the roll was confirmed, and that, if the relators rely upon that ground for alleging the invalidity of the roll, the court had no jurisdiction to issue the writs, and the trial court had no jurisdiction to try the validity of the rolls upon such an alleged reason. The relators then introduced evidence tending to establish that the contract between the Buffalo Dredging Company and commissioner of public works was entered into on the 27th day of September, 1906; that in pursuance of that contract the dredging company actually did the work shortly thereafter, which was inspected and supervised by the city authorities, and all work was completed under the contract before the assessments complained of were made and confirmed by the common council on July 2, 1907. These facts were claimed by the relators to be admissible under the allegations of their petitions above quoted, and that they establish the illegality of the assessments for the reason that it is provided by section 408 of defendant's charter that no contract for any improvement costing more than \$500 shall be entered into until the assessment therefor shall have been made, confirmed, and rolls delivered to the treasurer. The receipt of these facts in evidence was objected to by the defendant upon the ground that the petitions did not allege that the assessments were illegal for any such reason, that no grounds of invalidity were set forth in the petition, and particularly that it is not averred in the petition that the assessment roll is void for the reason that the contract was entered into before the roll was confirmed. The evidence relative to making the contract before assessments were levied was received upon the statement of the court that the ruling upon its admissibility would be disposed of upon the submission of the case.

While it is true that the commissioner of public works did not in

fact sign the contract until July 6, 1907, the fact is that the contract was drawn and dated on September 27, 1906, signed and acknowledged by the dredging company on that date, the bond of the dredging company for faithful performance of the work was executed September 27, 1906, contract was approved by the corporation counsel of the defendant on September 28, 1906, approved by the comptroller of the defendant on September 29, 1906, and also approved by the bureau of engineering of the defendant on October 9, 1906, by the deputy engineer, commissioner, and by the assistant engineer, and immediately thereafter the dredging company began the work of such dredging, and such work was prosecuted under the inspection of the proper officers of the defendant and in accordance with plans and specifications prepared by the bureau of engineering. If such facts constitute "the entering into a contract" in September, 1906, it is certainly established that the contract was made in violation of section 408 of the defendant's charter, in which case the assessments are illegal, for the charter specifically forbids entering into such a contract until after the assessments upon property benefited by such work are completed, confirmed, and delivered to the treasurer.

It is idle to argue that this section does not mean precisely what it says. Under this statute, for it is the act of the Legislature, the city of Buffalo cannot levy a local assessment to pay expense of making an improvement in the water ways of the city upon property benefited by any improvement costing more than \$500 unless such assessment is made, confirmed, and delivered to the treasurer before the city becomes bound by contract to do the work or to pay for the same. There is not a suggestion or word in any of the statutes relative to the Buffalo river improvements to which my attention has been called that relieves an assessment levied to pay one-half of the contract price of the expense of dredging or maintaining the navigable depth of the water ways of the defendant from the fatal objection that the contract was made before such an assessment was levied, confirmed, and delivered to the treasurer, if such should be the fact. Chapter 566, p. 1356, of the Laws of 1902, provides for a local assessment to pay bonds of the city of Buffalo. Section 408 of the city charter does not apply to such an assessment. Chapter 527, p. 1439, of the Laws of 1906, provides for a local assessment to pay a portion of the expense of making the improvements therein specified. Section 408 of the city charter does apply to such an assessment. I have been referred to no statute providing for an assessment to pay the expense of dredging the city ship canal that dispenses with a compliance of the procedure specified in section 408 of the city charter. An assessment to pay expense of any improvement costing more than \$500, made after a contract therefor has been entered into, would undoubtedly be illegal, and could successfully be defeated by proper proceedings.

If such an objection had been properly made by the relators in these proceedings, these assessments and this assessment roll must necessarily have been held to be void, with the result that the entire sum would be chargeable to the general fund. The relators now seek

to avail themselves of this objection under the averment in their petitions that the assessment is void for the reason that it is not made "in compliance with the general or special provisions of law for the levying" of such assessment. Such allegation is ineffective to raise the objection urged. To entitle the relators to the writs of certiorari to review the assessments and urge their illegality for the reasons here presented, their petitions "must show a proper case for the issuing of the writ." Section 2127, Code of Civil Procedure. The petition is the relators' pleading. It is their complaint. It must show the reasons why the assessment is illegal. To say that it is illegal for the reason that it does not comply with the law does not state any reason at all. What law has been violated, and in what way or manner does the assessment fail to comply with it, should have been stated. To allege that the assessment is illegal for the reason that it does not comply with the law does not "show a proper case for the issuing of the writ." Some fact or reason must be stated with such certainty that, if such fact be true, a judgment by default could be rendered adjudicating the actual existence of the fact as stated. If the relators' petition alleged that the assessments were void for the reason that such assessment was not made before the contract for the work was entered into, a fact would be stated and a reason given showing that assessment was void under section 408 of the defendant's charter. Such an allegation having been omitted from relators' petitions, it clearly appears that the writs were not issued on that ground, and the evidence relative to entering into the contract with the Buffalo Dredging Company before assessments were levied, confirmed, and delivered to the treasurer was inadmissible, should not have been received, and the same is stricken from the record.

The allegation of the petitions that the assessment roll is void because the assessments are unequal, or that the properties of the relators are assessed at greater sums than the benefits received, and that properties benefited by the improvements had not been assessed, have not been established upon the trial. It very clearly appears that the only means the relators have of reaching their properties with deep-water craft is through the city ship canal. The board of assessors determined that the properties of relators were benefited by maintaining the depth of the city ship canal at the contract depth of 23 feet, and no satisfactory evidence has been offered showing that the board of assessors erred in making such determination. The fact that such assessment had not been made upon relators' properties for annual dredging prior to 1906 is not a valid, legal objection to the assessments for 1906 dredging. While it is true that assessment rolls show on their face that relators' properties on their private canals were assessed at a uniform rate per foot canal front, yet it does not appear that the benefits to relators' properties are not precisely as assessed. It clearly appears that every foot of relators' properties has the same equal advantage of and privilege for shipping and commercial purposes, and that the benefits derived by the use of the city ship canal are identical and uniform. None of the reasons

for which the court condemn the per foot front assessment rule have been established.

For these reasons, the writs issued at the instance of the relators must be dismissed, with costs to the defendant; and judgment is accordingly ordered.

Let findings be prepared.

(122 App. Div. 582.)

MATTHEWS v. CARMAN.

(Supreme Court, Appellate Division, First Department. December 13, 1907.)

1. JUDGMENTS—CANCELLATION—EQUITY JURISDICTION.

Equity may cancel judgments, orders or decrees, or enjoin their enforcement, in whole or in part, for fraud; but the jurisdiction will only be exercised in cases of necessity, and where there is no adequate remedy at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 764-773, 836-840.]

2. INJUNCTION—ENJOINING EVIDENCE—EQUITY JURISDICTION.

Equity may enjoin the introduction in a law action of evidence obtained by fraud and duress.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 51.]

3. JUDGMENT—JUSTICES OF THE PEACE—JURISDICTION—NECESSITY OF SHOWING JURISDICTIONAL FACTS.

A justice's court being a court of inferior jurisdiction, jurisdictional facts essential to support its judgment must appear from the record, and may be neither supplied nor presumed to exist.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 398.]

4. LANDLORD AND TENANT—SUMMARY PROCEEDING—PETITION—SUFFICIENCY.

Under Code Civ. Proc. § 2235, requiring the petition in a summary proceeding to recover possession of land to describe the premises and the petitioner's interest therein, an averment that petitioner was the "landlord" and that he "leased" the premises to defendant insufficiently shows his interest, and, being insufficient to give the court jurisdiction, rendered void all proceedings taken.

5. SAME—SERVICE OF PRECEPT—SUFFICIENCY OF RETURN.

Code Civ. Proc. § 2240, subd. 1, provides for personal service of the precept in a summary proceeding for the possession of land. Subdivision 2 provides for service on another where the person to whom the precept is directed resides in the city where the property is situated and is absent from his dwelling house. Subdivision 3 provides for service by affixing a copy to the property where service cannot with reasonable diligence be had under subdivision 1 or 2. *Held*, that a return reciting that the constable was unable to find defendant "or any one on the property" was insufficient to sustain service by affixing a copy of the precept to the property, for failing to show that service could not be had under subdivision 1 or 2, and hence the justice did not acquire jurisdiction of the proceeding.

6. INJUNCTION—VOID JUDICIAL ORDER AS EVIDENCE—RIGHT TO ENJOIN.

Where an order for petitioner in a summary proceeding is void for jurisdictional defects, the defendant may not enjoin its use as evidence in a law action, since advantage of the defects may be taken when the order is offered in evidence.

Appeal from Special Term, Suffolk County.

Action by John H. Matthews against Richard F. Carman. From

an order denying his motion for an injunction, plaintiff appeals. Affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and HOUGHTON, JJ.

Eugene Cohn, for appellant.

J. Campbell Thompson, for respondent.

LAUGHLIN, J. This is a suit in equity to have a final order in summary proceedings declared null and void and to enjoin its use, particularly as evidence of the existence of the relationship of landlord and tenant between defendant and plaintiff. It appears that on the 4th day of April, 1906, the defendant presented a duly verified petition to a justice of the peace of the town of Huntington, county of Suffolk, N. Y., alleging that he was the "lessor" of certain real property therein described, situate in said town; that he "leased" it to the plaintiff on the 15th day of February, 1905, for one year from the 1st day of April thereafter, at a stated rental, payable semiannually on the 1st days of April and October; that the plaintiff entered into possession of the premises, but has not paid the rent, payment of which was personally demanded in said town; that three days' notice in writing, requiring in the alternative the payment of the rent or possession of the premises, was duly served on the plaintiff on the 22d day of March, and service thereof was also made on the 30th day of March, 1906, by attaching it to the door of the building on the premises, pursuant to the provisions of the Code of Civil Procedure, "there being no person to whom said notice could be served upon or delivered to"; that the rent had not been paid, nor had possession been surrendered; and that plaintiff held over and continued in possession without his permission after such default in the payment of rent and demand—and prayed for a final order to remove him. A precept in due form was issued, returnable on the 30th day of April, 1906. It was served by affixing it to the front door of the house; the return of the constable showing that he was unable to find the plaintiff or any one on the premises upon whom it could be served. The plaintiff failed to appear at the time the precept was returnable, and a final order and warrant were issued. The defendant thereafter brought an action against the plaintiff in the Supreme Court to recover the rent and for the value of certain improvements alleged to have been made on the demised premises at the request of the plaintiff. The plaintiff had no notice or knowledge of the dispossession proceedings at the time, and did not learn thereof until the 17th day of May, 1907. He then brought this action to have the final order annulled and to enjoin the defendant from using it as evidence, upon the ground that the summary proceeding was fraudulently instituted and conducted, in that the averments in the complaint that plaintiff rented the premises and entered into possession thereof were false, and that defendant pretended ignorance of the whereabouts of the plaintiff, who resided in the county of New York and had a place of business in the city of New York, and caused substituted service of the precept to be made.

The plaintiff concedes that he had an understanding with the defendant with respect to renting the premises after certain repairs should be made thereto, and that pursuant thereto, and with the expectation of consummating a lease, he forwarded certain carriages to the premises, which were delivered into the custody of the defendant. Courts of equity possess jurisdiction to cancel judgments, orders, or decrees, or to enjoin their enforcement in whole or in part, for fraud; but this jurisdiction will only be exercised in cases of necessity, and where there is no adequate remedy at law. *Huggins v. King*, 3 Barb. 616; *Farrington v. Bullard*, 40 Barb. 513; *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152; *Richardson v. Trimble*, 38 Hun, 409; *Hinckley v. Miles*, 16 Hun, 170; *Tracy v. Shannon*, 3 N. Y. Supp. 245; *Patterson v. Naehr*, 6 N. Y. Supp. 513. Equity may entertain jurisdiction to enjoin the introduction, in an action at law, of evidence obtained by fraud and duress. 22 Cyc. p. 811; *Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 316, 79 Am. Dec. 250; *Callendar v. Callender*, 53 How. Pr. 364.

In the case at bar the plaintiff claims that he was not a tenant and was never in possession, and therefore the only possible prejudice that may befall him in consequence of the summary proceeding is the use of the final order as evidence of the relationship of landlord and tenant, and therefore probable prejudice on this theory is the only basis for equitable relief. If the final order be not open to collateral attack, there can be no doubt it would be conclusive on that question. *Reich v. Cochrane*, 151 N. Y. 122, 45 N. E. 367, 37 L. R. A. 805, 56 Am. St. Rep. 607. If the petition gave the justice jurisdiction and the service was in conformity to the requirements of the Code of Civil Procedure (section 2240), although the final order was granted on substituted service and by default, it would be as binding and conclusive as if the plaintiff had appeared. *Mutual Reserve Fund Life Association v. Cordero*, 33 Misc. Rep. 387, 67 N. Y. Supp. 464; *McCotter v. Flinn*, 30 Misc. Rep. 119, 61 N. Y. Supp. 786; *Brown v. Mayor*, 66 N. Y. 385; *Jarvis v. Driggs*, 69 N. Y. 143; *Reich v. Cochrane*, 105 App. Div. 542, 94 N. Y. Supp. 404. It is unnecessary, however, to decide whether the grounds upon which the summary proceedings are attacked go to the jurisdiction of the court or constitute fraud, or whether they are of such a nature that the plaintiff, without bringing this action, could challenge the validity of the final order collaterally when presented as evidence against him in the action for rent; for it appears from the petition in the summary proceedings, a copy of which is set forth in the record, that the justice never acquired jurisdiction, and that therefore the final order is a nullity. Being a court of inferior jurisdiction, every jurisdictional fact essential to support the order must be shown by the record and may neither be supplied nor presumed to exist. *Black on Judgments*, §§ 250, 278, 280. Section 2235 of the Code of Civil Procedure provides, among other things, that the application for the removal of a person in possession of real property may be made by the landlord or lessor, and that the petition must describe "the premises of which the possession is claimed and the interest therein of the petitioner or the per-

son whom he represents." The only averment in the petition of the petitioner's interest is that he is the "landlord" and that he "leased" the premises to the plaintiff. This does not constitute a description of the petitioner's interest in the premises as required by the Code of Civil Procedure already quoted, and it was insufficient to give the court jurisdiction, and renders all proceedings taken null and void. *Schneider v. Leizman*, 57 Hun, 561, 11 N. Y. Supp. 434; *Fuchs v. Cohn*, 19 N. Y. Supp. 236; *Cahill v. Wyand*, 22 Civ. Proc. R. 271; *Potter v. N. Y. Baptist Missionary Society*, 23 Misc. Rep. 671, 52 N. Y. Supp. 294; *Ferber v. Apfel*, 113 App. Div. 720, 99 N. Y. Supp. 215.

Moreover, service of the precept was made by the constable under the third subdivision of section 2240 of the Code of Civil Procedure, by affixing a copy of the precept upon a conspicuous part of the property, which is only authorized where service cannot be made as prescribed in either of the preceding subdivisions of the section; and the return does not show that service could not have been made as prescribed in subdivision 1 or 2 of the section. The return does not show that the constable was unable to find the plaintiff in the county or that plaintiff had no residence in the county. Subdivision 1 of said section 2240 provides for personal service, which may only be made in the county. *Beach v. Bainbridge*, 7 Hun, 81. Subdivision 2 provides that if the person to whom the precept is directed resides in the city or town in which the property is situated, but is absent from his dwelling house, service may be made by delivering a copy of the precept at his dwelling house to a person of suitable age and discretion residing there, and in the event that no such person can, with reasonable diligence, be found there, then by delivering a copy of the precept at the property sought to be recovered, either to some person of suitable age or discretion residing there, or, in the event no such person can be found there, to any person of suitable age or discretion employed there. The only statement in the return explaining why service was made by affixing a copy to the door of the building on the premises, is the following clause: "Being unable to find John Matthews or any one on the property." The justice did not acquire jurisdiction by the service made, in the absence of evidence that service could not be made as prescribed in subdivisions 1 and 2 of said section. *Beach v. Bainbridge*, *supra*; *Eckerson v. Ellis*, 30 Misc. Rep. 794, 63 N. Y. Supp. 150. Advantage may be taken of these jurisdictional defects when the final order is offered in evidence, and therefore the plaintiff in no event requires relief in equity.

It follows that the order should be affirmed, with \$10 costs and disbursements. All concur.

INGRAHAM, J. I concur with Mr. Justice LAUGHLIN. I also think that the plaintiff has failed to make out a case of fraud or oppression sufficient to justify the court in setting aside the adjudication in the summary proceedings. As stated by Mr. Justice LAUGHLIN, the mere fact that the final order was without jurisdiction, and therefore void, is no ground for an action to set aside, if no lien is created upon the plaintiff's property, so that the judgment or final order

would be a cloud upon the plaintiff's title. The only way in which this order could possibly injure the plaintiff would be by its use against him as an adjudication; and if the order is attempted to be so used, and the court or officer was without jurisdiction, that objection will then be available to the plaintiff. There is no fraud alleged, and no fact to give a court of equity jurisdiction.

MORTON TRUST CO. v. SANDS et al.

(Supreme Court, Appellate Division, First Department. December 13, 1907.)

1. PERPETUITIES—SUSPENSION OF POWER OF ALIENATION—WILLS.

A will speaks as of the time of the testator's death, and whether or not it violates the statute against perpetuities must be determined as of that date, and not as of some subsequent date.

2. SAME—PERSONAL PROPERTY.

Testator provided by his will that when his youngest child should attain its majority his residuary estate should be divided between his wife and his three children, and that one of such equal proportions should be invested as a separate fund for the benefit of each of said persons; the income thereof to be paid over to each of them as long as they lived. At the death of the wife or of any of the children the principal sum should be divided equally between the survivors. The will further provided that when the youngest child should reach majority \$30,000 should be set apart by the executors, before the residuary estate was divided for the benefit of testator's wife; the interest thereof to be paid to her during her life, and at her death the principal to revert to testator's estate. *Held*, that the disposition attempted to be made by the legacy of \$30,000 violated the statute forbidding the suspension of the absolute ownership of personal property for more than two lives in being; that the vice in the attempted disposition of the fund was not cured by the fact that the widow died before the youngest child came of age, so that no illegal suspension of absolute ownership was actually effected; and that as to such fund testator died intestate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, §§ 48-50.]

Ingraham and Laughlin, JJ., dissenting.

Appeal from judgment on report of referee.

Action by the Morton Trust Company, as trustee under the will of Mahlon Sands, deceased, against Mahlon Alan Sands and others. From part of a judgment entered on the report of a referee, Mahlon Alan Sands and another appeal. Judgment modified, as directed in opinion, and, as modified, affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

William G. Choate, for appellants.

Russell Benedict, for respondent trustees and others.

William Williams, for respondent Morton H. Sands.

Egerton L. Winthrop, Jr., for respondent Morton Trust Co.

SCOTT, J. This appeal presents but the single question as to the validity of a certain disposition of personal property attempted to be made by the will and codicil of Mahlon Sands, deceased. The testator died on May 7, 1888, leaving a widow, one child by a former wife,

and three children by his second wife, who became his widow. After making certain provisions for his wife and children not necessary to be considered here, he provided by the tenth clause of his will that when his youngest child should attain its majority his residuary estate should be divided equally between his wife, provided she has remained his widow, and his children by her; that one of such equal proportions should be invested as a separate fund for the benefit of each of said persons, and the income thereof to be paid over to each of said persons so long as they lived. At the death of his wife, or of any of the children by her, the principal sum hereinbefore provided for should be divided equally between the survivors, except that if any child should die leaving issue such issue are to take the share allotted to the parent. By the third clause of the codicil to the will the testator provided as follows:

"It is my will that when my youngest child attains the age of twenty-one years a sum of thirty thousand dollars be set apart by my executors, before my residuary estate is divided, for the benefit of my wife, provided she remains my widow, and that said sum be invested for her benefit and the interest thereon paid over to her during her natural life, and at her death the principal to revert to my estate."

The controversy arises over this legacy of \$30,000, and the question presented is whether the disposition attempted to be made violates the statute forbidding the suspension of the absolute ownership of personal property for more than two lives in being. Reading the will and codicil together, as we must, it is clear that the testator expected that his wife would survive the majority of his youngest child. In that event the residuary estate, including the \$30,000, would be held by the executors, as trustees, until said youngest child should attain his or her majority. The \$30,000 would then be held by his executors as trustees during the lifetime of his widow, and the said sum would then fall into the residuary estate, to be divided into parts and held for the respective lives of the surviving children. There can be no doubt that, if the expectations of the testator had been fulfilled, the will and codicil would have required, at least as to a part of the \$30,000, that it be held in trust for more than two lives in being at his death. It so happened, however, that the testator's widow did not survive until the majority of the youngest child, so that the occasion never arose for setting apart the fund of \$30,000, and no illegal suspension of absolute ownership was actually effected.

The question is whether or not this fortuitous circumstance cured the vice in the attempted disposition of the fund. In our opinion it did not. The will speaks as of the time of the testator's death, and whether or not it violates the statute against perpetuities must be determined as of that date, and not as of some subsequent date. The rule is inflexible, and has been often repeated and applied, that the validity of such an attempted disposition is to be determined, not by the event, but by the possibility. As was said in *Hersog v. Title Guarantee Trust Company*, 177 N. Y. 86-89, 69 N. E. 283, 67 L. R. A. 146:

"The rule is that where, by the terms of an instrument creating an estate, there may be an unlawful suspension of the power of alienation, or of the ab-

solute ownership, the limitation is void, although it turns out by subsequent events that no actual suspension beyond the prescribed period would have taken place. In other words, to render such future estates created by will valid, they must be so limited that in every possible contingency they will absolutely terminate within the period of two lives in being at the death of the testator, or the estate will be held void."

In the light of this plain and explicit statement of the rule, we see no escape from the conclusion that the attempted disposition of the fund of \$30,000 was void, and that as to that sum the testator died intestate, unless the disposition was saved as to one-third of the sum by the circumstance that, as to that proportion, the reversion after the death of the widow would be held for the life of Morton Harcourt Sands, the youngest child mentioned in the third clause of the will, so that as to that proportion the absolute ownership would be suspended in any event only during two lives, to wit, his and that of his mother. The result of holding the disposition valid as to this share would be that Morton Harcourt Sands would receive, not only the provision which his father intended for him, but also one-fourth of the larger sum which the testator intended should be enjoyed solely by the other two children of his second marriage. There is nothing to indicate that any such result as this was within the intention of the testator. The rule in such cases is to hold the entire disposition invalid. *Benedict v. Webb*, 98 N. Y. 460-466; *Brown v. Quintard*, 177 N. Y. 75-85, 69 N. E. 225. It is true that the testator's daughter by the first marriage will thus share in the fund, and that her father did not intend that she should do so. This, however, is the logical and necessary consequence of his intestacy as to this fund, resulting from his attempt to make an unlawful and invalid disposition of it. By holding the disposition invalid in toto, the departure from the testator's intention will be the result, not of our decree, but of his own act.

The judgment appealed from must be so modified as to decree that Mahlon Sands died intestate as to the whole trust fund of \$30,000 attempted to be set up by the third clause of the codicil to his will, and that the whole of said sum shall be paid over in equal shares to his children by the second wife, and the substituted trustees under the antenuptial settlement of Mabel Sands, his child by his first marriage; and, as so modified, the judgment will be affirmed, with costs in this court to all parties separately appearing and filing briefs, payable out of the estate.

PATTERSON, P. J., and CLARKE, J., concur.

INGRAHAM, J. (dissenting). The question presented on this appeal depends upon the construction to be given to the tenth clause of the will of Mahlon Sands and the third clause of the codicil to such will. The will is dated May 19, 1883, and the codicil is dated May 1, 1885. The testator died on May 7, 1888, and the will was admitted to probate January 25, 1889. The testator left him surviving a widow and four children, the next of kin and heirs at law; Morton Harcourt Sands being the youngest child. The testator's widow died July 4, 1896, and Morton Harcourt Sands, the youngest child, became of age

September 15, 1905. The will, after making provision for the testator's daughter Mabel, a child by a former wife, and his son Morton Harcourt Sands, provides in the eighth clause that the business of making certain patent medicines in which the testator was interested be continued as far as possible as then conducted, and the profits realized therefrom received by his executors until his youngest child became of age. His executors were then directed to divide the profits of testator's interest in such business between his wife, provided she remained his widow, and her children by the testator. Should his wife have remarried, the profits were then to be equally divided between the children of the second marriage, and what the will calls the "fee" of his interest in the said patent medicines was to be disposed of as thereafter provided with reference to his residuary estate. By the fourth clause of his will he gave to his wife, so long as she should remain his widow and until such time as his youngest child by her should attain his majority, two-thirds of the net income of his estate; and by the ninth clause of the will he provided that the income of his estate not otherwise disposed of should be invested by his executors.

The intention of the testator as to the disposition of his estate during the minority of his youngest child is clear. The estate was to be kept intact, except in regard to the provision to be made for his daughter by his first wife. His wife was to have his Newport house during her life and two-thirds of the net income of his estate. Upon the arrival at age of his youngest child there was to be a distribution of his estate, which was provided for by the tenth clause of the will. That clause is as follows:

"Tenth. When my youngest child attains its majority, I direct that all the rest, residue and remainder of my estate be divided equally between my wife, provided she has remained my widow, and her children by me; and that one of such equal portions be invested as a separate fund for the benefit of each of said persons, and the income thereof be paid over to each of said persons as long as they may live. At the death of my wife, or of any of my children by her, the principal sums hereinabove provided for shall be divided equally between the survivors, but should any child die leaving issue, such issue are to receive in equal shares such portions of the patent medicines above referred to and of my residuary estate as their parent would have received if living."

Here again the intention of the testator is plain. There was no distribution of the estate until the arrival of his youngest child at age, but when that period arrived the share of each child depended upon the survival of his wife and upon whether or not she had remarried. The whole scheme of the will as to the disposition of the residuary estate thus depended upon the condition existing at the time the youngest child arrived at age, and the disposition of his estate was necessarily postponed until that time. By the third clause of the codicil, executed on the 1st day of May, 1885, the testator directed a modification of the distribution of his estate which was to take place upon the majority of his youngest child. That clause is as follows:

"Third. It is my will that when my youngest child attains the age of twenty-one years a sum of thirty thousand dollars be set apart by my executors before my residuary estate is divided, for the benefit of my wife, provided she remains my widow, and that said sum shall be invested for her benefit, and the interest thereon paid over to her during her natural life, and at her death the principal to revert to my estate."

This clause must be read as a modification of the scheme contained in the tenth clause of the will, but this clause could become of effect only upon the testator's widow surviving the arrival of his youngest child at the age of 21. Until that time arrived no part of this third clause of the codicil could become effective, no sum of \$30,000 could be set apart by the executors, no fund was created, and no trust existed. It may be assumed that the surrogate in his decree construing the will correctly decided that the trust attempted to be created by this clause of the will was in violation of the statute requiring that the title to personal property should absolutely vest within two lives in being, because there was, first, the life of the youngest son; second, the life of the widow; and, third, the life of one of the two children other than the youngest son—which must end before the absolute title to two-thirds of the \$30,000 could vest, and therefore the provision which directed that two-thirds of the \$30,000 should be held in trust for his two children other than the youngest son never was effectual. But the whole provision in relation to the creation of the trust and the creation of the fund that was to be subject to the trust depended upon his wife surviving the majority of the testator's youngest child. If there was no trust created, no trust fund constituted, it seems to me evident that the question as to the validity of the trust when it was created would become immaterial. The question here is, not whether this modification of the tenth clause of the will by the third clause of the codicil created an illegal trust, but whether any trust, legal or illegal, was ever created; and it is the negative answer to that question which seems to me to determine this controversy.

If the tenth clause of the will gave \$30,000 to the widow absolutely upon the youngest child attaining its majority, there would be no question but that this bequest would lapse and no rights could be acquired under it; nor could it affect the validity of the other provisions of the will, of which the codicil was made a part. It seems to me, therefore, that by the death of the wife before the arrival of the time at which the executors were directed to create the trust the whole third clause of the codicil became inoperative, the trustees never did or could act under it, and no trust fund was ever created to which this provision could apply. The direction in the codicil was that:

"When my youngest child attains the age of twenty-one years a sum of thirty thousand dollars be set apart by my executors before my residuary estate is divided, for the benefit of my wife, provided she remains my widow."

Certainly during the minority of the youngest child the executors could not have been required, nor would it have been proper for them, to create this trust of \$30,000, and after the death of his wife, for whose sole benefit this trust was to be created, the executors never could have been required to set apart the sum of \$30,000 or create the trust fund contemplated by the codicil. It is not claimed that such trust fund ever has been created or ever could be created under this clause, because when the time for its creation arrived the wife for whose benefit it was to be created was dead; and how, therefore, can it be said that, if the wife had survived the minority of the youngest child and a trust fund had been created, a portion of it would have

been void, and that, therefore, the provisions of the will as to the disposition of the remainder of the testator's residuary estate was also void? In this case, as in all others, the intention of the testator is to control, so far as it does not violate any legal rules for the distribution of property, and where it distinctly appears that it was his intention that at a time in the future a trust fund should be created for the benefit of his wife, and his wife did not live to require the creation of the trust fund, it would seem necessarily to follow that the trust fund never was created and the provisions in regard to it simply became inoperative and could have no effect upon a valid disposition of his residuary estate, from which the trust fund was to be created in the event that his widow survived at the time fixed for its creation. If the testator's wife had died before the testator, there would be no question; and it seems to me that the same result follows where she died after the testator but before the trust was to be created.

This question was not the one before the surrogate. The question there was whether or not this third clause of the codicil created a valid trust, or ever could create a valid trust, as to two-thirds of the corpus of the trust fund; and in his determination that it did not and could not I entirely agree. We have now the question as to whether any trust fund of \$30,000 for the benefit of the widow was created, and that question was not and could not have been determined by the surrogate, as the time at which the trust fund was to be created had not then arrived. As I read the surrogate's decree, he did not attempt to determine what would happen in the event that the widow did not survive the minority of her youngest child. By the eighth clause of the surrogate's decree it was adjudged and determined—

"In respect of the third clause of the codicil, that the bequest of thirty thousand dollars (\$30,000) to the testator's widow is made payable out of the capital of the testator's estate when the youngest child, viz., Morton Harcourt Sands, shall attain majority or shall previously die, and provided she, the said Mary M. Sands, shall have, until then, remained the testator's widow. It is adjudged and determined that the provision of the will for the reversion of the said legacy to the residuary estate, upon her death or remarriage, after the majority, or decease before attaining majority, of Morton Harcourt Sands, is invalid, except as to that portion of the said legacy which shall, under the provisions of the tenth clause, be incorporated in the portion held in trust for Morton Harcourt Sands, or be paid to his issue, if he be then dead, and that, as to the balance of the said legacy, it shall be divided among the persons who would be entitled to the testator's personal estate if he had died intestate."

There is here no adjudication as to what would happen in the event that the testator's widow died during the infancy of the testator's youngest child. It is based upon the assumption that a trust fund would be created when the youngest child arrived of age, and that when so created the bequest of the remainder over was void. But it was nowhere determined that in the event that the widow died before the majority of the youngest child any trust was created, or that if no trust ever was created or no trust fund separated from the residuary estate, the invalidity of the trust, if it had been created, would involve intestacy as to the portion of the testator's residuary estate which was legally disposed of by the will. The general rule is that, where a party

sets up a former decree as *res adjudicata*, it must appear that the question presented was determined by the decree. In determining the extent to which an adjudication becomes controlling, the case of *Griffen v. Keese*, 187 N. Y. 454, 80 N. E. 367, illustrates this well-settled principle. In that case a fund had been created to provide for an annuity. A portion of that became distributable upon the death of one of the annuitants, and the trustees commenced an action for an accounting, and it was therein decided, among other things, that the appellant in the case then under consideration was not entitled to any share in that portion of the annuity fund or the unappropriated income that was then distributed. Upon the case then under consideration the same claimant insisted that she was entitled to a portion of the fund that had been set apart to provide for the annuitants, and in considering the judgment in the first action the court said:

"That judgment is to be interpreted in the light of the circumstances then existing, the issues then raised, and the attitude of the then defendant, the appellant in the case at bar. No change has been made in the annuity fund, except such as had been wrought by the distributions of principal and unappropriated income, as death had reduced the number of annuitants. The only issue raised and litigated was whether the defendant Haggerty and the issue, children, personal representatives, or assigns of either of the five grandchildren of the testator were entitled to share in that portion of the annuity fund or its unappropriated income which had become distributable by the death of the annuitant, Sarah A. Willets, or in any distribution thereafter to be made so long as either of said grandchildren should survive. The controversy was confined to the disposition of the annuity fund as such, and it embraced nothing else. * * * As to the issue actually decided, the judgment in that action is *res judicata*; but it cannot have that effect upon a question which was not then involved, and, for aught we know, had not yet then arisen. *Stokes v. Foote*, 172 N. Y. 327, 65 N. E. 176. Neither the record nor any extrinsic evidence brought to our attention shows that the question now before us was in fact litigated in the action of 1897. The burden of making this proof rests upon the respondents, who rely upon the plea of *res judicata*, and any uncertainty as to what has actually been litigated must inure to the benefit of the appellant."

Applying the rules there stated as to the limitation of a former adjudication, it certainly cannot be said that the surrogate in his decree adjudicated anything except the illegality of the third clause of the codicil as affecting a trust to be created under it. But there was no adjudication as to when such a trust was created, or as to the effect upon the will itself where, from contingencies subsequently happening, no trust was ever created.

We think, therefore, that the judgment appealed from must be modified, by providing that no part of the testators' estate was ever affected by the third clause of the codicil, and that the estate should be distributed under the tenth clause of the will, with costs to the appellants and the plaintiffs, payable out of the estate.

LAUGHLIN, J., concurs.

GREENFIELD v. MILLS.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

1. VENDOR AND PURCHASER—PERFORMANCE OF CONTRACT—INCUMBRANCES.

Where a contract for the sale of real estate provided that the vendee should assume a mortgage for a certain amount, the fact that such incumbrance was represented by two mortgages amounting to the sum specified did not warrant the vendee in refusing to accept a conveyance.

2. MORTGAGES—PAYMENT—PRESUMPTION.

The lapse of 20 years after maturity of a mortgage raises a presumption of payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 858, 859.]

3. VENDOR AND PURCHASER—PERFORMANCE OF CONTRACT—INCUMBRANCES.

A vendee refused to accept a conveyance on the ground of a mortgage on the premises. It appeared that the mortgagor of the mortgage had conveyed the land by full-covenant warranty deed to the mortgagee, and that thereafter the latter had conveyed by a like deed to a predecessor of defendant, that the mortgage was payable in 1 year, and that 20 years had elapsed since its maturity. *Held* that, owing to the presumption of payment and to the fact that the covenants against incumbrances in the conveyance by the mortgagee extinguished the mortgage, the vendee's conduct was not justified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 253.]

Woodward and Rich, JJ., dissenting.

Appeal from Municipal Court of New York.

Action by Edward Greenfield against Oswin J. Mills. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before WOODWARD, JENKS, HOOKER, RICH, and GAYNOR, JJ.

Walter E. Warner, for appellant.

Charles S. Carrington, for respondent.

GAYNOR, J. This is an action to recover back a deposit of \$200 paid by the plaintiff to the defendant on a contract for the sale of a city lot by the latter to the former. The contract describes the land as 82 feet 10 inches in depth. It fixes the contract price as \$7,000 and provides that \$2,500 thereof is to be paid by the purchaser assuming a mortgage which is already thereon for that amount, and that \$1,500 be paid by giving a bond and mortgage back for that amount, the balance to be paid in cash. The plaintiff refused to take title on the contract day and demanded his deposit back on the grounds (1) that instead of there being a mortgage on the property for \$2,500 there were two mortgages, one of \$2,000 and one of \$500, (2) that there was still another mortgage of \$150, and (3) that one of the sides of the lot was 82 feet 9 inches in depth instead of 82 feet 10 inches.

That there were two mortgages making up the \$2,500 was of no consequence. The mortgagor of the mortgage for \$150 had conveyed the land by a full-covenant warranty deed to the mortgagee in 1843, and the latter afterwards, viz., in 1845, conveyed the land free and clear of the said mortgage by a like deed to a predecessor of the defendant

in the title. This does not present a question of merger; the covenants against encumbrances in the conveyance by the mortgagee wiped out the said mortgage. But if that had not been the case, there is a presumption of payment in the absence of any proof of payments on the mortgage during the more than 20 years it has been due. *Ouvrier v. Mahon*, 117 App. Div. 749, 102 N. Y. Supp. 981. It was made in 1841, and is payable in one year. The objection that one side of the lot was an inch short was unsubstantial, but in addition it was not proved. The plaintiff's attorney testified that he found that the map for the opening of the street in front took off an extra inch on one side of the lot, but he refused to produce the survey which he had had made, and on cross-examination admitted that it conformed to the description in the contract.

The judgment should be reversed.

Judgment of the Municipal Court reversed, and new trial ordered; costs to abide the event. JENKS and HOOKER, JJ., concur. WOODWARD and RICH, JJ., dissent.

(56 Misc. Rep. 631.)

JACOBSON v. FRAADE

(Supreme Court, Appellate Term. December 20, 1907.)

1. TRIAL—INSTRUCTIONS—ISSUES—EVIDENCE.

Refusal to instruct on an issue within the pleadings and on which there is evidence is erroneous.

2. SAME.

The court should instruct the jury as to the legal effect of conclusions of fact which they are at liberty to deduce from the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 499.]

3. BROKERS—COMMISSIONS—ACTIONS—INSTRUCTIONS.

Where, in an action for commission for procuring a purchaser of real estate, defendant claimed that he was a joint owner with a third person, that the broker knew that the third person's assent to a conveyance was necessary, and that the third person refused to give his consent, and the court presented defendant's theory as a denial that plaintiff produced a purchaser ready, able, and willing to purchase on terms satisfactory to defendant, the refusal to charge that if the broker knew that the consent of the third person was necessary before defendant could enter into a binding contract, and his consent could not be obtained, plaintiff was not entitled to commissions, was reversible error, though the court stated that it would leave the matter to the jury to take into consideration in arriving at the fact.

Appeal from City Court of New York, Trial Term.

Action by Louis Jacobson against Maximilian Fraade. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Stephen Brooks Rosenthal (Arnold Gross, of counsel), for appellant. Rosenthal, Steckler & Levi (Alexander Rosenthal, of counsel), for respondent.

GILDERSLEEVE, P. J. The action was brought to recover commissions upon an attempt to make an exchange of real estate, which was not effected. There is a sharp conflict of proof in certain important particulars. The plaintiff claims that he was employed by defendant to find a customer for his property; that plaintiff found certain persons who were ready, willing, and able to effect an exchange of their property for that of defendant, and to give a certain sum in cash in addition thereto; that after some negotiation defendant agreed orally to make the exchange on the terms offered; and that subsequently defendant changed his mind and refused to enter into a written agreement of exchange. The defendant claims that he was a joint owner of the property with one Bettmann; that plaintiff knew that fact; that defendant particularly informed plaintiff in the first instance of such joint ownership, and plaintiff knew that defendant could not by himself make any agreement to dispose of the property, but that the consent of Bettmann would have also to be obtained to any terms procured by plaintiff from his customers, even if approved by the defendant on his own behalf; that plaintiff's customers were also notified of this necessity by defendant at the time the terms were proposed; that the consent of Bettmann could not be obtained to the terms proposed; that defendant himself never approved of the terms proposed by plaintiff's customers; and that the negotiations failed to accomplish any result. The plaintiff denies that he or his customers had notice of the necessity of obtaining the consent of Bettmann. In submitting the issues to the jury the learned court below presented the defendant's theory of the case as being merely a denial that "the plaintiff ever produced a purchaser or purchasers, or party or parties, ready, able, and willing to make an exchange on terms satisfactory to defendant," without referring to defendant's claim of the necessity of obtaining Bettmann's consent, and notice thereof to plaintiff and his customers, and the refusal of Bettmann to give such consent. At the end of the charge, and after plaintiff's counsel's requests to charge had been disposed of, defendant's counsel said:

"I ask your honor to charge that if the plaintiff knew that the consent and approval of Bettmann was required before the defendant could enter into a binding agreement or a binding arrangement, and if the consent and approval of Bettmann could not be obtained to the terms made, * * * that then the plaintiff is not entitled to the commissions in this case."

The court replied:

"I decline to charge that proposition as a matter of law, and leave it to the jury to take into consideration in arriving at the fact."

To this refusal defendant duly excepted. The jury brought in a verdict for the plaintiff for the full amount claimed. Defendant appeals.

A refusal to instruct the jury on a theory, issue, or defense which is within the pleadings and which there is evidence to support is erroneous. *Blashfield's Instructions to Juries*, § 103. It was the duty of the court to instruct the jury as to the legal effect of conclusions of fact which they were at liberty to deduce from the evidence. *Foster v. People*, 50 N. Y. 601. The reply of the court below, that it would

"leave it to the jury to take into consideration in arriving at the fact," was practically no instruction at all, and did not modify the refusal to charge on the proposition of law presented by the request. It was in no sense responsive to such request, and missed the subject to which the attention of the court was called. *Cross v. Tyrone M. & M. Co.*, 121 Pa. 400, 15 Atl. 643. *Blashfield's Instructions to Juries*, § 142. Moreover, the reply of the court may well have left the impression on the jury that, even if they found that plaintiff knew all along as a fact that defendant could agree to nothing definitely, without the consent of Bettmann, and that the latter refused such consent, still they might find that plaintiff was entitled to a verdict. The defendant was entitled to definite instructions to the jury on the question of law presented, and the neglect of the court to give such instructions constitutes reversible error.

Judgment and order reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

SHUBERT v. LAUGHLIN.

(Supreme Court, Appellate Division, First Department. December 13, 1907.)

1. PARTNERSHIP—ACTIONS BETWEEN PARTNERS—RECEIVERS.

Where an action by a partner against a copartner is not brought for a dissolution of the firm, but to continue the partnership and oust the copartner from the management secured to him by firm agreement, and to obtain the management for plaintiff, the appointment of a receiver pending the action is improper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 181½.]

2. SAME—PARTIES.

Where, after a partner and copartner had assigned their interests in the firm to a third person, the partner sued his copartner to deprive him of the management secured to him by the firm agreement, the copartner was entitled to have the third person made a party, so that any judgment might be binding on him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 178.]

3. ABATEMENT AND REVIVAL—UNNECESSARY ACTION—ANOTHER ACTION PENDING.

Where a partner in a firm engaged in the business of conducting a theater in a county brought an action in the county against his copartner and a third person with reference to partnership affairs, the copartner, though not served with process, should not be permitted to sue the partner in another county, but the matters in dispute should be determined in the first action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 39-72.]

Appeal from Special Term, Erie County.

Action by Lee Shubert against John Laughlin. From an order appointing receivers, defendant appeals. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Moses Shire, for appellant.
William Klein, for respondent.

SCOTT, J. The defendant appeals from an order by which the plaintiff and one Charles O. Maas were appointed receivers pendente lite of copartnership property. The material facts are not complicated. In July, 1905, the defendant held a lease of the Lyceum Theater, in Buffalo, running to September 1, 1906, and a further lease of the same premises running to August 31, 1911, with an option to extend it to August 31, 1915. The plaintiff was a theatrical manager, and booking agent for theatrical companies. On July 31, 1905, plaintiff and defendant entered into a copartnership agreement in the enterprise of managing and conducting said theater during the term covered by the aforesaid leases and option. To this partnership plaintiff contributed the leases above mentioned, and defendant contributed his skill as manager and booking agent. The parties agreed to equally share and bear all expenses necessary to be incurred and all profits realized. The defendant was to be local manager of the theater, drawing a salary of \$100 per week for at least 40 weeks in each year. The agreement contained an express covenant against the assignment or transfer by either partner of his interest therein, except that, if a certain corporation was organized, both parties should assign the copartnership agreement to it. Such corporation was apparently never organized. By a collateral agreement made on July 31, 1905, the plaintiff agreed to furnish or book for said theater at least 20 attractions in the minimum in each season. In the spring or early summer of 1907 plaintiff associated himself with other managers in a New Jersey corporation known as the "United States Amusement Company," and assigned his interest in the copartnership property and agreement to that company. Defendant was importuned by plaintiff to also assign his interest in the copartnership agreement and property to said Amusement Company, and after some demur did so, being induced so to do, as he says, by promises of employment in other theaters made to him by one Erlanger, the president of the Amusement Company.

It is not denied that these promises were made, nor that they were never fulfilled. When defendant failed to get the employment promised to him, he undertook to disavow and repudiate his assignment to the Amusement Company. Plaintiff says that he has withdrawn from or canceled his assignment to the Amusement Company; but whether this has been effectually done or not does not clearly appear. It is not very important, however, for the purposes of this appeal, because it is clear that the plaintiff's interests are identical with those of the Amusement Company. On August 24, 1907, after a performance in the theater, a number of representatives of the Amusement Company took physical possession of the theater, and when defendant on the next morning attempted to exercise acts of proprietorship he was violently assaulted and ejected. Thereupon defendant commenced an action in the Supreme Court in Erie county, joining as defendants the present plaintiff and the United States Amusement Company, and obtained a temporary injunction restraining said defendants from in-

terfering with him in the possession and management of the theater. The summons and order were not served on plaintiff, because he was temporarily absent from the state; but it is evident that he knew of the commencement of the action and the issuance of the injunction. Thereupon the present action was commenced, and the order appealed from was made appointing plaintiff and the said Maas receivers, with authority to continue the business, and enjoining defendant from interfering with them in any way.

There are several reasons why the order must be reversed. In the first place, the action is not brought for a dissolution of the partnership, and no relief of that nature is prayed for. The plaintiff's apparent purpose is to continue the partnership, but to oust defendant from the management secured to him by the copartnership agreement, and to assume such management himself. For this reason, if for no other, the order was improperly made. *Greenwald v. Gotham-Attucks Co.*, 118 App. Div. 29, 103 N. Y. Supp. 123. In the second place, no order disposing of the possession and control of the property should be made without the presence, as a party, of the United States Amusement Company. It appears that both partners at one time or another assigned their interests to that company. What rights or claims it may have we cannot tell; but it is entitled to be heard, and the defendant is entitled to have it a party to the action, so that any judgment may be binding upon it. In the third place, the matters in dispute between the parties can be and should be adjusted and determined in the action in Erie county. It may be that plaintiff had the legal right to bring this action; but, when the discretion of the court was appealed to by the motion for the appointment of receivers, that discretion would have been properly exercised if the parties had been remitted to the action already begun. It is not conducive to the orderly administration of justice that two actions should be pending at the same time in the same court to settle the same dispute, when the whole matter can be disposed of in the action first begun. It is true that plaintiff has not been served with process in that action; but he is named as defendant therein, and can intervene and appear whenever he pleases, and by his answer can ask for any equitable relief to which he deems himself entitled.

The order appealed from is reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs. All concur.

ALFORD v. COOK.

(Supreme Court, Appellate Term. December 20, 1907.)

1. MASTER AND SERVANT—ACTION FOR WAGES—SUFFICIENCY OF EVIDENCE.

Letters introduced in evidence in an action on a contract to pay a salesman an additional sum if his sales were satisfactory, written by the employer in answer to reports sent in by the salesman and containing words of praise for orders taken and encouragement "to keep up the good work." If competent as tending to prove the employer's estimate of the value of the whole period of the salesman's services, are at most the ordinary mes-

sages of an employer to his employé, calculated to stimulate him to renewed effort.

2. SAME—ADDITIONAL COMPENSATION.

Under a contract to pay a salesman an additional sum if his sales were satisfactory, it lay with the employer alone to determine whether the sales were satisfactory.

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Charles H. Alford against John J. Cook. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL, and FORD, JJ.

Sullivan & Cromwell, for appellant.

Charles Stein, for respondent.

FORD, J. Defendant (appellant) employed plaintiff (respondent) as salesman under a written contract at a stipulated salary from April 15 to December 15, 1906, wherein defendant agreed as follows:

"I also agree to pay the said Alford a further sum of \$200 on the last-mentioned date (December 15th) provided his sales shall have been satisfactory at that time."

This contract was fully executed, except as to payment of the \$200, for which plaintiff sued and obtained judgment.

Plaintiff sought to prove that his services were satisfactory by introducing a series of letters written to him by defendant during the course of the employment. They appear to be for the most part in answer to reports sent in by plaintiff, and contain words of praise for orders taken, encouragement "to keep up the good work," and similar kindly comment upon particular favorable results accomplished by plaintiff. If they are competent at all as tending to prove defendant's mental estimate of the value of the whole period of plaintiff's services, they are at most the ordinary messages of an employer to his employé, calculated to stimulate him to renewed effort. Under the terms of the contract it lay with the master alone to determine whether or not the services of the servant were satisfactory. *Tyler v. Ames*, 6 Lans. 280; *Zeiss v. American Wringer Company*, 62 App. Div. 463, 70 N. Y. Supp. 1110; *Duplex Safety Boiler Company v. Garden*, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709; *Crawford v. Mail & Express Co.*, 163 N. Y. 404, 57 N. E. 616.

In this case the defendant not only adjudged them unsatisfactory, but testified that he actually lost money on the sales made by the plaintiff, and showed in detail why his services were unsatisfactory in other respects.

The judgment should be reversed, and a new trial granted, with costs to the appellant to abide the event. All concur.

CAUFIELD v. BLATT.

(Supreme Court, Appellate Term. December 20, 1907.)

TRIAL—VERDICT.

Where the jury rendered a verdict for plaintiff for a less sum than he was entitled to, even conceding that the jury had found in favor of defendant on his contentions, the judgment will be reversed.

Appeal from Municipal Court, Borough of Manhattan, Tenth District.

Action by James Caufield against Emma M. Blatt. From a judgment in favor of defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Maxson & Jones (Henry L. Maxson, of counsel), for appellant.
Fullerton Wells, for respondent.

PER CURIAM. Plaintiff and defendant made a contract by which defendant hired the use of an automobile, or locomobile, for the month of August, 1907, for the sum of \$550, payable in equal quarterly payments on August 1st, 9th, 16th, and 24th. The first two installments were paid, but defendant deducted \$10 from the balance due on August 16th, on the ground that, owing to plaintiff's sending a defective machine for defendant, the latter was obliged to hire another machine for \$10 in order to get back. Defendant refused to pay the \$137.50 due on August 24th, on the ground that plaintiff broke the contract by sending a defective machine for defendant's use. Defendant further claims by way of offset \$14.75 for expenses caused by the defective condition of the machine furnished by plaintiff. The plaintiff claims he furnished a machine in proper order and according to contract. The court left the issues to the jury, with instructions that, if they found for plaintiff, their verdict should be for \$127.50. The jury found for plaintiff in the sum of \$15.25. The plaintiff appeals.

The rental was \$550, as we have seen, of which \$147.50 have not been paid, being, as we have seen, \$10 due on balance accruing on August 16th and \$137.50 due on August 24th. The defendant used the car on August 25th and August 26th, after which date plaintiff refused to let defendant have the car by reason of defendant's refusal to pay the balance due on August 24th, but defendant sent to plaintiff \$20 for the use of the car on August 25th and August 26th, which sum was credited on account. Plaintiff sued for breach of a contract of hiring, not on a quantum meruit for the use of the machine. By their verdict in plaintiff's favor the jury must have believed plaintiff's testimony that he fulfilled his part of the contract by furnishing a properly equipped machine in accordance with the agreement. Assuming plaintiff's contention to be correct, he would be entitled to \$147.50, less the \$20 paid for the machine on August 25th and 26th, making a balance due of \$127.50, which sum the court charged the jury was the amount they should find, if they gave a verdict for plaintiff. Even if the jury found that defendant was entitled to an offset

of \$14.75, the verdict should have been far in excess of the \$15.25 found by the jury. The amount of the verdict is contrary to the instructions of the court, and not based on the evidence, and it indicated a misapprehension or disregard of the testimony on the part of the jury that requires a reversal.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

(56 Misc. Rep. 661.)

JACOB V. KELLOGG.

(Supreme Court, Appellate Term. December 20, 1907.)

1. **BANKRUPTCY—SALE OF PROPERTY—RIGHTS OF PURCHASERS.**

Where the tenant of a building placed fixtures therein, the purchaser of the same from his trustee in bankruptcy acquired only such right to remove the fixtures as the tenant may have.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 374.]

2. **FIXTURES—CONVERSION INTO REAL ESTATE.**

The general rule is that fixtures cease to be personal property where they are firmly attached to the real estate, so that they cannot be removed without destroying or causing material injury to the realty, and where they are adapted to the use of the realty and it was the intention of the parties that they should be permanently annexed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fixtures, § 1.]

3. **SAME—FIXTURES AS BETWEEN LANDLORD AND TENANT.**

Where a tenant, occupying a building as a piano factory, installed a steam-heating plant in such a manner that its removal would cause serious injury to the realty, and the lease required the tenant to leave the premises in good condition, and the annexation of the plant to the realty was of a permanent nature, and it was peculiarly adapted to the use of the premises, the tenant was not entitled to remove it as personal property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fixtures, § 22.]

4. **SAME—TRADE FIXTURES.**

There is a presumption that, when articles are trade fixtures, which can be removed from place to place for use in a particular business, there is an intention on the part of the landlord and tenant that the attachment to the realty shall not be permanent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fixtures, §§ 23-29.]

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by C. Albert Jacob against Antoinette Kellogg. From a judgment in favor of plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Sullivan & Cromwell (Albert S. Ridley and Emery H. Sykes, of counsel), for appellant.

Wentworth, Lowenstein & Stern (Louis Lowenstein, of counsel), for respondent.

PER CURIAM. On May 1, 1901, defendant leased to one Charles Wessell the factory building, Nos. 222-224 East Thirty-Seventh street, in this city, for the manufacture of pianos, for a term of five years

and five months, commencing September 1, 1901, and ending February 1, 1907. The lease provided that the tenant should make all repairs at his own expense, and deliver up the premises at the end of the term in good order and condition, damages by the elements excepted. The said Wessell took possession of the premises under said lease, and told defendant he desired to make some necessary alterations in the building, to which proposition defendant consented. Wessell thereupon took the elevator car out of the building, enlarged the elevator shaft, installed a larger elevator, with attachments, and built partitions around it on each floor. He also installed a steam-heating plant, and put in some gas pipe, office partitions, a railing, and a stock room building. Subsequently, and in September, 1903, Wessell was adjudicated a bankrupt, and his trustee in bankruptcy sold his stock in trade and fixtures at public auction. The lease, with the consent of defendant, was assigned by the trustee to one Stevens, upon the guaranty by the plaintiff of the payment of rent by Stevens. The latter subsequently assigned the lease to plaintiff, who thereafter paid the rent to defendant. Plaintiff claims that the stock in trade and fixtures were sold in lots and purchased by him. On the expiration of the lease, the brother of plaintiff met defendant's representative at the factory, and told him that the plaintiff was going to take the fixtures out, whereupon they went through the building together and examined the fixtures; but defendant's representative refused permission to the plaintiff to remove the fixtures involved in this action. Upon the trial of this action, brought to recover the value of said fixtures, the court below decided that the elevator had become part of the realty, but that the steam-heating plant, consisting of boiler, pipes, radiators, and valves, still remained personal property, for the value of which steam-heating plant judgment was given in favor of the plaintiff. Defendant appeals.

The general rule is that fixtures cease to be personal property and become part of the realty where they are firmly attached to the realty in such a way that they cannot be removed without destroying or causing material injury to the realty, and where they are adapted to the use of the realty and it was the intention of the parties that they should be permanently annexed thereto. By his purchase of the steam-heating plant from the trustee in bankruptcy of said Wessell, plaintiff only acquired such rights and interest as Wessell may have had in said plant. *Sisson v. Hibbard*, 75 N. Y. 542. The only question presented in this case is one of fact, viz.: Was the steam-heating plant of such a character that it had become part of the realty, and therefore the property of defendant; or was this plant of such a character that it remained personalty, and therefore the property of the plaintiff? The great preponderance of evidence clearly shows that the plant was permanently annexed to the realty, and that its removal would cause serious injury thereto, and that it was peculiarly adapted to the use of the freehold; and, although there was no specific agreement between defendant and Wessell as to this plant, except as above stated, the nature of the plant and the requirements of the lease as to leaving the premises in good condition, and as to the repairs being made at Wessell's expense, indicate that it was the intention of the

parties that the plant should become part of the realty. It is true that there is a presumption that, when articles are trade fixtures, which can be removed from place to place for use in a particular business, there is an intention on the part of the landlord and tenant that the attachment to the realty shall not be permanent. But this steam-heating plant can scarcely be regarded as such a trade fixture, under the circumstances presented in the case at bar. It was a proper and usual part of the building for practically any purpose to which the building might be put, and had no peculiar use in Wessell's particular business. There is nothing in the record to indicate any special arrangement between Wessell and defendant, or between plaintiff and defendant, that this plant was to be regarded as personalty.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

GILBERT v. WILLIAMS.

(Supreme Court, Appellate Term. December 20, 1907.)

1. INNKEEPERS—LOSS OR INJURY TO PROPERTY OF GUEST.

An innkeeper is absolutely liable for all thefts from within or unexplained losses of property belonging to his guest, although he may be discharged from liability by the guest's contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Innkeepers, §§ 17-34.]

2. SAME—LIABILITY OF BOARDING HOUSE KEEPER.

The absolute liability of an innkeeper for all thefts from within or unexplained losses of property belonging to his guest does not extend to the keeper of a boarding house, whose duty is merely to exercise such care as a prudent man would exercise over his own property under similar circumstances, and he may be discharged from liability by the guest's contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Innkeepers, § 20.]

3. SAME—ACTION AGAINST BOARDING HOUSE KEEPER—EVIDENCE—SUFFICIENCY.

In an action against a boarding house keeper by a guest for the loss of property taken from his room, evidence considered, and *held* insufficient to show actionable negligence on the part of defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Innkeepers, § 88½.]

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by Samuel Gilbert against Belle W. Williams. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Maurice Nagler, for appellant.

Jerome Eisner, for respondent.

GILDERSLEEVE, P. J. Defendant kept a boarding house at Nos. 5, 7, 9, and 11 East Thirty-First street. The principal entrance was in No. 7, and there was a boy in charge of that entrance. Plaintiff had a

room in No. 5. The boarders, or at least some of them, had latch keys to the entrance door of No. 5, at which entrance there was no hall boy. On May 3, 1907, plaintiff left his room in the morning and was absent, as usual, most of the day. He claims he locked his door, upon leaving the room, and placed the key under the carpet in the hall, as he had been requested to do by the chambermaid. It seems that there was but one key to each room, and the chambermaid, not having any pass key, was obliged to use plaintiff's key, and that the custom was for the boarders, upon leaving their rooms and locking their doors, to put their keys under the carpet of the hall, so that the chambermaid could find them and get into the rooms for the purpose of putting them in order. While plaintiff was so absent from his room on May 3, 1907, some one entered his room and stole certain articles of wearing apparel; and upon returning to his room in the evening plaintiff found his door partly open, with the key in the lock, and the articles of clothing gone. The front or street door of No. 5 was sometimes left open by some boarders, who lived on the ground floor and desired to get fresh air into their rooms in warm weather. There is nothing, however, to indicate that this door was left open by defendant or her agents, or with their knowledge or consent, except that, on one occasion, her housekeeper found it open, with two boarders close by, at whose request she allowed, apparently, the door to remain open while the boarders remained where they could see any one attempting to enter the doorway. The chambermaid testifies as follows:

"Q. You had charge of plaintiff's room? A. Yes, sir. Q. Do you remember the day of the loss? A. Yes, sir. Q. Was the door of his room locked on the day of this loss? A. No, sir; it was not locked. He never locked the door. I never found the door locked. I locked it the first time he came, and Mr. Gilbert (plaintiff) came up to me, and I showed him where the key was. During all the time he was there before the loss, he went out and left the door open. I locked the door the first day, then I did not lock it any more. Q. Do you know where the key was during all these times? A. Yes, sir; when it was not locked, it was in the door, and remained there. The first time I locked the door Mr. Gilbert (plaintiff) said he had come all the way upstairs and could not find the key. I told him to lock the door and put the key by the side of the door (under the hall carpet). He said he did not want the door locked. The next day I did not find the door locked. Q. Did that continue during the time he was there? A. Yes, sir. Q. Are you positive that he at no time during this time locked the door? A. I do not remember of ever having [finding] the door locked until his things were taken. I found it always locked after that, and the key put under the carpet. Q. You are sure that at no time you had to use a key to get in his room? A. I always went in. I never found it locked (up to the time of the loss of the wearing apparel). Q. Did you ever report to defendant that he was in the habit of leaving the door open? A. No, sir. Q. Did you ever call his attention to that fact? A. The first time, I told him to always lock the door. He did not lock the door after that, and I did not lock it."

Defendant's housekeeper testifies that when plaintiff first came to the boarding house he made "a great fuss" because his door was locked and he could not find the key. Plaintiff denies that he was in the habit of leaving his door unlocked. The court below found for defendant, dismissing the complaint on the merits. Plaintiff appeals.

Although, as pointed out by Judge Loew in the case of *Smith v. Read*, 6 Daly, 33, a decision of the former General Term of the Court

of Common Pleas, it is somewhat difficult to see, under present conditions, why any distinction should be made between the liability of an innkeeper and that of a keeper of a boarding house or lodging house with respect to loss by a guest, such a distinction is nevertheless made by the great weight of authority. While the innkeeper is compelled to receive practically every one, the boarding house keeper may refuse whom he chooses to refuse, thereby exercising more care in the selection of his clients, and the statute now gives to the boarding house keeper the same lien on the property of his clients that the innkeeper has (*Jones v. Morrill*, 42 Barb. 623); so that, as was said in the case of *Smith v. Read*, "it is difficult to see why, on principle merely, the boarding house keeper should not be required to take at least as much care of the goods of a guest as the innkeeper." Be this as it may, however, the common law holds the innkeeper absolutely liable for all thefts from within or unexplained losses of property in his charge belonging to his guest, although he may be discharged from liability by the contributory negligence of the guest. 11 Am. & Eng. Ency. of Law, pp. 51, 53; *Metzger v. Schnabel*, 23 Misc. Rep. 699, 52 N. Y. Supp. 105; *Mowers v. Fethers*, 61 N. Y. 37, 19 Am. Rep. 244. The innkeeper is deemed an insurer of the property of his guests, and is bound to make good any loss, with some few exceptions. *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 405. This rigid liability does not extend to the boarding house keeper, whose duty to his boarders with respect to their property is merely to exercise such care as a prudent person would exercise over his own property, under similar circumstances. *Metzger v. Schnabel*, supra. The boarding house keeper is, of course, responsible for the negligence of his servants in the case of a boarder's property (*Smith v. Read*, supra), and, like the innkeeper, may be discharged from liability by the contributory negligence of the guest.

The question to be determined in the case at bar is this, viz.: Does the evidence show want of such care, on the part of defendant or her servants, as a prudent person would exercise in the care of his own property; and did not the acts of plaintiff show negligence on his part contributing to the loss? The court below had a right to believe the testimony of the chambermaid that plaintiff insisted on leaving his door unlocked. While it may not be necessary that a guest should keep his room locked at all times, so as to entitle himself to protection against robbery (*Buddenburg v. Benner*, 1 Hilt. 84), nevertheless where he makes a practice of so doing in a large boarding house, when he has been given a key and advised by the servant of the boarding house keeper to keep his door locked, such action on his part may be regarded as an element in the case tending to show negligence on his part. So far as the question of any negligence on the part of the defendant is concerned, the proofs adduced at the trial do not, in our opinion, show a lack of requisite prudence and care, except, perhaps, in one particular, viz.: It would have been more prudent to have a pass key for the chambermaid, and to allow each guest to carry his key with him, instead of placing it under the carpet in the hall. However, there is nothing in the case at bar to indicate that the loss occurred through some one finding the key under the carpet; but, on the other hand, the court below evidently found, upon the evidence of the chambermaid, corrob-

orated in part by that of the housekeeper, that the door was left unlocked at plaintiff's request.

We are of opinion that the judgment should be affirmed, with costs. Judgment affirmed, with costs. All concur.

THOMSEN v. HENRI P. ALEXANDER, Inc.

(Supreme Court, Appellate Term. December 20, 1907.)

SALES—ACTION FOR PRICE—PARTIES LIABLE.

Judgment against a corporation for goods sold and delivered cannot be sustained, the evidence showing that plaintiff's claim existed against its president individually, and was evidenced by his promissory note, several months before defendant was incorporated, and that defendant never dealt with or incurred liability to plaintiff.

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by Edward Thomsen against Henri P. Alexander, incorporated. From a judgment for plaintiff, defendant appeals. Reversed and dismissed.

Argued before GILDERSLEEVE, P. J., and McCALL, and FORD, JJ.

Welch, Heine & Fall, for appellant.

Sigmund Wechsler, for respondent.

McCALL, J. This action was brought against the defendant as a corporation, and the summons served upon Alexander, the president. The pleadings were oral, the plaintiff complaining for goods sold and delivered; but it is evident from the testimony that plaintiff's claim existed against Alexander individually, and was evidenced by a promissory note given by him several months before the defendant was incorporated. The defendant had never dealt with and had never incurred liability to the plaintiff. The plaintiff failed to prove a cause of action against the defendant corporation.

Judgment reversed, with costs, and complaint dismissed. All concur.

SPIEGELBERG et al. v. SHOENBERG.

(Supreme Court, Appellate Term. December 20, 1907.)

CONTRACTS—RIGHTS OF THIRD PERSONS.

In an action on a contract made between defendant and a third party, whereby defendant agreed to pay for certain goods purchased by the third party from plaintiff, plaintiff was entitled to recover on a showing that defendant and the third party were liable as partners for the debt contracted by defendant for their joint benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 798-802.]

McCall, J., dissenting.

Appeal from Municipal Court, Borough of Manhattan, Twelfth District.

Action by Jerome Spiegelberg and another against Isaac Schoenberg. From a judgment in favor of defendant, plaintiffs appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Charles L. Greenhall, for appellants.

Alex. B. Greenberg, for respondent.

FORD, J. This is an appeal from a judgment dismissing a complaint at the close of the case. Plaintiffs (appellants) sued upon a contract made between the defendant (respondent) and a third party, a Mrs. Herzog, whereby defendant agreed to pay for certain goods purchased on credit from the plaintiffs. Mrs. Herzog testifies in effect that she and the defendant commenced business as a partnership, and as such purchased the goods from the plaintiffs for the purchase price of which this suit was brought. She admits that they had in contemplation the formation of a corporation to take over their co-partnership business, and that steps preliminary to that end had been taken. Differences arose between them, which led to an agreement to dissolve the embryonic corporation and for a distribution of their assets. Under it the defendant was to take, and by his own admission did take, certain of the assets and accounts receivable. He also undertook to pay certain obligations, among which the bill owing to the plaintiffs was specifically mentioned. This agreement was in writing and is in evidence. Its recitals and general tenor bear out to some extent the contention of plaintiffs that in fact the business was regarded and treated as that of a partnership by both the defendant and Mrs. Herzog, and that the formation of the corporation was something outside of and apart from their business as actually conducted. The credit man of the plaintiffs testified that the first goods were ordered from his firm about February 9th, a month before the certificate of incorporation was filed in the office of the Secretary of State. He said that the defendant came to him and represented that he and Mrs. Herzog were about to organize a firm, with himself and her as the only partners; that subsequently, about the end of March, defendant and Mrs. Herzog came to him and represented that they were about to "dissolve and go out of business," and that the defendant was to pay all the debts. They offered to return so much of the merchandise as was in a salable condition to apply on the account. He swears positively that he never knew of the organization of the corporation until the effort was made to collect the bill by suit.

Upon the whole case, I think the foregoing evidence would support a finding by the trial justice that, so far as these plaintiffs are concerned, they could hold both the defendant and Mrs. Herzog liable as partners for the debt contracted by the defendant for their joint benefit. Such a finding would be sufficient to sustain the suit brought by plaintiffs to enforce a contract made for their benefit between the

defendant and Mrs. Herzog, under the familiar rule laid down in *Lawrence v. Fox*, 20 N. Y. 268. It was, therefore, error to dismiss the complaint.

The judgment should be reversed, and a new trial ordered, with costs to appellants to abide the event.

GILDERSLEEVE, P. J., concurs.

McCALL, J. (dissenting). I cannot agree in this case with the disposition about to be made. The learned justice below was amply and fully justified upon the proof in his finding that no copartnership existed and that the debt contracted was that of a corporation, which, of course, was the justification of the judgment he rendered. The plaintiffs are not without their remedy against this defendant; but it cannot be obtained upon the contractual relation they assert and use for a basis for the recovery sought in this action.

I therefore dissent.

RICHARDS v. KING.

(Supreme Court, Trial Term, Chemung County. December 12, 1907.)

1. INSURANCE—MUTUAL BENEFIT INSURANCE—APPLICATION—WARRANTIES.

Statements by an applicant in an application for mutual benefit insurance do not amount to warranties, where there is no reference to the application in the certificate or policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1800.]

2. SAME—BENEFICIARIES—WHO MAY BE BENEFICIARIES.

Where the constitution and by-laws of a mutual benefit association provided that certificates might be made payable only to the family or wife of a member, or a person dependent on him, a beneficiary to whom the proceeds were made payable as wife of the member, and who had lived with him as his wife and been supported by him, was entitled to the proceeds, though in fact there had been no lawful marriage between herself and the member.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1935.]

Action by Phoebe O. Richards against Albert E. King, as treasurer of the Brotherhood of Railroad Trainmen. Judgment for plaintiff.

Samuel D. Aulls, for plaintiff.

Herschell L. Gardner, for defendant.

COMAN, J. The Brotherhood of Railroad Trainmen is a fraternal benefit association transacting the business of life insurance in this state pursuant to the provisions of article 7 of the insurance law. One Lewis E. Richards became a member of the association on the 24th day of March, 1903, and a certificate was duly issued to him bearing date on that day. By the terms of the certificate and the provisions of the constitution and by-laws of the association, the beneficiary named in the certificate would become entitled to receive from the association the sum of \$1,200 upon the death of Richards. The beneficiary named in the certificate was the plaintiff, Phoebe O. Richards, and she was therein described as his wife. At the time of his

death Richards was still a member of the association in good standing, and this action is brought to recover the said sum of \$1,200. The defense interposed is that, at the time when Richards made his application for membership, he warranted the truth of certain statements contained in said application, which statements were false.

The facts are that on the 4th day of July, 1900, a marriage ceremony was performed between the plaintiff and said Richards in the state of New Jersey, and that from the date of said marriage ceremony until the time of the death of Richards they lived together as husband and wife; that two children were born of the marriage; and that during said period the plaintiff and said children were dependent upon said Richards for their support and maintenance. At the time when the said marriage ceremony was performed the plaintiff had a living husband from whom she had never been divorced, and the said Richards also had a living wife from whom he had never been divorced. Some evidence has been given before me on behalf of the plaintiff from which her counsel contends that both the plaintiff and Richards acted in good faith and believed that the marriage between them was lawful. The plaintiff claims that at the time of said marriage ceremony she believed and had good reason to believe that her former husband was dead. It is also shown that the former wife of said Richards was only 14 years of age at the time of her marriage to him, and that Richards represented to her that the marriage was void and had been annulled.

In the view which I take of this case, however, this evidence is quite immaterial. The only defense pleaded is a breach of warranty. The application which Richards made to the defendant for membership in its association was in writing and made upon a printed form. Among the questions asked of the applicant was:

"Question: To whom do you want benefits made payable? Answer: Phoebe Ophelia Richards; maiden name, Noble. Question: State relationship of the person or persons to you. Answer: Wife."

The application also contained the following provision:

"I hereby warrant the foregoing statements and answers to be true, full, and complete."

By the terms of the constitution and by-laws of the defendant it was provided that certificates might be made payable only to the family, heirs, wife, affianced wife, blood relation, or person dependent on the member, provided that, if the member has neither wife nor children living, he may name a charitable institution or a subordinate lodge of the Brotherhood as beneficiary.

The defendant's contention is that this application was a part of the contract between it and Richards, and that Richards in his application having warranted that the plaintiff was his wife, and it being practically conceded that she was not his lawful wife, a breach of the warranty has occurred, and the certificate is void. The defendant has not pleaded that it was induced to issue the certificate in question by the false and fraudulent representations of Richards. Most of the essential allegations of such a defense are missing from the answer. There is no allegation that Richards knew that the state-

ments were false, and no allegation that the defendant believed them and relied upon them. The distinction between a warranty and a representation is a well-defined one, and, in insurance cases, often a vital one. It is the settled law of this state that, under such circumstances as those recited, statements made in the application for insurance do not form any part of the contract, and are not to be treated as warranties, unless such application is referred to in the certificate and forms the basis of the certificate. *Fitzgerald v. Supreme Council*, 39 App. Div. 251, 56 N. Y. Supp. 1005, affirmed 167 N. Y. 568, 60 N. E. 1110; *Alden v. Supreme Tent Maccabees*, 78 App. Div. 18, 79 N. Y. Supp. 89; *Keefe v. Supreme Council*, 52 App. Div. 616, 64 N. Y. Supp. 1012; *Foley v. Royal Arcanum*, 151 N. Y. 196, 45 N. E. 456, 56 Am. St. Rep. 621; 25 Cyc. 708, and cases cited.

The cases of *Gaines v. Fidelity & Casualty Co.*, 93 App. Div. 524, 87 N. Y. Supp. 821, Id., 111 App. Div. 386, 97 N. Y. Supp. 836, and *Makel v. John Hancock Mutual L. Ins. Co. (Sup.)* 88 N. Y. Supp. 751, are not in conflict with this principle. In each of those cases the application was expressly referred to in the certificate or policy and made a part of the contract. In the case at bar there is no reference whatever to the application in the certificate or policy, and therefore the statements contained in the application cannot be treated as warranties, but only as representations; and by reason of the condition of the pleadings as above referred to the question as to whether the representations were false and fraudulent is not before the court.

I think that the beneficiary named in the certificate was a person "dependent upon the member," and therefore her designation was not in violation of the defendant's constitution or by-laws. Under a situation identical with this the Court of Appeals said, in the case of *Storey v. Williamsburg M. M. B. Association*, 95 N. Y. 474, 477:

"It was a case where it was the duty of Storey to provide for them, and the provision he made through this insurance was in entire accord with the objects of the organization."

These views lead to the conclusion that the plaintiff is entitled to judgment for the amount demanded in the complaint, and judgment is directed accordingly.

REGAN v. MILLIKEN BROS. et al.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

1. DISMISSAL—NEGLECT TO PROSECUTE—DELAY IN BRINGING ACTION TO TRIAL.

Code Civ. Proc. § 822, provides that, where plaintiff unreasonably neglects to proceed in an action, the court may in its discretion, upon application, dismiss the complaint, etc. Rule 36 of the Supreme Court provides that whenever an issue of fact has been joined, and plaintiff fails to bring it to trial, after younger issues have been tried in their regular order, defendant may move to dismiss; but, if it appears that the neglect has not been unreasonable plaintiff may be permitted to bring the action to trial at a future term. Nothing was done by plaintiff toward bringing an action to trial for three years after issue was joined, and after younger issues had been tried in their regular order. *Held*, that a

prima facie case of unreasonable neglect was established, requiring plaintiff to show a satisfactory excuse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dismissal and Nonsuit, §§ 140-152.]

2. SAME—EXCUSE FOR DELAY.

The fact that plaintiff's attorneys were copartners when they brought the action, and dissolved partnership about a year later, but had not agreed as to substitution in the action until a few weeks before the motion, was not sufficient to show that the delay was not unreasonable, nor to authorize the court to exercise its discretion in plaintiff's favor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dismissal and Nonsuit, §§ 140-152.]

Appeal from Special Term, Kings County.

Action by Patrick Regan against Milliken Bros. and another. From an order denying a motion to dismiss the complaint for neglect to prosecute, defendants appeal. Reversed, and motion granted.

Argued before HIRSCHBERG, P. J., and WOODWARD, RICH, MILLER, and GAYNOR, JJ.

Louis Cohn, for appellants.

Taylor & McGinniss, for respondent.

RICH, J. This record presents an appeal by the defendants from an order of the Special Term denying their motion to dismiss the complaint for laches. It is not disputed that after issue joined the plaintiff for three years has done nothing towards bringing the action to trial, and in the meantime younger issues have been tried in their regular order. These facts, under section 822 of the Code of Civil Procedure and rule 36 of the Supreme Court, established a prima facie case of unreasonable neglect, and threw upon the plaintiff the burden of satisfactorily excusing the same. In the affidavit used in opposition to the motion the only reason asserted for the delay is that plaintiff's attorneys were copartners when they brought the action, and in June, 1905, dissolved, and until a few weeks before the motion was noticed had not agreed as to substitution in the action brought by them as copartners. This fact does not in any degree tend to excuse the delay, and does not meet the requirement of the rule that, before the court is authorized to exercise its discretion in favor of a negligent plaintiff, it must be made to appear that the neglect to bring the action to trial has not been unreasonable.

The order appealed from must be reversed, with \$10 costs and disbursements, and the defendants' motion to dismiss the complaint granted. All concur, except HIRSCHBERG, P. J., not voting.

(56 Misc. Rep. 635.)

TENEMENT HOUSE DEPARTMENT OF CITY OF NEW YORK v. NEWLAND REALTY & CONSTRUCTION CO.

(Supreme Court, Appellate Term. December 20, 1907.)

MUNICIPAL CORPORATIONS—POLICE POWER—BUILDING REGULATIONS—VIOLATION.

An owner of tenement houses filed with the tenement house department plans for altering them for manufacturing purposes. Under these plans he proceeded to tear down partitions, erect others, and make extensive

alterations, which having been completed, the owner filed a second set of plans, which contemplated the adaptation of the houses as they then were to tenement house purposes, and the plans were approved. *Held*, in an action for the penalty for a violation of the tenement house law, after notice of violation, in that the alterations were made without plans filed and approved as required by law, that, it appearing that the alterations made before the second set of plans was approved were such as could not have been legally made in existing tenement houses, and the facts warranting a finding that the alterations so effected under the plans first filed were made with the intent to evade the tenement house law, and that the owner never intended to turn the houses from tenement to non-tenement purposes, he was guilty of a violation of the law.

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

Action by the tenement house department of the city of New York against the Newland Realty & Construction Company for the penalty for a violation of the tenement house law. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

A. S. Schomer, for appellant.

F. K. Pendleton, for respondent.

FORD, J. Defendant (appellant) owned 10 tenement houses which it proposed to turn into lofts for light manufacturing purposes. It accordingly filed plans with the plaintiff (respondent), the tenement house department, for that ostensible purpose. This took the buildings out of the jurisdiction of the plaintiff, and it so notified the superintendent of buildings. Under these plans defendant proceeded to tear down partitions, erect others, and make extensive alterations, with the evident purpose of their future use as tenement houses, although such alterations in old tenement houses are expressly forbidden by the statute. After these extensive changes were made in the buildings, defendant filed a second set of plans, which contemplated the adaptation of the houses as they then were to tenement house purposes. These latter plans were approved December 21, 1906. On March 8, 1907, plaintiff duly served notice of violation under the tenement house law, alleging that the alterations were made without plans filed and approved as required by law. Nothing was done by defendant to remove the violation. Plaintiff contends that this subjects defendant to liability for the statutory penalty, which was imposed by the judgment appealed from.

Defendant maintains that no liability exists, because as a matter of fact plans had been filed and approved—i. e., the plans for the change from tenement to nontenement purposes—before any alterations were made, and that at the time the notice of violation was served the second set of plans had been filed and approved, authorizing the changes made as well as those in contemplation. Hence, the defendant contends, there was no violation to be removed, and the case of the plaintiff fails. It appears that the alterations made before the second set of plans was approved were such as could not have been legally made in existing tenement houses. All the facts and circumstances surrounding the

case are ample warrant for the finding that the alterations effected under the plans first filed were made with the intent to evade the tenement house law, and that the defendant never really intended to turn the houses from tenement to nontenement uses. The statute plainly forbids the doing of just what the defendant did do. At the time the notice of violation was served the violation existed, and the penalty followed unless that violation was removed within five days. It was not removed, and no effort was made to remove it. Defendant should not be heard to plead in extenuation of its illegal acts the ingenious methods resorted to for their accomplishment.

The judgment should be affirmed, with costs. All concur.

MARTIN v. BORDEN.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

1. JURY—WAIVER OF RIGHT.

Under Code Civ. Proc. § 2990, providing that, in default of a deposit in advance of jurors' and constable's fees by a party to an action before a justice who at the joining of issue demanded a jury, the justice shall proceed as if no demand had been made, a party not making the deposit as so required, and as directed by the justice, waives a jury trial.

2. ANIMALS—ATTACKS BY DOG—KNOWLEDGE OF VICIOUSNESS—EVIDENCE.

Evidence that defendant's dog, which attacked and bit plaintiff, had habitually run out of the yard, where defendant lived with his parents, and angrily attacked people in the street, for several months, though without getting hold of them, is enough to imply knowledge to defendant of the viciousness of the dog; it being permissible to find that he knew what was notorious.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Animals, §§ 285, 288.]

Appeal from Westchester County Court.

Action by James F. Martin, as guardian ad litem for Raymond Martin, an infant, against William E. Borden, Jr. From a judgment of the County Court, reversing the judgment of a justice of the peace for plaintiff, plaintiff appeals. Reversed.

Argued before WOODWARD, JENKS, GAYNOR, RICH, and MILLER, JJ.

James Dempsey, for appellant.

Clinton F. Ferris, for respondent.

GAYNOR, J. The plaintiff's judgment was for damages by the bite of the defendant's dog. It was reversed on the grounds that a jury trial was refused and that it was not shown that the defendant had knowledge of the viciousness of the dog. The defendant demanded a trial by jury at the joining of issue, but did not deposit the jurors' and constable's fees in advance, as directed to do by the justice and required by law. This was a waiver of a jury trial, and it was the duty of the justice to proceed with the trial without a jury on the adjourned day, as he did. Code Civ. Proc. § 2990. There was no evidence of any direct notice to the defendant of the dog having attacked

any one before, but the evidence showed that the dog had habitually run out of the yard where the defendant lived with his parents and angrily attacked people in the street afoot, on bicycles and in wagons for several months, though without getting hold of them. This was ample to imply knowledge to the defendant. It is permissible to find that he knew what was so notorious.

The judgment of the County Court should be reversed and that of the Justice's Court affirmed.

Judgment of County Court of Westchester county reversed, and that of the Justice's Court affirmed, with costs. All concur.

MERCHANTS' REVIEW PUB. CO. v. BUCHAN'S SOAPS CORPORATION.

(Supreme Court, Appellate Term. December 20, 1907.)

PLEADING—FRIVOLOUS ANSWER.

While an answer setting up fraud and misrepresentation in defense of an action on a contract may be demurrable, because it does not allege that defendant upon the discovery of the fraud rescinded, or returned or offered to return any benefits it had received under, the contract, it is not frivolous, since it does not indicate bad faith upon bare inspection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 45, 1096-1098.]

Appeal from City Court of New York, Special Term.

Action by the Merchants' Review Publishing Company against the Buchan's Soaps Corporation. From an order overruling defendant's amended answer, it appeals. Reversed.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Graham & L'Amoreaux (Ralph P. Buell, of counsel), for appellant.
Joseph B. Handy, for respondent.

FORD, J. This is an appeal from an order of the City Court overruling defendant's amended answer, on the ground that it is frivolous, and from the judgment entered in said court in favor of the plaintiff and against the defendant.

The complaint sets out a contract between the plaintiff and the defendant, wherein the defendant ordered certain advertising to be done and promised to pay for the same as provided in the contract, and alleges that certain advertising has been done, for which the defendant has failed to pay. The amended answer admits the making of the contract, and alleges as a defense that the contract was procured by the fraud of plaintiff's agent. Plaintiff moved to overrule the answer as frivolous, and for judgment as demanded in the complaint, on the ground that the answer contained no allegation that defendant, upon the discovery of the alleged fraud and misrepresentation, rescinded the contract, or notified plaintiff of its intention to rescind, or returned or offered to return any benefits it had received under the contract. The motion was granted, and judgment entered for the plaintiff.

The answer may be demurrable. It does not follow necessarily that

it is frivolous. A pleading is not frivolous unless it is indicative of bad faith in the pleader upon bare inspection. It can hardly be said that an answer setting up fraud and misrepresentation comes within this definition. The distinction between a demurrable pleading and a frivolous one is clearly pointed out in *Bedlow v. Stillwell*, 45 App. Div. 557, at page 558, 61 N. Y. Supp. 371, where the court, by Mr. Justice O'Brien, says:

"The rule to be applied upon motions to strike out a pleading as frivolous has been so many times stated that a restatement would seem to be unnecessary, and yet the failure of the court below to apply it requires a reference thereto. The distinction between a motion to strike out a pleading as frivolous and the question presented on demurrer must not be lost sight of. One is a summary way of getting rid of the pleading on motion, and the other is the orderly manner of proceeding by argument to try the issue of law. On demurrer, a pleading, after argument and deliberation, might be held bad, which, on motion, should not be stricken out as frivolous. A pleading is not frivolous, unless it is indicative of bad faith in the pleader upon bare inspection. If any extended argument is needed to show its insufficiency, it is not frivolous."

The views there expressed are controlling here. Assuming that the answer is insufficient, the defendant should not be deprived of the right to plead over, which it would have if the sufficiency of the answer had been tested on demurrer.

The order should be reversed, and the judgment vacated, with \$10 costs and disbursements to the appellant, and the motion denied, with \$10 costs, but with leave to plaintiff to demur or take such other action as he may be advised. All concur.

KRULDER v. HILLMAN.

(Supreme Court, Special Term, Kings County. December 19, 1907.)

MORTGAGES—SATISFACTION—EXECUTION OF SATISFACTION PIECE.

Code Civ. Proc. § 1261, provides that the person entitled to enforce a judgment must execute a satisfaction piece thereof on presentation of the satisfaction piece and payment of the sum due and the fees allowed for taking the acknowledgment of a deed. Section 3298, subd. 2, allows 25 cents for taking an acknowledgment of a deed. A mortgagor having paid the mortgage, the mortgagee refused to deliver up the bond and mortgage unless the mortgagor would receive a satisfaction piece prepared by the mortgagee and pay therefor \$2.50, and the mortgagor claimed that he was entitled to a delivery of the securities and a satisfaction piece free of charge. *Held*, that the mortgagor was entitled to prepare a satisfaction piece and have it executed by the mortgagee on payment of a fee of 25 cents.

Action by Bernard J. Krulder against Caroline Hillman. Judgment in favor of plaintiff.

Robert Stewart, for plaintiff.

George H. Harmon, for defendant.

CRANE, J. The plaintiff is the owner of certain real property in Brooklyn on which the defendant held a mortgage of \$260 which was duly recorded in the Kings county register's office. Prior to the com-

mencement of this action the full amount due upon the mortgage was paid, but the defendant failed and refused to deliver up the bond and mortgage unless the plaintiff would receive a satisfaction piece thereof prepared by him and pay therefor \$2.50. This the plaintiff refused to do, and has brought this action to compel the mortgagee to deliver up the original securities and also give a satisfaction piece free of charge. The issue between the parties is this: The defendant insists that he is entitled to hold the papers until the plaintiff pays him the cost of preparing and executing his own satisfaction piece, while the plaintiff claims the right to his papers and to a satisfaction piece without cost.

In *Halpin v. Phoenix Insurance Co.*, 118 N. Y. 165, at page 177, 23 N. E. 482, at page 485, it is stated as follows:

"A mortgagor, who pays a mortgage, has a legal right to have the mortgage satisfied on the record. In no way, except by a certificate of the holder of the mortgage, can that result be accomplished. It is within the terms of the contract between the parties, and is a thing which, on payment of the debt, the mortgagee is under an obligation to do, and one which a court of equity would compel him to do. It is a condition, therefore, which the mortgagor has a right to attach to the tender of the debt, and does not destroy its effect."

Upon examination of the record in this case, however, I find that the tender was made to the mortgagee of the expenses of executing the satisfaction piece, so that this authority does not conflict with *Pettengill v. Mather*, 16 Abb. Prac. 399, which decides that a judgment debtor must prepare the satisfaction piece of the judgment and tender payment to the creditor of the expense of executing the same. Following this *Pettengill Case* section 1261 of the Code of Civil Procedure provided as follows:

"The person, entitled to enforce a judgment, must execute, and acknowledge before the proper officer, a satisfaction piece thereof, at the request of the judgment debtor, or of a person interested in the property bound by the judgment, upon presentation of a satisfaction piece and payment of the sum due upon the judgment, and the fees allowed by law for taking the acknowledgment of a deed."

The fees allowed by law for taking an acknowledgment of a deed are 25 cents. Section 3298, subd. 2, of the Code of Civil Procedure. There is no reason why the method of procuring a satisfaction piece from a mortgagee should not follow the practice in obtaining a satisfaction piece from a judgment creditor. *Reeves on Real Property* says, at page 677:

"While it is ordinarily the rule of law that a debtor cannot demand a receipt or other evidence of satisfaction as a condition precedent to his payment of the debt, and that such a demand, accompanied by an attempted tender, vitiates the tender, yet, since the mortgage is generally on record, and, if not canceled of record, will remain as an apparent incumbrance on the land, it is said that the party entitled to pay the debt has a right to demand a satisfaction piece, or its equivalent, from the creditor, as a condition precedent to such payment, and that, if he put the creditor to no unnecessary trouble or expense, he may make a valid legal tender of the mortgage debt, though he attach as a condition thereto the demand that he shall be supplied with such evidence of payment. Therefore, if he have a satisfaction piece prepared and all the facilities for its due execution present, he can tender payment in full on condition that the mortgagee execute and deliver the satisfaction piece, and if the latter refuse to do this the tender is nevertheless valid and effectual."

Thomas on Mortgages says, at page 290:

"A person demanding a certificate of satisfaction of a mortgage should prepare the instrument and present it to the mortgagee, at the same time offering to pay the expenses of the execution."

It therefore follows that a mortgagee cannot insist upon preparing the satisfaction piece and charge the mortgagor therefor, but that the mortgagor may himself prepare the satisfaction piece and, upon the payment of the mortgage debt, present the satisfaction piece thus prepared to the mortgagee and tender him the fee specified in section 3298 of the Code of Civil Procedure, to wit, 25 cents, and the mortgagee will be obliged to sign and acknowledge the same.

In this case the defendant was in the wrong. He should at least have given to the plaintiff the bond and mortgage when the full amount was paid; but he was not obliged to give his prepared satisfaction piece without payment of the expenses. I do not find from the evidence that the plaintiff presented him with a drawn satisfaction piece, requesting execution upon the tender of the notary's fee.

My decision is that the defendant deliver to the plaintiff the bond and mortgage herein, and that within 10 days the plaintiff prepare a satisfaction piece, present it to the defendant, and tender him the notary fees, or take a notary or commissioner to the defendant and demand execution of the same; and I direct the defendant mortgagee, when these conditions are complied with, to execute the instrument. I award no costs.

DUBNOW v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

1. CARRIERS—INJURIES TO PASSENGER—EVIDENCE—SUFFICIENCY.

In an action against a street railroad for the death of a passenger, evidence held insufficient to show that the driver of defendant's car intentionally pushed decedent from the platform.

2. SAME.

Where decedent boarded the crowded front platform of a horse car, and the driver with an involuntary motion, resulting from the necessity of properly managing his horses, pushed decedent from the platform, there was no liability on the part of the carrier.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1200-1203.]

3. TRIAL—EXCEPTIONS—SUFFICIENCY AND SCOPE.

Where the court, at the request of plaintiff's counsel, gave a certain instruction to the jury, which was excepted to, and, after a colloquy between the court and counsel, the court substantially reiterated the requested instruction, the same was subject to defendant's exception.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 192, 254-258.]

Clarke and Houghton, JJ., dissenting.

Appeal from Trial Term.

Action by Elka Dubnow, as administratrix of the estate of Jacob Dubnow, deceased, against the New York City Railway Company. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Bayard H. Ames, for appellant.

Moses Feltenstein, for respondent.

INGRAHAM, J. The plaintiff's intestate was killed by one of the cars of the defendant railroad at or about Delancey and Attorney streets, in the city of New York. It appeared from plaintiff's testimony that the car from which the deceased fell and was killed was a horse car that was slowly moving west on Delancey street towards Broadway. There were a number of passengers on the front platform, upon which the deceased jumped, when the driver said to him: "Don't you see the car is crowded? Why don't you get off?" Then with his elbow he pushed the deceased, who swung around to the front of the car, falling between the dashboard and the horses. One witness for the plaintiff testified that the elbow of the driver's left arm hit or pushed the boy; that the driver held the lines of the horses with the left hand, and with the right hand had hold of the brake, and that, when he pushed the deceased, the deceased fell off; that as the boy fell the driver stopped the car. The cause of action as alleged in the complaint is based solely upon the negligence or carelessness of the defendant's employes in pushing the deceased from the car while in motion, and the case was submitted to the jury upon that theory of the plaintiff's right to recover.

The action cannot be sustained upon any theory of a breach of contract between the deceased and the company, as that cause of action is not set up in the complaint and was not presented upon the trial. It is doubtful whether the deceased could be said to be a passenger, or whether any relation of that kind ever existed. According to the plaintiff's testimony, as soon as the deceased got on the car he was told by the driver to get off, as it was crowded, and that subsequently he fell off the car as the result of a push from the driver's arm. Thus, so far as the employes of the defendant had acted at all, they refused to allow him to continue on the car because the car was crowded, and upon his failure to get off the car he was pushed from it. The car did not stop for him. The deceased was not invited, either expressly or by implication, to board the car. No fare was asked for or received; but the deceased in some way fell off the car immediately after boarding it. So the cause of action must depend upon proof that the driver either negligently or maliciously and wantonly threw the deceased from the car. That is the cause of action alleged in the complaint, that was the cause of action that was submitted to the jury, and the judgment can only be sustained if the evidence justifies a recovery upon such a cause of action.

There were two witnesses, called by the plaintiff, who claimed to have witnessed the incident which resulted in the deceased falling or being pushed from the car. The first and main witness was one Goldberg, who testified that on the 15th of April, 1904, about 7 o'clock in the morning, he was a passenger on a Delancey street car on the front platform, standing with his back to the car and facing the horses;

that the car was crowded; that the accident happened as the car was crossing Attorney street; that the car was drawn by two horses, and was going west towards Broadway slowly up the hill; that there were other persons standing on the front platform; that the deceased came from Attorney street, "running slow"; that the car did not stop; that the deceased jumped on the front platform of the car, next to the witness, and standing in the middle of the platform; that the driver said to the deceased, "Don't you see the car is crowded? Why don't you get off?" and then with the elbow of his left arm pushed the boy; that the driver was standing in the center of the platform, and had the reins with which he was driving the horses in his left hand and his right hand upon the brake; that, when he pushed him, the boy fell off; that the deceased was standing in front of the witness, next to the driver. The witness stated several times that he could not explain in English exactly. The deceased was 16 or 17 years of age. There were two men between the driver and the door of the car. There were seven persons altogether on the front platform, of whom only the witness and the deceased were to the left of the driver. This witness seems to have made several statements before the trial which were somewhat inconsistent with his testimony. On cross-examination the witness said:

"The driver held his reins in his left hand. I claim that the driver touched this man with his elbow. * * * The driver did not move from his place where he was standing. He stood right in the middle of the platform, with his right hand on the brake and his left hand on the reins. After he said, 'Don't you see the car is crowded?' he moved a little bit, and he gave him a push with his elbow. He moved just with his body—not with his feet."

The other witness to the accident was standing on the right-hand step of the car, on the opposite side from that upon which the deceased got on the platform. He testified:

"I stepped up just before the boy did, as the boy was coming up on the other side of the car. I got on the right side, and the boy came on the left side. The minute—it wasn't a minute, but probably a second—the boy got up on the platform and was standing by the driver. The driver hollered to him, 'Get off the car; take the next car,' and he tried to give him a push with his arm. Of course, I couldn't see exactly the way he gave him the push; but the boy fell in front of the car, because the boy started to hold himself by that railing, you know, that comes around the car at the front."

It appears that the driver was between the witness and the deceased. The driver made no remonstrance as to any one else getting on the platform. This is all the testimony as to any act of the driver in relation to the deceased. The driver was standing attending to his duties in the middle of the platform, one hand holding the reins and the other the brake. The deceased stood immediately alongside of the driver. There is not the slightest evidence that the motion of the driver's elbow was not connected with the proper driving of the horses, or that the movement of his arm was intended to push the deceased off the car.

It is quite apparent that a person crowding up against a driver having to manage a team of horses and the brake of a car would be liable to interfere with the driver; and if a driver of a car, while making a movement necessary in the management of his horses and brake, strikes a person who voluntarily places himself beside him, neither

the driver nor the company can be held liable for the consequences. The fact that the driver objected to the deceased getting on the car, crowded as it was, and standing on the platform immediately next to him and in a position which might interfere with his management of the car and horses, does not justify an inference that the driver intended to push the deceased off the car. The driver was certainly entitled to have sufficient room to perform his duties, and there is nothing to show that the movement of the driver's arm, which resulted in what was described as a push against the deceased, was not necessary in properly controlling the horses. The driver had died before the trial; but there was considerable evidence from passengers and others in the street that the boy fell getting on the car while in motion. The evidence of the plaintiff is entirely consistent with the inference that the driver in some way, in the management of the horses, was compelled to move his arm, and that in doing so it came in contact with the deceased, who had voluntarily placed himself alongside the driver in such a position that any movement of the driver's arm would involve its striking the deceased. It seems to me that, in order to sustain the finding, more has to be shown than a condition which is consistent with an involuntary motion resulting from the necessity of properly managing the horses. We think, therefore, that the verdict against the defendant, holding it liable for negligence or an assault by the driver, was against the weight of evidence.

I also think the charge of the court in answer to a request of the plaintiff was error. Counsel for the plaintiff asked the court to charge that if the driver did not intend to push the boy off, but simply to throw him away from himself, and as the result of that push the boy lost his footing and fell, the consequences would be the same. To this request the court replied:

"If the boy came to his death by reason of the push, whether the driver threw him under the wheels, or pushed him, and he tripped and fell under the wheels, or in any other way, if his death was the result of the push by the driver, then the defendant is liable, and if the boy slipped when he went to jump on the car the company is not liable."

To this counsel for the defendant excepted. There was some discussion between the court and counsel as to this charge, when the court said:

"At the request of the defendant, gentlemen, I instruct you that if by an error of judgment the driver pushed the boy off then the company is not liable."

To which counsel for the plaintiff said:

"That is what he wants charged."

The court then said:

"How does any question of error of judgment of the driver come into this case?"

To which counsel for the defendant said:

"It does not on the facts; but I thought that Mr. Feltenstein's request was improper, because it did not contain that fact."

Counsel for the plaintiff then said:

"In what way do you desire the request as last charged by the court to be modified?"

And counsel for the defendant said he was satisfied with the court's last charge. The court then said:

"Then you withdraw your exception?"

And counsel for defendant said:

"I take no exception to it, but I do except to the charging of the request of Mr. Feltenstein."

The court then said to the jury:

"Now, gentlemen, I think you have all the law that is necessary for you to determine, first, these two questions of fact: Was this boy pushed off—whether maliciously or not is immaterial—as testified to by the plaintiff's witnesses? Or was he running for the car, and did he slip and fall, as testified to by defendant's witnesses? In the one case, if he slipped and fell, the verdict should be for the defendant. In the other case, if you find that he was pushed off by the driver, and in that way he fell, then you may find for the plaintiff. If you are in doubt, and you cannot determine, then you will find for the defendant."

I think this whole charge was clearly erroneous. It took away from the jury the question as to whether the driver was either negligent or wanton, instructing them as a matter of law that if there was a push, and the deceased fell off in consequence, the defendant was liable, and took from the jury the question of contributory negligence of the deceased. While the last instruction was not excepted to, I think the court fairly had notice that the defendant insisted upon his exception to the charge of the court in response to the plaintiff's request, and, as that was subject to the same objection, it seems to me that it was erroneous. No one can read the whole charge without the conviction that the jury must have understood that the one fact that they had to determine was whether or not the driver pushed the boy off the car, and, if he did push him off, whether it was an intentional or involuntary push, that the defendant was liable. Certainly the evidence is just as consistent with a mere involuntary motion of the driver's arm in managing the horses as it was with an intentional push to throw the deceased from the car. The defendant had taken the exception to the remarks of the judge in answer to the plaintiff's request to charge. It stood upon the record. The objectionable character of the charge was not in any way withdrawn or modified; but the court deliberately repeated the proposition which had been excepted to, and which exception had not been withdrawn, but had been insisted upon. I think the exception was still available to the defendant, and, as the charge was clearly error, that also requires the reversal of the judgment.

It follows that the judgment and order appealed from must be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur, except CLARKE and HOUGHTON, JJ., who dissent.

(56 Misc. Rep. 684.)

DURYEE v. HUNT.

(Supreme Court, Appellate Term. December 20, 1907.)

1. COURTS—NEW YORK MUNICIPAL COURT—JUDGMENT BY DEFAULT—RELIEF OF DEFENDANT.

Prior to Laws 1907, p. 554, c. 804, § 253, which took effect September 1, 1907, and amended Municipal Court Act, Laws 1902, p. 1562, c. 580, § 253, that court had no power to vacate a judgment or to set aside the alleged service of summons on the ground that the summons had never been served, and the only remedy given a defendant who claimed that he had never been served with summons was an appeal from the judgment, under Municipal Court Act, Laws 1902, p. 1578, c. 580, § 311, providing that, where a judgment is rendered against defendant in an action wherein he did not appear and was not personally served with summons, he may appeal therefrom within 20 days after personal service upon him by plaintiff of written notice of the entry of the judgment.

2. SAME—APPEAL—DECISIONS REVIEWABLE—OPENING DEFAULT JUDGMENT—AFFIDAVITS.

Where a defendant appeals from a default judgment of the Municipal Court of the city of New York and from an order denying his motion to set aside the service of summons because he had not been personally served, and his appeal is not governed by Laws 1907, p. 554, c. 304, § 253, amending Municipal Court Act, Laws 1902, p. 1562, c. 580, and giving the court power to vacate a judgment because of no service of summons, the court may consider the appeal as being taken under Municipal Court Act, Laws 1902, p. 1578, c. 580, § 311, providing for an appeal from a judgment in such cases, and which gave a defendant his only remedy prior to the amendment, and may consider the affidavits submitted by defendant in the court below to support his contention that no service had been made upon him as being the proof relied upon by him on appeal to show nonservice of the summons; and if the affidavits were not served upon the plaintiff's attorney, and he had no notice that defendant intended to rely upon them on appeal, he may be allowed to controvert the allegations contained therein, if deemed necessary.

3. SAME—PROCESS—SUBSTITUTED SERVICE—SUFFICIENCY OF AFFIDAVITS.

Municipal Court Act, Laws 1902, p. 1500, c. 580, § 32, provides that an order for substituted service of summons upon a defendant residing within the city may be made, etc. It appeared from affidavits that a clerk, to whom a summons issued July 16th was given to serve, called at defendant's business address and was informed that defendant had moved. He then called at another address, given in a directory as defendant's residence, and was told that defendant had moved to the country and would return in September. He called again in September, and was told that defendant had moved and that his informant did not know where. It appeared from defendant's affidavit and that of his attorney that he had no residence in the city after June 27th, that he disposed of his business in June 21st, and returned to his country home. *Held*, that the affidavits were insufficient to support an order for substituted service, since they did not show that defendant had either a place of business or a residence in the city after a date some time prior to the issuance of the original summons.

4. APPEAL—RECORD—CONCLUSIVENESS OF RETURN—AFFIDAVITS.

A return on appeal is conclusive on an appellate court, and affidavits to strengthen it will not be considered.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by John K. Duryee against Willard W. Hunt. From a default judgment against defendant, and an order denying his motion to set aside the service of summons, he appeals. *Reversed*.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Foley & Powell, for appellant.

Wilbur, Norman & Kahn, for respondent.

McCALL, J. Upon the return day of the summons in this action the defendant appeared specially and moved to set aside the service of the summons, upon the ground that no service had been made upon him. Affidavits were presented by the defendant in support of his contention, and also by the plaintiff in opposition, the contents of which affidavits we shall refer to hereafter. The motion was denied, and an order duly entered to that effect. The defendant not appearing further in the action, judgment was subsequently rendered by default against him. From this judgment the defendant appeals, and in his notice of appeal states that he intends to bring up for review the afore-said order.

Prior to the amendment to section 253 of the Municipal Court act (Laws 1902, p. 1562, c. 580) by chapter 304, p. 554, Laws of 1907, which took effect September 1, 1907, there existed no authority in that court to vacate a judgment, or set aside the alleged service of a summons, upon the ground that such summons had never been served. *Diehl v. Steele* (Sup.) 97 N. Y. Supp. 1024. The amendment referred to has no application to this case. The only remedy given to a defendant, who claimed that he never was served with a summons, was to appeal from the judgment under the provisions of section 311 of the Municipal Court act (Laws 1902, p. 1578, c. 580). So far, then, as the motion made by the defendant to set aside the service of the summons is concerned, his motion should have been dismissed in the court below. A situation similar to this, was presented in the case of *Mann v. Meryash* (at the November term of this court) 107 N. Y. Supp. 599, and Mr. Justice Bruce, writing the opinion of the court, said:

"The defendant has, however, appealed from the judgment, and for the purpose of disposing of the appeal we may consider it as having been taken under section 311, supra, and we may consider the affidavits submitted by the defendant in the court below, inasmuch as they form part of the return, as being the proof relied upon by him on this appeal to show nonservice of the summons; and as such affidavits were never served upon plaintiff's attorney, and as no notice was given him that the defendant intended to rely upon them on this appeal, an opportunity to controvert the allegations contained therein would be given him, if it was deemed necessary."

That is undoubtedly the proper practice to follow. It is not claimed by the plaintiff in this case that personal service of the summons was ever made upon the appellant, but that jurisdiction was obtained over him by reason of substituted service. The original summons was issued July 16, 1907. The defendant swears in his affidavit that he—

"has had no residence in the city of New York since June 27th; that on June 21, 1907, he disposed of all his business interests in this city and returned to Chautauqua county, his former place of residence; and that he vacated his apartments at No. 418 Central Park West on June 27, 1907."

In this he is fully corroborated by the affidavit of James C. Foley, the defendant's attorney, who gives at length and in detail all the facts

relating to appellant's change of residence, etc. Opposed to these unqualified statements is that of one Seelig, a clerk in the office of plaintiff's attorneys, who says that he was given the summons and complaint to serve on July 16, 1907; that "the business address of the defendants Hunt was in the Times Building; that he called there and was informed by the elevator starter that the Hunts had removed, but they did not know where." He says that he then ascertained, from the directory, that one of the defendants resided at the Braender, No. 418 Central Park West, and upon inquiry there he was told by the hall man that Hunt was in the country and would return in September. Upon calling again in September the hall man said that Hunt had removed, but he did not know where. An order for substituted service based upon these affidavits was made on October 23, 1907.

The statements contained in these affidavits were entirely insufficient upon which to base such an order. Section 32 of the Municipal Court act provides that:

"An order for the service of a summons, upon a defendant residing within the city, may be made in the district in which the action is brought," etc.

There was nothing in the affidavits upon which the order was based showing that the defendant had either a place of business or a residence in the city after a date some time prior to the issuance of the original summons in this action. It is also evident that no further affidavits bearing upon this question could be presented by the defendant that would change the situation. After the return was filed herein, and on the first day of the term, the respondent's attorney handed up an affidavit, in an attempt, evidently, to strengthen the return. This affidavit, even if we could weigh its contents, which we cannot do, has no bearing upon the question at issue. The return, as settled by the justice who tried the case, is conclusive upon this court, and the practice of handing up affidavits, for the purpose of adding to a return, has been emphatically disapproved by this court. *Forman v. N. Y. Transportation Co.* (Sup.) 95 N. Y. Supp. 581.

Judgment as to William W. Hunt, as executor, etc., appellant, reversed, and complaint dismissed, with costs. All concur.

PASTER v. MEYER.

(Supreme Court, Appellate Term. December 20, 1907.)

1. JUDGMENT—CONFORMITY TO PROOF—JUDGMENT FOR AMOUNT IMPOSSIBLE UNDER EVIDENCE.

Where plaintiff sued for \$94.50, and defendant introduced a receipted bill for \$37.50 of the amount, together with a bill of \$76 for medical services rendered plaintiff and a claim of \$10.60 overcharges made by plaintiff, and defendant's evidence was substantially undisputed, a judgment of \$20 for plaintiff was erroneous, since by no combination of the sums given in evidence could that amount be arrived at.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 243-245, 452.]

2. APPEAL—RESERVATION OF GROUNDS OF REVIEW—FAILURE TO MAKE OBJECTION—NEW TRIAL.

Where no objection is made in the trial court that the motion for a new trial was not made in time, the question cannot be raised on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1333-1337.]

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by Louis Paster against Leo B. Meyer. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL, and FORD, JJ.

Louis S. Posner, for appellant.

A. I. Gordon, for respondent.

PER CURIAM. Plaintiff is a tailor, and brought this action to recover the price of two ladies' suits at the agreed price of \$35 each and for cleaning and pressing clothes for the defendant; the total amount of plaintiff's claim aggregating \$94.50. The defendant, a physician, claims, and his claim is substantially undisputed, that the plaintiff was indebted to him for services rendered to the amount of \$76, and that he had paid some of the items on plaintiff's bill, notably for one of the suits charged for; and he produced upon the trial a receipted bill which clearly established such payment. The receipted bill, together with the items for medical services, aggregate \$124.10. Nevertheless the plaintiff had a judgment for \$20.

From an examination of the record it is impossible to ascertain upon what basis of calculation the judgment for this amount was arrived at. The plaintiff claimed \$94.50. The amount allowed the defendant, therefore, must have been \$74.50; but there is no proof in the case which by any reasonable calculation would disclose such sum. Defendant's proof was a receipted bill for \$37.50, his bill for medical attendance \$76, and a claim of \$10.60 for overcharges made by the plaintiff. By no combination of these figures can the deduction from plaintiff's bill of \$74.50 be reached. The judgment can be sustained only by the arbitrary use of figures for which there is no basis in the evidence.

No objection was made in the court below that the motion for a new trial was not made in time, and it cannot be raised for the first time upon appeal. *Duryee v. Hunt* (decided at present term) 107 N. Y. Supp. 734.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

POST V. INGRAHAM.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

TRUSTS—TESTAMENTARY TRUSTEES—ACCOUNTING—JURISDICTION.

The Surrogate's Court, and not the Supreme Court, is the proper tribunal for proceedings for settlement of the accounts of a testamentary trustee; and the fact that the trustee has died is no ground for proceeding against his executor in the Supreme Court, as Code Civ. Proc. § 2806, gives the

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Surrogate's Court full jurisdiction over an accounting of an executor of a deceased testamentary trustee respecting his receipts and disbursements. [Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 417.]

Appeal from Special Term, New York County.

Action by George W. Post, Jr., individually and as administrator of the estate of Virginia W. Post, deceased, against John B. De Cue, as testamentary trustee under the will of James Brady, deceased. From an order reviving the action against him, Henry C. Ingraham, as executor of the will of John B. De Cue, appeals. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Augustus Van Wyck, for appellant.

A. Walker Otis, for respondent.

HOUGHTON, J. Plaintiff's intestate was a beneficiary under the trust created by the will of James Brady, deceased. John B. De Cue was the sole surviving trustee, and plaintiff brought this action in the Supreme Court for an accounting by him as such testamentary trustee. The other beneficiaries under the trust were joined as defendants and process was served upon them, and it is claimed that a summons and complaint was served upon De Cue shortly before his death. He having died, leaving a will of which the defendant Ingraham is the executor, the plaintiff moved for an order making him a party defendant and reviving the action as against him.

Irrespective of the question as to whether De Cue was properly served or not, we think the order of revival was improperly made. The complaint discloses no facts or circumstances showing that appropriate relief cannot be had in the Surrogate's Court. The relief asked is simply a judicial settlement of the accounts of a testamentary trustee and payment of the money found due. The Surrogate's Court is the proper tribunal for such an accounting, and such an action will not be entertained by the Supreme Court unless facts are pleaded showing that the case is one requiring relief of such a nature that the Surrogate's Court is not competent to grant it, or that for some reason complete justice cannot be done in that court. *Matter of Smith*, 120 App. Div. 199, 105 N. Y. Supp. 223; *Citizens' Central Nat. Bank v. Toplitz*, 113 App. Div. 73, 98 N. Y. Supp. 826, affirmed 188 N. Y. 634, 81 N. E. 1162; *Borrowe v. Corbin*, 31 App. Div. 172, 52 N. Y. Supp. 741, affirmed 165 N. Y. 634, 59 N. E. 1119, on opinion below.

In *Borrowe v. Corbin*, supra, the complaint was dismissed upon the action coming on for trial, and the determination was affirmed on the ground that the Supreme Court would not entertain jurisdiction because complete relief could be granted in the Surrogate's Court. A testamentary trustee obtains his authority to act through probate of the will and qualification in Surrogate's Court, and with respect to control over his acts and adjustment of his accounts he stands in the same position in that court as an executor or administrator. Such being the rule, the court below should have refused to revive the action as against the defendant executor.

The fact that the substituted defendant is an executor of a deceased testamentary trustee does not change the situation. By section 2606 of the Code of Civil Procedure the Surrogate's Court is given full jurisdiction over an accounting voluntary or compulsory, of an executor or administrator of a deceased executor, administrator, guardian, or testamentary trustee respecting the receipts and disbursements of such deceased representative.

The order should be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs. All concur.

COLLYER v. KRAKAUER.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

SALES—WHAT CONSTITUTES.

A delivery of goods to another, who was to sell them on a commission, the proceeds to be credited on notes of the owner held by the one to whom the goods were delivered, was not a sale and delivery of the goods to him, resulting in an obligation to pay therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 17, 18.]

Appeal from Appellate Term.

Action by Charles S. Collyer, as trustee in bankruptcy of the estate of the Schelling-Krakauer Company, against Abraham P. Krakauer. From a judgment of the Appellate Term, affirming a judgment of the City Court for plaintiff, defendant appeals. Reversed, and a new trial ordered.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Samuel P. Goldman, for appellant.

Joseph Fried, for respondent.

INGRAHAM, J. The plaintiff, as assignee of the corporation, the Schelling-Krakauer Company, sued to recover from the defendant for goods, wares, and merchandise sold by the bankrupt to the defendant. There is no question of an illegal preference; the action being for the sale and delivery of these goods to the defendant. The answer is substantially a general denial.

Upon the trial the plaintiff called the defendant, who testified that he was an incorporator and one of the directors of the bankrupt, which was a corporation organized about May 1, 1903; that he was also agent for the bankrupt in handling its goods; and that he sold his stock in the bankrupt to the other directors. He was then asked whether he purchased from the bankrupt the goods described in the complaint, which he said he did not. He was then asked as to certain testimony that he had given before the referee in bankruptcy, from which it would appear that the defendant admitted receiving from the bankrupt certain goods and merchandise during October, November, and December, 1903, and February, March, April, and May, 1904; that during this period he was selling agent of the corporation, and he received the goods from the company and sold them.

Plaintiff then called the president of the bankrupt, who testified that he was an officer and director of the bankrupt from October, 1903, to May, 1904. He was then asked whether the bankrupt sold merchandise to the defendant in the month of October and in subsequent months, to which the witness replied that the defendant got the merchandise and was selling it on a 10 per cent. commission basis; that the defendant was selling this merchandise for the bankrupt, and it was delivered by the bankrupt to the defendant. On cross-examination he stated that his testimony as to the purchase and sales of the defendant had been learned by him from the books of the company; that he had no knowledge of any of these transactions that he had testified to, except such as he obtained from the books and the merchandise that he delivered himself; that there was an agreement that the bankrupt was to deliver merchandise to the defendant; that the defendant held notes of the bankrupt, and that as the merchandise was delivered to the defendant the bankrupt would take up the notes; that that was true about all the transactions about which he had been questioned; that "the arrangement had with him [the defendant] as to his selling these goods for the company was he was to get 10 per cent. for selling the merchandise. The merchandise he was to sell is the merchandise I have testified to as being sold to him between October, 1903, and May, 1904. These were the only transactions of purchase and sale between the company and Mr. Krakauer during this period. These were all made, as I have testified, in pursuance of the arrangement I have specified." And on redirect examination the witness again stated that the arrangement was that "Mr. Krakauer was to sell the merchandise and he was to get 10 per cent. on selling the merchandise"; that "Mr. Krakauer said we should make a settlement and take up these notes, and give him credit for the notes less the 10 per cent. discount. When he said 'I want to make a settlement,' I said I would take up the notes, and he said he would deliver the notes, which he did. I said: 'I will give you credit for the merchandise that you got from the Schelling-Krakauer Company.' I then took up the notes and gave him credit for the amount of merchandise that he received from the Schelling-Krakauer Company. The merchandise for which I gave him credit is the merchandise about which I have testified on this witness stand."

It is quite evident that this transaction was not a sale and delivery of goods to the defendant, for which the defendant ever became indebted to the bankrupt. It was a transaction by which the bankrupt was to deliver goods to the defendant, who was to sell them upon a 10 per cent. commission, the proceeds to be credited on the notes of the bankrupt held by the defendant. Goods delivered to the defendant under such an agreement was not a sale and delivery of the goods, from which resulted a legal obligation of the defendant to pay, which would have to be thereafter satisfied by payment, which, to be available as a defense, would have to be pleaded; but here, under the very arrangement by which the goods were delivered, the proceeds were to be applied upon the payment of the vendor's notes, which were to be delivered up by the vendee, and which were actually delivered up by the vendee to the vendor. It is quite clear that, as to the purchase

price of goods delivered under such a contract, no obligation to pay ever existed in favor of the vendor which would justify a recovery. All of these facts appeared as part of the plaintiff's case, and established the fact that there was not at the trial, and never had been, any liability of the defendant to the bankrupt upon which an action could be maintained.

It follows that the judgment appealed from must be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

HARRISON v. HOLAHAN.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

VENUE—CHANGE—CONVENIENCE OF WITNESSES.

In an action by an attorney for services rendered, the defendant is entitled to a change of venue to the county of his residence, where the services were rendered and where the majority of the witnesses reside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, §§ 76, 77.]

Appeal from Special Term, New York County.

Action by George C. Harrison against Thomas Holahan. From an order refusing a change of venue, defendant appeals. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

James M. E. O'Grady, for appellant.

George C. Harrison, pro se.

HOUGHTON, J. Plaintiff is a practicing lawyer in the city of New York. The action is to recover the value of professional services, and the venue is laid in the county of New York. The defendant is a resident of the county of Monroe, and he moved to change the place of trial to that county on the ground of convenience of witnesses.

The alleged retaining of plaintiff to perform the services sued for occurred in the county of Monroe, and all the services rendered by plaintiff were performed in that county, with the exception of writing a letter or two and having an interview with the president of the village of Brockport at plaintiff's office. The locality in which the cause of action arises and the services are performed is an important element, on a motion to change for convenience of witnesses, in determining the county in which the trial should be had. *Roberts v. Lansing*, 60 App. Div. 81, 69 N. Y. Supp. 736; *Shaff v. Rosenberg*, 116 App. Div. 366, 101 N. Y. Supp. 892. The affidavits disclose a considerable number of witnesses on each side, whose testimony is more or less material. It is manifest that the larger number of material witnesses reside in the county of Monroe. Some witnesses whom it may become necessary for plaintiff to call also reside in that county.

The motion should have been granted. The order appealed from should be reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs. All concur.

CITY OF NEW YORK v. BURNS.

(Supreme Court, Appellate Term. December 20, 1907.)

APPEAL--APPEALABLE ORDER.

An order amending the summons in the Municipal Court by changing its date of issue is not an appealable one, and can only be reviewed by appeal from the judgment, taken after appearance and due objection made to its being granted, which appeal is provided for by Municipal Court Act, Laws 1902, p. 1578, c. 580, § 811.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 654.]

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

Action by the city of New York against Frank B. Burns. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Robert L. Turk, for appellant.

Francis K. Pendleton (John P. O'Brien and Louis Gans, of counsel), for respondent.

PER CURIAM. The defendant appeals from a judgment rendered against him on the 12th day of June, 1907, in favor of the plaintiff, and claims that no summons was ever served upon him. He also appeals from an order made in the court below, amending the summons by changing its date of issue from March 30, 1906, to March 28, 1906. The order is not an appealable one, and could only be reviewed by an appeal from a judgment taken after appearance and due objection being made to its being granted. The appeal from the judgment is provided for by section 311 of the Municipal Court act (Laws 1902, p. 1578, c. 580). The affidavits submitted on the part of the defendant amply support his contention that he was never served with process, and the judgment must be reversed.

Judgment reversed, with costs, and complaint dismissed.

(56 Misc. Rep. 687.)

P. H. & F. M. ROOTS CO. v. NEW YORK FOUNDRY CO.

(Supreme Court, Appellate Term. December 20, 1907.)

1. SALES—BREACH OF WARRANTY—RESCISSION—BUYER'S DUTY.

Where there was a breach of warranty respecting machinery weighing 18,000 pounds and erected in the buyer's factory, and the buyer rescinded the contract and notified the seller to remove the machinery, but on the seller's request and promise to substitute other machinery the buyer permitted it to remain on his premises, holding it at the disposal of the seller, who failed to keep its promise, the buyer was not bound to remove the machinery and actually deliver it to the seller.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 303-306.]

2. SAME—ACTION FOR PRICE—QUESTION FOR JURY.

In an action on a note for machinery, it was improper to direct a verdict for plaintiff, where defendant's testimony showed a rescission by it for breach of warranty.

Appeal from City Court of New York, Trial Term.

Action by the P. H. & F. M. Roots Company against the New York Foundry Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

See 104 N. Y. Supp. 785.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

John L. Walsh, for appellant.

Burke & Fay (Daniel Burke, of counsel), for respondent.

PER CURIAM. The action is brought upon a promissory note given by defendant for the purchase price of a machine called a "blower." The case has been tried several times. On the first trial defendant obtained a verdict in its favor. The Appellate Term reversed the judgment on the ground, principally, that a rescission of the contract was not pleaded. The defendant did not amend its pleadings, and upon the second trial was not allowed to show a rescission. It thereupon obtained leave to withdraw a juror, and applied at Special Term for permission to amend its answer. This motion was denied, and defendant appealed from the order entered thereon, which appeal was dismissed. Pending this appeal the case was again tried upon the original pleadings, and the court directed a verdict for plaintiff. Upon appeal the Appellate Term reversed the judgment on the ground that:

"Inasmuch as evidence was admitted, without objection and without contradiction, which tended to show that, in point of fact, defendant had disaffirmed the contract, on account of the failure of plaintiff's warranty or the misrepresentations of its agents, and had given plaintiff notice of such rescission, and had requested plaintiff to take back the blower, * * * it was error to direct a verdict for plaintiff."

The defendant then made another motion at Special Term for permission to amend its answer, which motion was granted, and the answer was amended by inserting the following allegation, viz.:

"That, owing to the failure of the plaintiff's warranties and representations, this defendant disaffirmed the said contract to purchase and the note dated March 21, 1906, for \$1,100, and rescinded the said contract of purchase, and notified said plaintiff of the defendant's disaffirmance and rescission of said contract with the plaintiff herein; and thereupon this defendant offered and tendered to plaintiff a return of the said No. 7 Root's positive blower, and the defendant is now and has been at all times ready and willing to return the said blower to the plaintiff in this action."

Upon the amended pleadings the case was tried again, and the court directed a verdict for the plaintiff. Defendant appeals.

If the issue raised by defendant's evidence had been submitted to the jury, and such evidence believed by them, they would have been justified in finding that there was a warranty that the blower in question could be run, not only by a 38-horse power, as required by defendant, but even by a 20-horse power; that the blower failed to meet this requirement; that defendant thereupon rescinded the contract and notified the plaintiff to remove the blower, but, at plaintiff's special request and promise to substitute another blower for the defective one, permitted the said blower to remain on defendant's premises,

holding it, however, at the disposal of the plaintiff who failed to redeem its promise. The blower in question was a heavy piece of machinery, weighing some 18,000 pounds, and had been erected in defendant's factory. Under the circumstances presented by defendant's evidence, it was not incumbent on defendant to remove the blower itself and actually deliver it to plaintiff. The issues raised a question of fact, which should have been submitted to the jury, and it was error for the court to direct a verdict.

The judgment must be reversed, and a new trial ordered, with costs to appellant to abide the event.

SOLOMON v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Term. December 20, 1907.)

STREET RAILROADS—COLLISION WITH VEHICLES—DAMAGES.

In an action for injuries to plaintiff's horses and truck in a collision with defendant's car and for the services of a veterinarian, the evidence showed that the value of one of the horses before the accident was \$200 and that right afterwards it was not worth over \$5, but that after treatment by the veterinarian it was able to do light work. Its value after recovery was not shown. *Held*, that defendant, having been called on to pay for the veterinary services, was entitled to the benefit of any resulting appreciation in the value of the horse, and in the absence of proof as to the difference in value prior to the injury and after recovery there was no basis for the assessment of damages to the horse.

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by Jacob Solomon against the New York City Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, unless plaintiff stipulate to reduce the judgment, in which case the judgment, as modified, to be affirmed.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

William E. Weaver, for appellant.

Emanuel Klein, for respondent.

PER CURIAM. Plaintiff sued to recover for damages to personal property sustained by one of defendant's cars colliding with plaintiff's two-horse truck. The jury rendered a verdict in plaintiff's favor for \$345.

It is not strenuously urged by the appellant that the plaintiff was not entitled to recover; but the sufficiency of the evidence as to the damages sustained is attacked, and the claim is made by the defendant that such evidence is inadequate to support the verdict. There was sufficient testimony to support the claim for damage to the harness of \$50, for the hire of a substituted horse, during the time one of the defendant's horses was unable to work owing to his injuries, of \$72, and to the amount of \$50 paid a veterinary surgeon for his services. These amounts aggregate \$172. The balance of the verdict is evidently for damages to the injured horse. The testimony regarding that horse

was that its value immediately before the accident was \$200, and that at the time of the accident it was not worth over \$5; but it was shown that, after treatment by the surgeon for about six weeks, it had so far recovered as to be able to do light work, and what its value was after recovery was not shown. The defendant, having been called upon to pay for the services of the surgeon, was clearly entitled to the benefit of any resulting appreciation in the value of the horse, and proof should have been given as to the difference in value just prior to his injury and his value after recovery. There was no proper basis for the damages as assessed. The judgment must therefore be reversed, unless the plaintiff will stipulate to reduce the recovery to \$172.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event, unless plaintiff will stipulate within five days to reduce the judgment to \$172, with appropriate costs in the court below, in which event the judgment, as modified, will be affirmed, without costs of this appeal to either party.

OSORIO et al. v. BURLINGTON REALTY & CONSTRUCTION CO.

(Supreme Court, Appellate Term. December 20, 1907.)

BROKERS—RIGHT TO COMPENSATION.

In an action for real estate broker's commissions, evidence *held* insufficient to sustain a verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 116-120.]

Appeal from City Court of New York, Trial Term.

Action by Jacob N. Osorio and others against the Burlington Realty & Construction Company. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Wolf, Kohn & Ullman (Sol. Kohn, of counsel), for appellant.
Lawrence Goldberg, for respondents.

PER CURIAM. The action is for brokers' commissions, and plaintiffs claim that they were the procuring cause of a sale of real property, and set forth facts which, if true, would entitle them to their commission. Defendant admits that the plaintiffs were at one time authorized to procure, and did procure, a person to enter into negotiations for the exchange of properties, which negotiations fell through, and defendant denies that plaintiffs were the procuring cause of the final sale of the property. We think, upon the plaintiffs' case, when the motion was made for a dismissal, it should have been granted, and that it was error to refuse same.

Plaintiffs wholly and absolutely failed to make out a case. There is nothing demonstrated by the proof that justifies even a submission to a jury. If a telephonic communication is to be credited, then it shows that Mr. Crystal agreed to make a purchase upon terms to which he

says Mr. House assented, and after that nothing transpired. The parties never met. The agent never saw his principal again. The agent says himself that he never saw the parties personally again till after a sale had been consummated. There is not in the pleadings anything like an allegation of fraud, or collusion, or conspiracy, that tended to deprive the plaintiffs of their commission justly earned. Yet from this point the case was allowed to proceed upon this theory, over the objection and exception of the defendant. Immaterial, irrelevant, and wholly incompetent proof was taken as to commissions paid, and division of same with the purchaser, while not a word connects the defendant with even a knowledge of same. All this testimony was erroneous and harmful by way of prejudicing the jury. When defendant sought to offer proof as to how the actual sale was brought about, the evidence was excluded, and it was not allowed any proof at all on that subject, and without any justification whatever the judge passed the case over to the jury with an instruction that it was for them to say whether or not a conspiracy was proven by which it was sought to deprive plaintiffs of their rights in the matter, and this, too, when, as we have said, nothing of the kind had been charged or pleaded.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

PEOPLE ex rel. BUTLER et al. v. HAWXHURST et al.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

MANDAMUS—HIGHWAY BOARDS—OBSTRUCTIONS.

Where bathhouses are built at the foot of a highway, which extends to the shore of a bay at high-water mark, so as to substantially cut off access to the water from the highway, mandamus will lie to compel the board of highway commissioners to remove the obstructions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 142.]

Appeal from Trial Term, Nassau County.

Mandamus by the people, on the relation of William H. Butler and another, against Frederick W. Hawxhurst and others, as board of highway commissioners, to compel removal of obstructions. Judgment for defendants, and plaintiffs appeal. Reversed and new trial ordered.

Argued before WOODWARD, JENKS, HOOKER, GAYNOR, and RICH, JJ.

Bertram L. Kraus, for appellants.

George B. Stoddart, for respondents.

GAYNOR, J. In 1877 the commissioners of highways made an order opening a highway now called Maple avenue down "to the shore at highwater mark," i. e., to the shore of the bay called Oyster Bay, and the highway has ever since been open and in public use. There is nothing to show that land of the town was taken along the shore above highwater mark without any notice to the town officials in the opening of such highway, as the defendants claim; nor does it appear

that the town owned any land there. Above highwater mark at the foot of and upon the said highway several persons have erected bath houses, and this proceeding was to obtain a peremptory writ of mandamus against the defendants, the highway commissioners, to compel them to remove such obstructions. With the obstructions there access to the water by the said highway is substantially cut off. A dock or landing there out into the water would be a very different thing. The final order should have been for the relators, as such a proceeding is maintainable. *People ex rel. Pumpysky v. Keating*, 168 N. Y. 390, 61 N. E. 637.

The final order should be reversed, and a new trial ordered.

Order reversed, and new trial ordered; costs to abide the event. All concur.

DE VEAUX v. HOLLIDAY et al.

(Supreme Court, Appellate Term. December 20, 1907.)

REPLEVIN—LIABILITIES ON UNDERTAKINGS—ACTIONS—CONDITIONS PRECEDENT.

Under the express provisions of Municipal Court Act, Laws 1902, p. 1531, c. 590, § 126, a defendant in replevin, who has recovered a final judgment, cannot maintain an action against the sureties in plaintiff's undertaking until after the issuance and return unsatisfied of an execution against plaintiff.

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

Action by Carrie De Veaux against John F. Holliday and another. Judgment for plaintiff, and defendants appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Walter M. Dodd, for appellants.

Jacob Stiefel, for respondent.

FORD, J. This is an action against the sureties on an undertaking in replevin furnished by the plaintiff in the replevin action to the defendant in that action, the plaintiff here. In the replevin action, the following judgment was rendered:

"Judgment for the plaintiff for the possession of the chattels or their value, fixed at \$50.00, on payment to defendant of her lien fixed at....."	\$54 61
Prospective costs.....	10 00
	2 41
	\$67 02

\$67 02

"Dated this May 21st, 1907.

George F. Roesch, Justice.

"If defendant's lien as above not paid, judgment for defendant."

The plaintiff in that action did not pay the amount of the lien, and the defendant there brings this suit against the sureties on the undertaking. Judgment was rendered for plaintiff and the defendants appeal.

There was no proof of the issuance and return unsatisfied of an execution against the plaintiff in the replevin action. Under section 126 of the Municipal Court act (Laws 1902, p. 1531, c. 580), this is a condition precedent to the maintaining of an action against the sureties.

For this reason the judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

CITY OF NEW YORK v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Term. December 20, 1907.)

STREET RAILROADS—COLLISION WITH AUTOMOBILE—EVIDENCE.

In an action for injuries to an automobile by collision with one of defendant's street cars, evidence *held* insufficient to sustain verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 239-250.]

Appeal from Municipal Court, Borough of Manhattan, Twelfth District.

Action by the city of New York against the New York City Railway Company. Judgment for plaintiff, and defendant appeals. Reversed. Argued before GILDERSLEEVE, P. J., and McCALL, and FORD, JJ.

William E. Weaver, for appellant.

Francis K. Pendleton (Theodore Connoly and Thomas F. Noonan, of counsel), for respondent.

McCALL, J. Aside from the question of freedom from contributory negligence, which would bother us very much if it were the only question in the case, we believe that the verdict is absolutely against the weight of evidence. In fact, upon the proof offered, we believe the trial justice should have dismissed the complaint. Against the unequivocal and positive testimony of the president of the Manhattanville & Forty-Second Street Railway Company that the car No. 3,054 (which was the one which collided with plaintiff's automobile) was on that day owned and operated by his road, and that it was not under the control of the defendant or operated by its servants, it would seem inexplicable how a jury could find to the contrary, merely because the evidence showed that the signs on the car bore the names "Broadway and Metropolitan," and this, too, in the face of Mr. Beaver's testimony that they sometimes leased these very cars to operate them over his road. The judgment should be reversed.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

CITY OF NEW YORK v. UNSAFE BUILDING et al.

(Supreme Court, Special Term, New York County. December 16, 1907.)

1. *LIS PENDENS*—CANCELLATION—PROCEEDINGS UNDER BUILDING CODE.

Code Civ. Proc. § 1671, providing for a cancellation of a *lis pendens* on deposit of money or giving of an undertaking, and expressly excepting therefrom an action to foreclose a mortgage, relates solely to an action of the character specified in section 1670, an action to recover a judgment affecting the title to, or the possession, use, or enjoyment of, real estate, and does not apply to a proceeding against an unsafe building under Building Code, §§ 153-155, showing that the proceeding is distinctly in rem, and section 155, providing that judgment shall be for sale of the premises for the cost and expenses attending the execution of a precept to repair, secure, or take down an unsafe or dangerous building, which judgment "shall be in the same manner and with like effect as sales under judgment in foreclosure of mortgages."

2. *SAME*.

Lis pendens in proceedings under the Building Code against an unsafe building could not be canceled on deposit of money or giving of an undertaking, even if Code Civ. Proc. § 1671, applied to such a proceeding; it authorizing cancellation only where adequate relief can be secured plaintiff by such a deposit or undertaking.

Action by the city of New York against the alleged unsafe building at No. 429-431 West Fifty-Third street and Henry Holding, owner. Heard on motion to cancel *lis pendens*. Motion denied.

Harold C. Knoepfel, for the motion.

Francis K. Pendleton, Corp. Counsel (John P. O'Brien and Samuel J. Parmenter, of counsel), opposed.

GIEGERICH, J. A motion to cancel the *lis pendens* filed herein was heretofore denied by Mr. Justice Fitzgerald. It is claimed by the owner, however, that in such prior application cancellation was demanded as a matter of right, while in the present one it is sought by making a deposit of money or the giving of an undertaking, as provided by section 1671 of the Code of Civil Procedure. Assuming, without deciding, the point in favor of the owner, it clearly appears from a reading of said section that it does not apply to a proceeding such as this one, which is brought under the provisions of the Building Code, but relates solely to an action of the character specified in section 1670 of the Code of Civil Procedure. Upon reading sections 153, 154, and 155 of the Building Code it will be seen that the proceeding thereunder is distinctly in rem, and that they afford no authority for the entry of a personal judgment; section 155 providing that judgment shall be rendered for the sale of the premises for the cost and expenses attending the execution of a precept to repair, secure, or take down an unsafe or dangerous building, which judgment "shall be in the same manner and with like effect as sales under judgment in foreclosure of mortgages." An action to foreclose a mortgage is expressly excepted from the provisions of section 1671 of the Code of Civil Procedure, and, if there is any analogy between a proceeding taken pursuant to the portions of the Building Code above referred to and an action in foreclosure, then the agreement that the provisions of section 1671

do not apply to the *lis pendens* that has been filed in this proceeding has great force.

Apart from all this, as it appears that the city is entitled to other relief than a judgment for a sum of money and to a judgment for the sale of the property, adequate relief would not be secured by a deposit of money or an undertaking, and therefore the *lis pendens* should not be canceled. *Tishman v. Acritelli*, 111 App. Div. 237, 97 N. Y. Supp. 668; *Kennedy v. Hall*, 51 Misc. Rep. 78, 99 N. Y. Supp. 162, affirmed 114 App. Div. 913, 100 N. Y. Supp. 1124.

Motion denied, with \$10 costs.

BLAIR v. M. McCORMACK CONST. CO.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

1. JURY—VOIR DIRE EXAMINATION.

Code Civ. Proc. § 1180, providing that it is ground for challenge to a juror that he is an employé of or a stockholder in a corporation which is a party to the action, authorizes, in an action for personal injuries, a question to a juror on his *voir dire* whether he is an officer or stockholder in an indemnity insurance company, but not a question as to whether he is an officer or stockholder in a specific insurance company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 410, 565.]

2. TRIAL—VOIR DIRE EXAMINATION OF JUROR—IMPROPER QUESTION—ACTION OF COURT.

Where a juror in an action for personal injuries, was asked on his *voir dire* whether he was a stockholder in a specified indemnity insurance company, and an objection was sustained, and the jury instructed that the mention of the company must not influence it and had no bearing on the case, it sufficiently secured the rights of the defendant.

Appeal from Trial Term, Queens County.

Action by Frank Blair against the M. McCormack Construction Company. From an order setting aside the verdict, plaintiff appeals. Reversed, and verdict reinstated.

The record shows the following: "In the examination of the talesmen counsel for plaintiff asked the following question: Q. Are any of the jurors officers or stockholders in the Travelers' Insurance Company? Counsel for Defendant: If the court please, in the course of the examination of the talesmen, counsel for the plaintiffs asked the question which the stenographer has taken down there, and I object to that question, and ask that the jury be discharged from the consideration of this case, and that this panel be discharged from the consideration of this case, on the ground that it is an improper question to ask, and on the ground that it injected a matter into the case— The Court: You object first to the question, and the objection is sustained. (Exception by plaintiff.) The Court: What is your further motion? Renew your motion. Counsel for Defendant: And I move to have this panel discharged from the consideration of this case on the ground that the suggestion has been made, and is bound to be in their minds— The Court: The motion is denied on the ground that great public inconvenience would result. (Exception to defendant.) Counsel for Defendant: My motion applies to those who are in the hearing of the question. The Court (addressing jury): Gentlemen, counsel seems to apprehend that mention of the Travelers' Insurance Company may in some way prejudice your minds, and prejudice the defendant's case. Now, the court charges you that has no bearing in this case whatever—any mention of an insurance company should not have any influence in your minds at all, whether the Travelers' Insurance or the

Equitable Life Insurance Company, or any other insurance company—no consequence whatever in this case; should not influence you in the least, or any juror in the room. You may proceed with the examination. Counsel for Plaintiff: I wish to ask the jurors if any of them are stockholders or officers of any casualty insurance company. Counsel for Defendant: I think, in view of the question directed to a particular corporation, following that up with that, I think this case should be withdrawn from this panel, especially in view of the court's remarks that the question of any insurance company has nothing to do with this case. (Objection overruled. Exception.) Counsel for Plaintiff: Now, gentlemen, will you please answer my question: Are any of you officers or stockholders in any casualty insurance company? (No response from jury.) The jury thereafter found a verdict for the plaintiff, which upon motion the court thereafter set aside. It is apparent from the opinion handed down by the learned court that the order was based upon the incident of the examination set forth.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and MILLER, JJ.

Archibald Foote Clark (Ralph Gillette, on the brief), for appellant.
Eugene Lamb Richards, Jr. (Rutherford B. Meyer, on the brief), for respondent.

JENKS, J. Lord Brougham said:

"In my mind he was guilty of no error. He was chargeable with no exaggeration. He was betrayed by his fancy into no metaphor who once said, 'All we see about us, kings, lords, and commons, the whole machinery of the state, all the apparatus of the system and its varied workings, is simply bringing 12 good men into a box.'" Present State of the Law.

A jury implies 12 competent and disinterested men. "The question for the triors is whether the juror is, as he assuredly should be, altogether indifferent, and, if they find he is not, it is their duty to reject him." Peckham, J., in *Butler v. G. F., S. K. F. E. S. R. R. Co.*, 121 N. Y. 118, 24 N. E. 187. A stockholder in a corporation which had underwritten the liability of the defendant might well be objectionable as a juror to the plaintiff. See *Grant v. National Railway Spring Co.*, 100 App. Div. 234, 91 N. Y. Supp. 805; *Mechanics' & Farmers' Bank v. Smith*, 19 Johns. 115; *People v. Bodine*, 1 Denio, 281, cited in *Butler's Case*, supra. The reason for the provision in section 1180 of the Code of Civil Procedure—"The fact that a juror is in the employ of a party to the action; or, if a party to the action is a corporation, that he is an employee thereof or a shareholder or a stockholder therein, shall constitute a good ground for a challenge to the favor as to such juror"—obtains to a degree. *Cosselmon v. Dunfee*, 172 N. Y. 507, 65 N. E. 494, is not authority against the course pursued by the plaintiff in his examination of the jury on voir dire. That case holds that inquiry of a witness into this matter of assurance is not material, and should be excluded. To extend the rule to the question up in this case is to exclude an inquiry pertinent and proper on its face, because it may permit the jury to infer from the inquiry that the defendant was assured. In *Cosselmon's Case*, supra, the fact that the question was asked of a witness indicated that the primary purpose thereof was to elicit an immaterial fact. But the inquiry in the case at bar was legitimate; and any sinister purpose behind the apparent purpose must be a matter of inference. On the mere face of

things the court cannot exclude a proper question for the reason that the court infers that there may be or is an ulterior motive. *Grant v. National Railway Spring Co.*, supra. The learned court sustained the objection to the specific question, and fully cautioned the jury that the mention of the assurance company must not influence it, and had no bearing on the case. I think that the caution was sufficient to secure the rights of the defendant (*Stouter v. Manhattan Railway Co.*, 127 N. Y. 661, 27 N. E. 805), and that the learned court was not warranted in thereafter setting aside the judgment. As a rule tactics of indirection prejudice a jury against the tactician, and carry their own punishment.

I think that there is no error in the record which would justify a reversal, and that the case made out by the plaintiff is sufficient to support the verdict.

The order is reversed, with costs and disbursements, and the verdict is reinstated. All concur, except HIRSCHBERG, P. J., not voting.

BLAIR v. M. McCORMACK CONST. CO.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

Appeal from Trial Term, Queens County.

Action by Louise Blair against the M. McCormack Construction Company. From an order setting aside the verdict, plaintiff appeals. Reversed, and verdict reinstated.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and MILLER, JJ.

PER CURIAM. Order reversed, with costs and disbursements, and verdict reinstated. See *Frank Blair v. M. McCormack Construction Company* (decided herewith) 107 N. Y. Supp. 750.

HIRSCHBERG, P. J., not voting.

FLOCK v. KAUFMAN.

(Supreme Court, Appellate Term. December 20, 1907.)

1. COURTS—MUNICIPAL COURT—MOTION FOR NEW TRIAL.

Under Municipal Court Act, Laws 1902, p. 1563, c. 580, § 255, authorizing the court to grant or deny a motion for new trial on the ground of fraud or newly discovered evidence, it is not a ground of denial of such a motion that it was not made in five days after the trial.

2. NEW TRIAL—GROUNDS—PERJURY.

Plaintiff sued for goods sold and delivered by his assignor. The assignor testified that defendant owed him a balance on the goods, and that theretofore he had sold the claim to plaintiff, who owned the same. He also testified that the goods were sold on different dates, and that defendant himself took the goods away on the 8d, which was not the correct date; it being the 80th. *Held*, that the discrepancy in assignor's testimony, in that he first seemed to claim ownership of the cause of action

and afterwards said that he sold the claim to plaintiff, could not be characterized perjury, assignor apparently intending merely to state that the claim against defendant had not been paid; that the goods might have been sold at different dates and yet taken away by defendant at one time; that the statement that the goods were taken away on the 8d may well have been a mere unintentional mistake for the 30th; and that such discrepancies did not warrant a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 183.]

3. SAME—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

The rule that, to warrant a new trial on the ground of newly discovered evidence, it must appear that the evidence could not have been procured before the trial by the exercise of due diligence, does not require a party to anticipate the introduction of manufactured evidence and to be prepared to meet it on the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 214.]

4. SAME—CUMULATIVE EVIDENCE—PROBABLE EFFECT.

The mere fact that newly discovered evidence is cumulative is not sufficient ground for denying a motion for new trial, if the evidence is of such probative force that it would probably change the result.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 228.]

5. SAME.

Plaintiff sued for goods sold and delivered by his assignor. The assignor testified that the goods were taken away by defendant himself, who signed a receipt therefor, and that he saw defendant sign it. Defendant denied that he bought the goods or had any transaction with assignor subsequent to a date several days previous to the sale in question, except one, when he paid cash, and he denied that he signed the receipt. On verdict for plaintiff, defendant moved for a new trial on the ground of newly discovered evidence, which was that of a former employé of the assignor, who swore in his affidavit that he had been a bookkeeper for the assignor, that to the best of his knowledge defendant did not deal with the assignor subsequent to the date testified to by defendant, and that he himself did not make out any receipt. *Held*, that the newly discovered evidence was not of such a character, that, if produced on the trial, it would probably have changed the result, and hence would not warrant a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 228.]

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by Samuel Flock against Louis Kaufman. There was a verdict for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Joshua S. Shapiro, for appellant.

Isador Frankel, for respondent.

PER CURIAM. The defendant moved for a new trial on the ground of newly discovered evidence and alleged perjury on the part of plaintiff's assignor. The motion was denied, and the order denying said motion, from which defendant appeals, states that it was denied "on the ground that defendant did not make this motion in five days after the trial of this action." This particular ground for denying the motion is not tenable (Municipal Court Act, Laws 1902, p. 1563, c. 580, § 255); and, if the defendant has made out a proper case for a new trial, the order must be reversed.

The claim of perjury is founded upon certain alleged discrepancies in the testimony of the plaintiff's assignor. He testifies thus:

"Q. And he [defendant] now owes you a balance of \$58.05? A. Yes. Q. Did you on the 8th day of January sell your claim to Samuel Flock [plaintiff]? A. Yes. Q. For how much? A. \$45. Q. And Mr. Flock now owns this claim? A. Yes."

The alleged discrepancy, upon which defendant bases his claim of perjury, is that plaintiff's assignor first seems to claim ownership of the cause of action in himself, and immediately afterwards says he sold the claim to plaintiff. It seems to us that the testimony hardly warrants the characterization of perjury. The witness apparently misunderstood the first question, and intended merely to state that the claim against defendant had not been paid, and that defendant still owed \$58.05 on said claim. Again he testifies:

"Q. Were those goods sold to him [defendant] all in one day, or on different dates? A. Different dates. Q. You say you delivered the goods? A. He came around with the wagon himself and took the goods. Q. Were you there when the goods were taken away? A. I gave them to him. Q. When was that? A. On the 3d of May, 1906."

It is evident that the goods might have been sold at different dates, and yet been taken away by defendant at one time. Also the statement that the goods were taken on the 3d of May may well have been a mere unintentional mistake for the 30th of May, which is conceded to be the correct date. We do not think these discrepancies in the testimony of plaintiff's assignor sufficient ground for granting a new trial. The court below must have observed these contradictions, and was in the best position to judge of the weight to be given to the witness' evidence.

The ground of newly discovered evidence is based on the claim that plaintiff produced a receipt at the trial, which defendant did not know existed, and that he could not prepare himself to meet it at the trial, and that he has since discovered evidence tending to contradict it or show it to be a forgery. The rule is that it must be shown that the evidence could not have been procured before the trial by the exercise of due diligence; but the exercise of reasonable diligence does not require a party to anticipate the introduction of manufactured evidence and to be prepared to meet it on the trial. If he is surprised by such evidence, and unable to meet it at the trial, the court may grant a new trial, and let in rebutting evidence subsequently discovered. *Seligman v. Sivin*, 46 Misc. Rep. 58, 61, 91 N. Y. Supp. 395. The motion, however, will not be granted if the evidence is merely cumulative and of such a character that, had it been given at the trial, it would probably not have changed the result, although the mere fact that the evidence is cumulative is not sufficient ground for denying the motion, if the evidence is of such probative force that it would probably change the result. *Solowye v. Hazlett*, 35 Misc. Rep. 197, 198, 71 N. Y. Supp. 486. The newly discovered evidence is, as we have seen, with regard to the receipt. If that evidence had been produced at the trial, would it probably have changed the result? Plaintiff sued for goods sold and delivered. The answer was a general denial. The plaintiff's assignor testified that on

May 30, 1906, he sold and delivered to defendant the goods specified by him for \$158.05, and that \$100 thereof were paid to him on account; that the goods were taken from plaintiff's assignor's store by defendant himself, who then signed a receipt therefor, which, so far as material, reads thus:

"Received goods.....\$158 05
100

§ 58 05, balance due L. Kaufman."

Plaintiff's assignor swears he saw defendant sign this receipt. Defendant denies that he ever signed said receipt. He was required to sign his name on a piece of paper, and the court compared his signature with that on the receipt. Defendant denies that he bought the goods in suit, or had any transaction with the plaintiff's assignor subsequent to May 17th, several days previous to the sale in suit, except that in September he bought a lot of goods and paid cash for them. The alleged newly discovered evidence is that of one Klausner, a discharged employé of plaintiff's assignor, who swears in his affidavit, read on the motion, that he was bookkeeper for plaintiff's assignor for three years previous to June, 1906, and that "to the best of his knowledge" defendant did not deal with plaintiff's assignor subsequent to May 17, 1906, and that he himself did not make out any receipt. There is nothing to indicate that defendant could not have made and signed the receipt in question without the said Klausner's knowledge, while his testimony that "to the best of his knowledge" defendant did not deal with plaintiff's assignor subsequent to May 17th is not of such probative force that it would probably change the result of the trial, as there is no reason for supposing that he would necessarily have knowledge of any dealings between defendant and plaintiff's assignor that might have occurred between May 17 and May 30, 1906. The testimony of the defendant seems to have been halting, evasive, and unconvincing, and the learned court below, who had the parties before him and could observe their appearance and manner of testifying, would probably have reached the same conclusion, had the alleged newly discovered evidence been produced at the trial.

The order must be affirmed, with costs.

FARBER v. ROGINSKY.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

ANIMALS—INJURIES BY ANIMALS—NOTICE OF VICIOUS PROPENSITIES.

Where defendant, on stabling his horse in plaintiff's stable, failed to fasten his horse, or to use proper care in fastening it, and the horse, being free, injured plaintiff's horse by kicking it, it was not necessary, to hold defendant liable for negligence, to show that he had notice either actual or presumptive that his animal was inclined to such or similar mischief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Animals, §§ 288, 289.]

Appeal from Nassau County Court.

Action by Samuel Farber against Lucyan Roginsky. Appeal by plaintiff from a judgment in favor of defendant and from an order denying a motion for a new trial. Reversed, and new trial ordered.

Argued before WOODWARD, JENKS, GAYNOR, RICH, and MILLER, JJ.

Harry W. Moore, for appellant.

Denis O'Leary, for respondent.

JENKS, J. The action is for negligence, to recover damages for wounds of the plaintiff's horse inflicted by the kicks of the defendant's horse. The plaintiff permitted the defendant to stable his horse over night in plaintiff's stable. The plaintiff and defendant went together to the stable. The stable contained two stalls. The plaintiff's horse was in one stall, and the plaintiff directed the defendant to place his horse in the other stall. The defendant went to the stall to tie up his horse, and led the horse into the stall. There was a halter on the horse with a rope on it. The defendant fed his horse. The plaintiff asked the defendant if "he was through," the defendant answered "Yes," and plaintiff and defendant came out together. On the morning of the next day the plaintiff found his own horse wounded, and then looked around to find the defendant's horse free, with the halter on his head and the rope loose on the floor. The wounds on plaintiff's horse were such as could result from kicks of a horse, and, when plaintiff went to take out his horse, the other horse began to kick the plaintiff's horse. The learned trial court dismissed the plaintiff at the close of his case for failure of proof of any cause of action.

The opinion of the court begins with the proposition that the jury could have found that either the defendant did not fasten his horse at all, or did not fasten it with proper care. The learned court then advances the further proposition that something more must be shown; that it was necessary to allege and to prove that the owner had notice, either actual or presumptive, that his animal was guilty of such or similar mischief. In other words, that proof of scienter was essential to the plaintiff's case. The flaw in this conclusion is that the cause of action for negligence in such cases does not necessarily require proof of scienter; but it may also rest upon mere failure of the owner to exercise due care in the keep of the horse. *Moynahan v. Wheeler*, 117 N. Y. 285, 22 N. E. 702; *Mills v. Bunke*, 59 App. Div. 39, 69 N. Y. Supp. 96; *Dickson v. McCoy*, 39 N. Y. 400. In the case last cited the court, per Dwight, J., say:

"It is not necessary that a horse should be vicious to make the owner responsible for injury done by him through the owner's negligence. The vice of the animal is an essential fact only when, but for it, the conduct of the owner would be free from fault."

In *Mills v. Bunke*, supra, this court, per Woodward, J., say:

"The duty which the defendants owed to the plaintiff's intestate was to use reasonable care in the management and control of the horse which worked this wrong, and, while we have been afforded a very thorough discussion of wild and domestic animals, and the degree of care and responsibility imposed upon their owners, we are of opinion that the owner of a domestic animal is bound to take notice of the general propensities of the class to which it be-

longs, and, if such propensities are of a nature to cause injury, he must anticipate and guard against them (*Hammond v. Melton*, 42 Ill. App. 187), and, if the animal be given an opportunity to exercise the propensity through the negligence of the owner, he will be liable to persons injured without fault on their part (*Thomas*, Neg. 508, citing *Whart. Neg.* § 907)."

I think that the learned court erred in dismissing the complaint, and that the judgment must be reversed and a new trial be ordered; costs to abide the event. All concur.

WOOD et al. v. PROUDMAN.

(Supreme Court, Appellate Division, First Department. December 13, 1907.)

1. TROVER AND CONVERSION—SALE OF PROPERTY DELIVERED FOR INSPECTION.

Where wholesale diamond dealers delivered diamonds to retailers on memorandum for inspection, to be returned on demand, stipulating that there was no sale or contract to sell until their approval of the retailers' selection, and the retailers sold the diamonds without such approval, they were guilty of conversion, since the title to the diamonds never passed to them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 84-86.]

2. SAME—ACTION—PARTIES.

An action for a conversion by a firm, being in tort, may be brought against all or one or more members of the firm.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, § 190.]

3. SAME—PLEADING—GENERAL DENIAL—WAIVER OF CONVERSION.

In an action for conversion, defendant may not, under a general denial, show that the conversion was waived, but such matter, being in avoidance, must be affirmatively alleged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, § 212.]

4. PLEADING—DEFENSE—MATTER IN AVOIDANCE—RELEASE.

The release of a cause of action or rescission of a contract must be specially pleaded.

Patterson, P. J., dissenting.

Appeal from Trial Term.

Action by St. John Wood and others, copartners, against John C. Proudman. From a judgment for defendant and an order denying a new trial, plaintiffs appeal. Reversed, and new trial granted.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Charles A. Mackensie (William L. Marshall and Crowley Wentworth, on the brief), for appellants.

Benjamin Patterson, for respondent.

LAUGHLIN, J. The action is for the conversion of certain diamonds. The plaintiffs were wholesale diamond merchants, and their place of business was No. 2 Maiden Lane, borough of Manhattan, N. Y. During many years the defendant was a retail jeweler in the city of New York, and prior to the time in question had taken his wife

and one Trebilcock into business as partners, under the firm name of J. C. Proudman & Co. The partnership business was conducted in the main by Trebilcock, who had been manager for the defendant. The plaintiffs had from time to time delivered diamonds to the defendant and to his firm on consignment. On the 1st day of October, 1904, Trebilcock sent one Ulner, a clerk of the firm, to the plaintiffs' store for two diamonds which were delivered to him, together with a memorandum in the usual form, as follows:

"New York, Oct. 1, 1904

"Mr. J. C. Proudman:

"Memorandum from J. R. Wood & Sons, 2 Maiden Lane.

"These goods are sent for your inspection and examination only, remaining the property of J. R. Wood & Sons, held by you subject to their order, and are to be returned to them on demand. There is no sale or contract to sell until the date of their approval of your selection.

1 dia 2-3/4 less 1/64 at 124.00.....	\$339 06
1 " 2-1/4 less 1/64 at 124.00.....	280 94
2-3/8 14 mtg. .90.....	2 14

\$622 14

"Send list of goods selected when reporting. No later claims allowed.

"Duplicate."

Ulner delivered the diamonds, together with this consignment memorandum, to Trebilcock, who sold the diamonds 10 or 12 days thereafter, and deposited the proceeds, so far as received, to the credit of his firm. Before making the sale, he did not send to the plaintiffs a list of the diamonds selected, or obtain their approval of his selection. The complaint describes the property and alleges the conversion thereof by the defendant, who interposed merely a general denial. Upon the trial the defendant gave evidence tending to show that, after the alleged conversion, it was waived, and credit was given the defendant's firm by the plaintiffs' credit agent for the diamonds as upon a sale. This evidence was received under plaintiffs' objection and exception that the answer merely contained a general denial; that a waiver of the conversion was not pleaded, and, also, that the authority of the credit agent to waive conversion was not shown. The court submitted to the jury the question as to whether there was a conversion, and, if so, whether it was waived.

We are of opinion that there should be a new trial. The sale of the diamonds without the approval of the plaintiffs, and affording them an opportunity to determine whether or not they were willing to extend credit to the defendant's firm therefor, constituted a conversion as matter of law. The consignment memorandum clearly apprised the defendant of the fact that his firm had no authority to sell the diamonds until they reported to the plaintiffs the selections made, and obtained the approval of the plaintiffs. The title to the diamonds remained in the plaintiffs, and never passed to the defendant's firm. The action being in tort, the plaintiffs were at liberty to proceed against all or one or more members of the firm. The defendant was not at liberty to show that the conversion was waived without specially setting up that defense. The conversion was complete by the act of the defendant's firm in selling the diamonds. The subsequent negotia-

tions for credit may have constituted a waiver, if the credit man was authorized to waive the tort; but this could not be proved under the general denial. It did not tend to disprove the conversion. It constituted matter in avoidance, which it was essential to allege affirmatively. The plaintiffs' cause of action became complete by the conversion. The defendant, in effect, seeks to show under a general denial, not that the cause of action did not accrue to the plaintiffs, but that after it accrued it was compromised or waived. I think the question falls on principle within the rule that the release of a cause of action or rescission of a contract must be specially pleaded. *Horton v. Horton*, 83 Hun, 213, 31 N. Y. Supp. 588; *Chapin v. Pratt*, 66 Hun, 628, 20 N. Y. Supp. 952.

It follows that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event. All concur, except PATTERSON, P. J., who dissents.

(122 App. Div. 572.)

BRAUNER v. THIRD AVE. R. CO.

(Supreme Court, Appellate Division, First Department. December 18, 1907.)

STREET RAILROADS—COLLISION WITH VEHICLE ON TRACK—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—SUBMISSION TO JURY.

In an action against a street railroad for death of plaintiff's decedent in a collision between a vehicle in which decedent was riding and defendant's car, evidence held sufficient to go to the jury on the questions of defendant's negligence and decedent's contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 251-257.]

Ingraham, J., dissenting.

Appeal from Trial Term.

Action by Meier Brauner, as administrator, etc., against the Third Avenue Railroad Company. From a judgment dismissing his complaint and from an order denying his motion for new trial, plaintiff appeals. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Alex. B. Greenberg, for appellant.

Bayard H. Ames, for respondent.

LAUGHLIN, J. This is a statutory action to recover for the death of Israel Brauner, alleged to have been caused by the negligence of the defendant. It is alleged in the complaint, as amended, that on the 10th day of July, 1899, the decedent was lawfully driving a wagon drawn by two horses northerly along Third avenue, in the borough of Manhattan, N. Y., and, while between Ninety-Seventh and Ninety-Eighth streets, the wagon was struck by a south-bound car of the defendant, whose employes operated the same in a careless and negligent manner, precipitating the decedent to the ground, thereby causing his death.

The points presented by the appeal are with respect to the sufficiency of the evidence of freedom from contributory negligence and negligence to take the case to the jury. We are of opinion that both questions became questions of fact for the consideration of the jury. The plaintiff gave evidence tending to show that the decedent was a healthy, intelligent boy, 19 years of age, and was employed as salesman for the firm of Stern & Brauner, engaged in the pickle business; that he always went along with the driver; that on the day in question he started from his employer's place of business with one Grill as a helper, on a covered truck wagon load of pickles drawn by two heavy truck horses, and was driving at the time of the accident.

One Herman, a dry-goods merchant at No. 1766 Third avenue, which is next door south of Ninety-Eighth street on the westerly side, testified that he was standing on the sidewalk in front of the door of his store; that he observed the pickle wagon at Ninety-Seventh street coming northerly on the north-bound track, and then noticed a car behind and heard the gong, and observed that the driver of the wagon turned west onto the south-bound track while crossing Ninety-Seventh street; that at this time a double top ice wagon was standing on the east side of the avenue, backed up to the curb in front of the second store north of Ninety-Seventh street; that after the car passed, and about in the middle of the block, and when the wagon was between the westerly curb and westerly track, it commenced to turn to cross diagonally to the east side of the street; that he did not see any car approaching from the north until he heard it strike the wagon directly in front of his place of business; that he was looking at the wagon passing, and that, when the horses passed upon the south-bound track, the car was not on that block, but that he did not see the car until it struck the wagon; that by the collision the wagon was tipped over to the east side of the avenue; that the car first struck the left front wheel of the wagon and then the left hind wheel, the wagon being at the time in a diagonal position on the track, slanting towards the northeast, and that the wagon was nearly off the track when it was struck.

One Unger, who resided and kept store at No. 1758 Third avenue, which was the third door north of Ninety-Seventh street, on the west side, testified that he had just come out of his store and was standing in the middle of the street near the car track where an underground improvement was being made, which he was looking at; that he first noticed the wagon on the westerly side of the street when it commenced to turn toward the east to cross to that side, which he says was about opposite No. 1762 or 1764, which would be a little above the middle of the block, but later on he says, "It was about the middle of the block"; that he saw the south-bound car crossing Ninety-Eighth street; that at the time the horses, in crossing the avenue from west to east, reached the track, it was about in the middle of the block or opposite No. 1762, and "at that time, I say, the car was crossing Ninety-Eighth street. Next I was just watching on the street, and I heard some hollering, and I looked up and saw that the car had struck the wagon. The car went into the hind wheel, and turned over

the wagon. After the car struck the hind wheel of the wagon, the wagon fell over from the west side on the east side, to the east."

One Knobler, who conducted a store at No. 1763 Third avenue, which was the second door south of Ninety-Eighth street, on the east side, testified that he was standing in his store, looking out through the window, and was attracted by the decedent's helper hollering "Stop, stop!" that he looked out, and saw Grill standing up, holding up his hand, and shouting "Stop, stop!" and that he saw the car coming down on the west side—"it was coming near Ninety-Eighth street"—that it was a cable car; that he did not see the gripman doing anything at first, but that after the hollering, and when the car was about 15 feet from the wagon, or "maybe more," he saw the gripman endeavor to stop the car; that the car struck the hind wheel of the wagon, turning it over to the east side. On cross-examination this witness said that, when the horses first came on the south-bound track, he heard the shouting, and that "the car then was at Ninety-Eighth street, just coming from Ninety-Eighth street"; that at this time he saw the decedent urge the horses forward with the reins—"I saw that, but he didn't quite succeed, and the car hit him"—that the wagon was headed in the direction where "they delivered pickles there somewhere about Ninety-Eighth street"; that the car was running along at the regular rate of speed when he first saw it and during all the time he saw it; that "the first time that I looked at the motorman he was trying to stop the car, putting his hand on the brake." But on redirect examination he again testified that the car was within 15 or 20 feet of the wagon before the motorman attempted to stop. At this point the record does not show that the plaintiff rested, but it contains a formal motion for a dismissal of the complaint, and shows that it was granted, and that an exception thereto was taken. It then appears that the attorney for the plaintiff requested the court to permit him to call another witness, which the court declined. Then counsel for plaintiff duly excepted to the ruling of the court, and moved for a new trial which motion was denied, and he excepted.

Perhaps it should be assumed that the plaintiff rested or acquiesced in the motion for a dismissal of the complaint upon the theory that he had rested, inasmuch as it does not appear that there was any objection upon the ground to the motion being made. Even so, however, assuming, as we must, that the record correctly shows the proceedings, plaintiff should have been permitted to call his other witness. It appeared that Grill, who was on the wagon with the decedent, was in court, and it is to be inferred that he is the witness the plaintiff desired to call. It is manifest that his evidence would be most material. Assuming, however, that the plaintiff formally rested his case upon the evidence disclosed by the record, the material parts of which are herein summarized, sufficient was shown to take the case to the jury. The easterly carriageway having been obstructed, the driver had a right to turn to the westerly side of the street, and, after the car passed, he not only had a right, but it was his duty, to return to the proper side of the street with reasonable dispatch.

The evidence would have warranted a finding that the horses and the front part of the wagon had cleared the track, and that the car collided with the left hind wheel. The accident occurred in broad daylight. In these circumstances it might be inferred that the motorman saw the wagon crossing the track in time to avoid the collision; and the evidence indicates that he would have discovered it in time to slow down or stop the car until the wagon cleared the track if he had exercised proper care. According to the evidence, the car was 100 feet or more away when the horses reached or entered upon the track; and therefore it cannot be said as matter of law that the driver was guilty of negligence in proceeding to cross.

It follows that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event. All concur, except INGRAHAM, J., who dissents.

INGRAHAM, J. (dissenting). I dissent. I do not think the evidence was sufficient to justify a finding that the defendant was negligent, or that the plaintiff was free from contributory negligence.

McLAUGHLIN v. McCANN et al.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

1. PROCESS—ORDER FOR PUBLICATION—NECESSARY PROOF.

An order directing service of summons on a defendant by publication, which Code Civ. Proc. § 438, authorizes where the defendant is not a resident of the state, or where, after diligent inquiry, he remains unknown to plaintiff, or plaintiff is unable to ascertain whether he is or is not a resident of the state, and which the following section provides must be founded on proof by affidavit of the facts required by such section, and, where the application is made on the ground that defendant is not a resident of the state, that plaintiff has been and will be unable, with due diligence, to make personal service of the summons, is not warranted as to two defendants, O. and M., where the affidavit of plaintiff, after stating that none of the defendants are residents of the state, says: "Said defendants O. and M. * * * I suppose reside out of the state; * * * but I cannot ascertain after diligent inquiry where either of them resides at present. The said O. is a sailor and has no fixed place of abode"—and that plaintiff "will be unable with due diligence to make personal service" on them; the final statements as to their residence superseding the first, that none of defendants are residents of the state, and the statements that plaintiff will be unable with due diligence to make personal service on them, and that she cannot ascertain after due diligence where they reside, being mere conclusions of fact, which cannot be considered, and no facts constituting proof being stated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, §§ 114-118.]

2. SAME.

An order for service of a summons by publication is authorized on an affidavit of plaintiff stating that the last she knew of the defendant she resided in the state of Washington; the presumption of continuance of residence obtaining, and the great distance of that state warranting a finding that defendant cannot be served in New York with due diligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, §§ 114-118.]

Appeal from Special Term, Kings County.

Action by Rose McLaughlin against Henry McCann and others. From an order denying a motion of Daniel F. S. Connell, a purchaser at partition sale, to sustain his objection to the title and relieve him from completing his purchase of the referee, said Connell appeals. Reversed.

Argued before WOODWARD, JENKS, GAYNOR, RICH, and MILLER, JJ.

Edward T. Horwill, for appellant.
Henry Melville, for respondent.

GAYNOR, J. The affidavit of the plaintiff on which the order for service by publication was obtained, after stating that none of the 23 defendants, excepting a few of them who are specified, "are residents of the state of New York, or at present within the state," states of one of the three of such non-resident defendants, service of summons upon whom is now in question, as follows:

"The last I knew of said defendant, Mary McGoldrick, she resided somewhere in what is now the state of Washington, but she has not been heard from for upwards of ten years, and I cannot, after diligent inquiry ascertain her present residence."

And of the two others as follows:

"The said defendants, Owen McLaughlin and 'Mary' McLaughlin, the name 'Mary' being fictitious, I suppose reside outside of the state of New York, but I cannot ascertain after diligent inquiry where either of them resides at present time. The said Owen McLaughlin is a sailor and has no fixed place of residence."

This final statement of these two, that she supposes they reside outside of the state of New York, but "cannot ascertain after diligent inquiry where either of them resides at present time," and that one of them, Owen, is a sailor, "and has no fixed place of residence," supercedes her prior statement that they are not residents of this state. Then follows the general statement, in the very words of section 438 of the Code of Civil Procedure, that she "will be unable with due diligence to make personal service of the summons" upon them. This, and the statement that she cannot ascertain after diligent inquiry where they reside, have to be dismissed at once as mere statements of conclusions of fact, and therefore not probative. It was not for her to state these conclusions at all, but to state facts which proved them, so that the judge could find and state them. An affidavit is not a pleading, in which allegations of conclusions of fact may be permissible; on the contrary, it is a statement of facts from which judicial conclusions may be drawn. The said section 438 requires "proof by affidavit" that each of the said defendants "is not a resident of the state"; or that "after diligent inquiry, the defendant remains unknown to the plaintiff, or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state," and "that the plaintiff has been or will be unable to make personal service of the summons." The mere statement of these things in the language of the statute is not proof of them, nor evidence, which is not always proof. They were conclusions

for the judge to find, not for the plaintiff to state. It was for her to state facts which would prove them, and thereby give the judge jurisdiction to find them. There is no statement of any fact of inquiry by the plaintiff to ascertain where either of these defendants resided. No fact is stated to show that she knew or ever knew them, or anything about them or their residence or whereabouts, or that they sometimes came or never came into the state, except that Owen is a sailor. If she had made inquiry, and stated all the facts ascertained by her, the judge might have been able to find therefrom that they were nonresidents of the state, or that the plaintiff was unable to ascertain whether they were residents or nonresidents, or, if the latter, the particular place of their residence; and also (as the statute requires even in the case of nonresident defendants) that she had been and would be unable with due diligence to make personal service on them within the state—which would be the case if they were not in the habit of coming into the state frequently. But without such proof the judge had no jurisdiction to so find. The plaintiff could not decide for herself what "due diligence" was, or that she had exercised it, or that personal service could not be obtained by the exercise of it. That was for the judge. *Kennedy v. Lamb*, 182 N. Y. 228, 74 N. E. 834, 108 Am. St. Rep. 800.

In respect of the other defendant, the affidavit stated the fact that she resided in the state of Washington about ten years ago. This, and the presumption of the continuance of residence, and not of change (*Nixon v. Palmer*, 10 Barb. 175), sufficed as proof to enable the judge to find that she was a resident of that state at the time the application was made to him—for a presumption of fact is evidence. And the great distance of that state from here was a fact which enabled the judge to find, without eking out too much, that she could not be served in this state with due diligence, any more than if she resided in Germany; for she could not visit here often, and the plaintiff is not required to await such coming an undue time. The case would be different if she resided in New Jersey, where she might be of the many thousands who come daily to New York city where they do business or work, and proof that she did not come to the state frequently would be necessary. *Kennedy v. Lamb*, *supra*.

The persistency with which such affidavits have so long continued to state in the language of the statute the conclusions which the statute requires the judge to find from proved facts before he may grant the order, instead of stating the specific facts from which such conclusions may follow and be found by the judge, is most remarkable in our learned profession, especially in view of the long line of litigation and the serious consequences to titles which it has caused.

The order should be reversed.

Order reversed, with \$10 costs, and disbursements, and motion granted, with costs. All concur.

SMITH v. BRONSTEIN.

(Supreme Court, Appellate Term. December 20, 1907.)

ACCORD AND SATISFACTION—EVIDENCE.

Some eight or ten cases of goods purchased of plaintiff by defendant having been delivered February 14, 1906, two of the cases were returned on the succeeding day as not the goods ordered. On May 29th defendant sent plaintiff a check on which he indorsed the words: "The amount of this check, \$481, in payment of all bills to date." Plaintiff, on receiving the check, struck out the indorsement without notice to defendant, deposited the check to his credit, and collected the money. He also wrote a note to defendant, saying that defendant still owed \$1.60 for interest and that he had credited the amount of the check against defendant's account, but said nothing as to the cases returned. *Held*, that such check constituted an accord and satisfaction, relieving defendant from any liability for the goods returned and of all claims, except as to the \$1.60 interest.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Albert D. Smith against Harris Bronstein. From a Municipal Court judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Alfred B. Jaworower, for appellant.

Douglass & Minton (E. Dudley Barlow, of counsel), for respondent.

PER CURIAM. Some time previous to February 14, 1906, the defendant purchased some eight or ten cases of goods from plaintiff, all of which were delivered on February 14, 1906. Two cases, constituting the subject-matter of this action, were returned by defendant to plaintiff on February 15, 1906, as not being the goods ordered. On May 29, 1906, defendant sent to plaintiff a check for \$481, upon which he indorsed the words: "The amount of this check, \$481, in payment of all bills to date." The plaintiff, on receiving the check, struck out the words so indorsed, without notice to defendant, and deposited the same to his own credit, and collected the money thereon. He also wrote a note to defendant, saying that defendant still owed \$1.60 for interest, and that he credited the amount of the check against defendant's account. Nothing, however, was said as to anything being still due for the goods returned on February 15th, some three months previous to the sending of the check. Plaintiff claims there was some question about the receipt of these goods by plaintiff, and it was understood that the claim as to the returned goods was to be held in abeyance until the facts were ascertained in respect thereto.

The evidence clearly shows that the goods in question were, in point of fact, returned by defendant to plaintiff on February 15th, and there is no positive proof that they were not received by plaintiff, while, on the contrary, there is evidence of admissions by plaintiff of the receipt of the goods. Certainly it would not seem that it required more than three months to ascertain whether or not the goods had been received by plaintiff. Under the evidence presented, we are of opinion

that, in view of the dispute as to the amount due, the length of time that had elapsed between the return of the goods and the sending of the check, with the above-quoted indorsement thereon, and the retention of the check by plaintiff without notice of any dissent from defendant's claim that it was sent in full payment, except as to \$1.60 interest, there was an accord and satisfaction with respect to the claim in suit, and that the court below erred in giving judgment for plaintiff. *Fuller v. Kamp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

MANDEL v. HESS et al.

(Supreme Court, Special Term, New York County. December 28, 1907.)

VENDOR AND PURCHASER—CONTRACT—SUFFICIENCY OF TITLE OF VENDOR—INCUMBRANCES.

A purchaser of real estate under a contract of sale is not bound to accept the vendor's title subject to unpaid water rents and taxes, even though the vendor offers to deduct the amount of such liens from the purchase price.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 250-252.]

Action by Adolph Mandel against Sam Hess and others. Judgment rendered for plaintiff.

John D. Connolly, for plaintiff.

Paul M. Abrahams, for defendants.

NEWBURGER, J. This is an action to recover a deposit upon the signing of a contract for the purchase of real estate. At the time fixed for the closing of title the parties attended, and the defendants tendered a warranty deed and demanded that the plaintiff perform his contract. Plaintiff made a tender of the purchase money, demanding performance by the defendants, and refused to take the title tendered upon several grounds, among which was that there was unpaid Croton water rents and taxes for the year 1904. In *Zorn v. McParland*, 11 Misc. Rep. 555, 32 N. Y. Supp. 770, affirmed in 155 N. Y. 684, 50 N. E. 1123, in delivering the opinion of the court, Judge Beekman said:

"The defendant in this case has not set up any equitable defense or counter-claimed for the specific performance of the contract, but stands upon his strict legal right to retain the money which has been paid by the plaintiff on the ground that at law no recovery can be had if the plaintiff was at fault in refusing to perform at the time fixed for the purpose. In this situation he cannot invoke the aid of any equitable principle in support of his position, but must submit to be bound to a full and exact performance of his part of the agreement at the time specified. He had agreed to deliver to the plaintiff a title to the premises in fee simple, free from all incumbrances except those mentioned in the contract, and the plaintiff had a right to demand that this obligation should be fully complied with at the time when completion of the contract on his part was required. * * * The defendant was bound, also, to discharge the taxes and the Croton water rents. It was not sufficient for him to offer to allow the same to the plaintiff out of the purchase money, and

thus cast upon the latter the obligation of seeing to the payment and discharge of the same."

In *Morange v. Morris*, 3 Keyes, 48, 51, the court says:

"In the present case the vendor was unable to perform his agreement for the reason that the premises were incumbered with the liens for taxes and assessments admitted in the answer. By his agreement he was not only to convey a title in fee simple, but he was to convey and assure it free from all incumbrances except as therein specified, and the incumbrances referred to were not within the exception. The existence of the incumbrances at the time fixed in the agreement for the execution of and delivery of a deed was a breach of the agreement on his part, which put it out of his power to perform and excused the plaintiff from tendering payment. * * * In most cases they [vendors] can also find relief from the stress of the situation in actions for specific performance, but where they assume the position of exacting a forfeiture of the money paid by the vendee upon the contract they do so under claim of compliance with the conditions of the contract on their part, and they cannot justly complain of the demand which the law makes that such compliance shall be full, exact, and timely."

While it is true that the defendants offered to permit the amount due for such water rent and taxes to be deducted from the purchase price, yet under the rule laid down in the case above quoted, in an action for the recovery of money, plaintiff was entitled to have the same discharged before accepting a deed.

Without considering the other objections that were raised at the time of the closing of title, judgment must be rendered for the plaintiff for the amount of the deposit, with interest, and \$150 as a fee for the searching of the title.

SCOFIELD v. TOWN OF POUGHKEEPSIE

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

1. HIGHWAYS—OBSTRUCTIONS—TELEPHONE POLES.

Telephone companies have a right to erect their poles in the highway, subject to the reasonable regulation of the highway commissioners; hence the presence of a telephone pole along the side of a highway is not an obstruction constituting a nuisance per se.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 417, 418.]

2. SAME—DUTY OF HIGHWAY COMMISSIONERS.

Highway commissioners are merely required to use reasonable care to see that the highways are reasonably safe for travel; and the test of their duty is whether men of average intelligence and precaution would have considered that the situation was one of danger to a traveler using ordinary care under the circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 480.]

3. SAME—ACTIONS FOR INJURY—SUFFICIENCY OF EVIDENCE.

In an action against a town for injuries received on a rural highway, it appeared that the railing of a bridge which crossed a creek curved out at the end, and extended some distance between the road and the creek. Two telegraph poles were placed at the roadside about 3 feet from the railing, about 13 and 17 feet, respectively, from the bridge abutment, and in a direct line with the railing on the bridge. They were set well away from the highway as used, and about 12 to 20 inches inside the grass plat at the side of the traveled portion. The road narrowed as it approached the bridge; but there was 19 feet of clear space between the bridge rail-

ing and the nearest rail of a street railroad at the opposite side. When plaintiff approached the bridge, at about 11 o'clock one evening during a thunder storm, he saw an automobile approaching, pulled his horse to the side of the highway, and collided with the telephone poles, thus causing the injury complained of. *Held*, that the accident was not caused by any actionable negligence of the highway commissioners, and plaintiff could not recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 527, 528.]

Appeal from Trial Term.

Action by William Irving Scofield against the town of Poughkeepsie. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Argued before WOODWARD, JENKS, RICH, MILLER, and GAYNOR, JJ.

Allison Butts, for appellant.

Frank B. Lown, for respondent.

WOODWARD, J. The plaintiff alleges as his cause of action that he was injured in or near the Casper Creek Bridge, on the New York and Albany Post Road, in the town of Poughkeepsie, on the 15th day of July, 1904, while driving south from Poughkeepsie; such injuries being caused by the defective and narrow condition of the highway and bridge in such place, and the unsafe, negligent, and improper manner in which the said highway was permitted to be, remain, and exist, and the narrowness of its position in that location, caused by obstructions allowed to be and remain in the highway and bridge, which defective condition of the highway and bridge was caused by the neglect of the commissioners of highway of said town, and their neglect to properly care for the same and to remove obstructions therefrom as required by law. The evidence in support of these allegations shows that the New York and Albany Post Road runs through a woodland at the point where Casper Creek crosses the same, and the location of the accident here involved; that there is a street surface railroad running along one side of this highway; that the creek runs partially parallel with the roadway near the bridge; and that pipe railings have been erected on either side of the bridge out for a considerable distance along the margin of the creek and the low land adjacent to the stream. At the bridge proper the highway is considerably narrowed down, though it is in evidence that at the narrowest place, and at the point of the accident there is a clear driveway of something over 19 feet from the nearest rail of the street railroad; such driveway being clearly defined by a grass plat running between the railing above described and the driveway as worked and held out to the public for use. Two telephone companies, duly organized and acting under the laws of this state, had erected telephone poles at a distance of about 3 feet from the guard rail, and at distances of 13 and 17 feet, respectively, from the northerly abutment of the bridge; these poles being almost exactly in line with the guard rail or pole at the end of the bridge opposite to the street surface railroad, so that a man driving in the direction of Poughkeepsie and safely crossing the bridge, and

straight ahead, would not come in contact with these poles, and there was a clear space of more than 19 feet between them and the railroad on the opposite side of the way. The plaintiff was driving from Poughkeepsie at about 11 o'clock in the evening. It was raining, with thunder and lightning, and a trolley car had stopped on the bridge to take down its trolley on account of the storm. As the plaintiff approached the bridge in this storm, he saw the lights of an automobile approaching him from the south, or in the opposite direction from which he was going. The automobile appeared to be bearing down upon him, and he pulled his horse to the side of the highway, as he says, to avoid contact with the machine, and his wagon collided with one of these telephone poles, throwing him out, and producing the injuries for which he seeks damages. There is some evidence that he actually collided with the automobile, but we accept the view which the jury must have taken of the evidence, and assume the facts to be as stated above. The question is presented whether the highway commissioners were guilty of negligence in permitting these telephone poles to remain in the highway in the place in which the companies had erected them under their charter from the state.

The telephone companies unquestionably had a right to erect their poles in the highway, subject to the reasonable regulations of the highway commissioners; so the obstructions were not unlawful in the sense that would constitute them a nuisance from the mere fact that they were in the highway. The evidence shows clearly that originally these poles were set in the grass plat at the side of the traveled way from 1 foot to 20 inches from the traveled portion; that subsequently a rural free delivery box was placed upon one of these poles, and that the delivery man, in driving up to deposit mail, had worn the grass away from in front of these particular poles, but that the grass plat, defining the driveway, was not otherwise disturbed. The plaintiff had driven over this way for 19 years and presumptively knew all about it; and, the accident having occurred in a thunder storm, the question of the appearances at that exact spot are not very material, except as going to show the situation as it must have appeared to the highway commissioners in the discharge of their duties. Was it negligent for the commissioners not to have anticipated this accident, and to have guarded against it by compelling the companies to remove these poles? If they were, then there is scarcely a highway commissioner in the state who is not liable for like accidents, for similar situations are to be found along almost every rural highway in the country. The poles were set well away from the highway as used. They were in the highway as it approached a bridge, well known to be narrower than the general way. They were in line with the guard rail as it passed along the end of the bridge. They were as conspicuous as any sign post or warning of their presence could well have been, and certainly as to one who was familiar with the situation these poles would not have suggested a greater danger than was to be anticipated from the abrupt angle of the guard rail as it turned in toward the narrow portion of the highway over this bridge. If the accident had occurred exactly at the bridge, and the plaintiff had collided with the angle of the guard rail, it could certainly not have been held that the highway commis-

sioners were guilty of negligence in erecting such a railing, where they had left a perfectly clear way of over 19 feet in a country road; and these telephone poles, erected by corporations duly authorized to use such highways for the purpose, did not, we think, present substantially more of an obstruction to the highway than was presented by this narrowing up of the bridge. It seems to us that, if this situation had been viewed before the accident by men of average intelligence and caution, it would not have occurred to them that the situation was one of danger to the traveler using ordinary care in driving along a rural road, and this is the test of the duty of the highway commissioners. They were not bound to anticipate that the plaintiff or others would meet a reckless automobilist on a dark and stormy night, and that they would be crowded out of the beaten path. All that they were required to do was to use reasonable care to see that the highways were reasonably safe for travel, and no one would question that this highway was reasonably safe if not told that this accident had happened, and that the plaintiff had suffered injuries. This is not the place for citing authorities. It simply requires the application of the true rule of negligence; and tested by this rule there was no question here for the jury, because, taking the plaintiff's own version, the facts did not constitute actionable negligence as against the highway commissioners. If the telephone poles had not been where they were, it is quite as likely that the plaintiff would have been run against the bridge railing, only 17 feet further along in the direction in which he was traveling, and the proximate cause of the accident was the automobile running the plaintiff out of his course, and not the negligence of the highway commissioners in not anticipating that this might occur.

The judgment and order appealed from should be reversed.

Judgment and order reversed, and new trial granted; costs to abide the event. All concur.

GILMAN et al. v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Term. December 20, 1907.)

1. STREET RAILROADS—COLLISION WITH VEHICLE—RIGHT OF WAY.

A driver on a street occupied by street car tracks does not have an equal right of way with the street car company, except at street intersections, on that portion of the street occupied by the tracks.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 193.]

2. SAME—ACTIONS—EVIDENCE.

In an action for injuries caused by a collision between plaintiffs' wagon and a street car, evidence held insufficient to show freedom from contributory negligence.

Appeal from Municipal Court, Borough of Manhattan, Thirteenth District.

Action by Kalman Gilman and another against the New York City Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

William E. Weaver, for appellant.

Isidor L. Daniels, for respondents.

PER CURIAM. One of the plaintiffs, Goldenberg, was driving a wagon belonging to plaintiffs, who were partners. Both plaintiffs were in the wagon. They entered Third avenue at 106th street, and drove south on the westerly side of Third avenue until near 101st street. Goldenberg says:

"We [plaintiffs] were on a wagon drawn by one horse, and on the way down we wanted to stop at a customer's at 101st street, and I took the lines and drove the horse toward the side street. I heard a rush as of a car behind me, and I looked around and saw that the car was 50 or 60 feet back of me. I started to drive the horse clean out of the way, when the car came with a great rush behind me, and struck the wagon with such force as to throw me off the wagon. * * * The car struck the wagon with such force as to cause the car to go backwards. * * * I did not hear any signal of the approach of the car."

The wagon was a covered one. On cross-examination he testifies thus:

"Q. When you reached 101st street, at that corner, you drove right across the track without doing anything? A. I looked around first, and saw that the car was 50 or 60 feet away from me, and then I started to cross. Q. When you reached the crossing on the north side of 101st street, leading from the west of the avenue to the east side of the avenue, did you attempt to cross the track then in a diagonal direction? A. No; I did not. I first looked around, and then I started to cross. I was at the crossing, in the middle of the street, on the right-hand side, next to the curb. The first time I looked back for the car was when I had reached 101st street. Before I went to turn around, I looked at the car, and I thought it was about 50 or 60 feet away. I looked before I turned the horse on the track. Q. Now, when you looked, how far west of that south-bound track was your wagon, when you looked at the car? A. Twenty feet. Q. And at the time you looked the car was 50 feet away? A. Yes, sir; the car was moving. I can't say whether it was going very fast or not. Q. And that was the only time you saw the car, wasn't it? A. Yes."

It therefore appears that plaintiff drove 20 feet while the car was coming 50 feet, and that plaintiff looked at the car only once, and that was when he was 20 feet from the track and the car 50 feet to the north. The car hit the wagon behind the axle. His partner testified that they drove across the street in a "slanting direction." He also testifies thus:

"Q. Now, when you turned to cross 101st street, that was the first time you saw the car, wasn't it? A. That was the first time we looked at the car. We were looking after the car. Q. And your horse was right on the track at that time? A. It was over the track at that time."

This testimony would seem to indicate that plaintiffs did not look for the car until they were actually crossing the track. This plaintiff, Gilman, also testifies that their place of destination was on the east side of Third avenue, "two stores away from the corner" of 101st street, and that, while crossing "in a slanting way," the wagon was struck by the car behind the axle, and shoved into a pillar of the elevated railroad structure which was at the south side of 101st street. The motor-

man testifies that his car was going at the rate of 4 or 5 miles an hour, and that he required about 20 to 25 feet in which to stop it; that he sounded his gong and tried to stop the car, but plaintiffs continued in a diagonal direction, and the car struck the wagon in the center between the two wheels. One Wolff, a passenger sitting on the front seat of the car, which was an open one, swears that, when the car got within 12 or 15 feet of the wagon, the plaintiff turned his horse across the track; that the motorman sounded his gong and applied his brakes, but before the car stopped the collision had occurred. The conductor gives the same version as the motorman. The defendant's inspector swears that Goldenberg stated to him that he did not see the car and turned on the track. This is denied by Goldenberg.

It may be observed that, inasmuch as the vehicle was proceeding along the same street as the car, and the attempt to cross to the other side was made before reaching the intersection of 101st street and Third avenue, the plaintiffs did not acquire an equal right of way. *Schmedding v. N. Y. & Q. C. Ry. Co.*, 85 App. Div. 24, 82 N. Y. Supp. 1034. It does not seem to us that the plaintiffs have sufficiently sustained the burden imposed upon them of proving by a fair preponderance of evidence their freedom from contributory negligence. The testimony of the two plaintiffs is somewhat conflicting; but, at best, it shows that they undertook to go 20 feet while the car was going 50 feet, and that they looked only once for the car. The driver says he looked when the car was 50 feet up the track and the wagon 20 feet from the track, while the other plaintiff swears that the first time "we"—i. e., the two plaintiffs—looked was when they turned to cross 101st street and when the horse "was over the track."

Defendant's counsel claims that the proofs as to damage are defective, but we will not discuss that branch of the case, as we deem a new trial necessary for the reason above stated.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

(56 Misc. Rep. 643.)

STERN v. ROSENTHAL et al.

(Supreme Court, Appellate Term. December 20, 1907.)

BAILMENT—GOODS DESTROYED—BAILEE'S RIGHT TO COMPENSATION.

Though generally, where, while work is doing on a thing belonging to an employer, the thing perishes by internal defect or inevitable accident without the workman's fault, he is entitled to compensation for the work actually done, where plaintiff worked on defendants' material under an agreement that defendants would pay therefor only after delivery in good order at their store, he may not recover for work done on material destroyed on his premises, though he is blameless for the loss.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bailment, § 77.]

Appeal from City Court of New York, Trial Term.

Action by Adolph Stern against Samuel Rosenthal and others. From a judgment for plaintiff, defendants appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Marks & Freyer, for appellants.

Nathan Waxman, for respondent.

McCALL, J. The plaintiff (respondent) in this action was a contracting tailor, who had been receiving material from and doing work for the defendants (appellants) for a long time prior to the beginning of this action. The contractual relations between the parties are expressed in documentary proof submitted and found in certain slips attached to the printed record. A part of said contract, read and thoroughly understood by the plaintiff herein, in so far as the purport of the English employed is concerned, states as follows: "We agree to pay for work only after delivery in good order to our store"—and all there is to this case will turn upon the question of whether or not, by thus specially contracting, there is a different obligation imported, and which differentiates this case on the facts presented from the well-settled rule which provides that if, while work is doing on a thing belonging to an employer, the thing perishes by internal defect or inevitable accident without any fault of the workman, the latter is entitled to compensation to the extent of labor actually performed, under the application of the old maxim: "The thing is lost to the owner."

It must be borne in mind that the defendants sent all their goods involved in this litigation to the plaintiff's workshop. It was the latter's place of business, over which defendants exercised no control or power whatsoever. Plaintiff was not working on defendants' material in defendants' workshop when the fire ensued, but had the custody and absolute control of same in his own premises and in the place where the fire caused the destruction. Of course, the only intention of emphasizing this fact is to mark the distinction in the case at bar from the cases submitted, wherein the plaintiff in most instances did the work on the material for which they recovered in the premises of the owner of the material. Here the goods were taken away from the employers' premises, and before the plaintiff could recover any compensation for the services to be rendered he solemnly contracted that he would return same to the defendants' store in good order. This he failed to do. True it is demonstrated without fault of his, but because of a destructive fire, for which he is to be held blameless, which prevented his so doing; but in our judgment that does not avail him as an excuse, for under the terms of his express contract he imports an obligation that takes the case away from the ordinary rule, stated supra, and unforeseen contingencies, no matter of what nature, cannot be accepted as a reason for failure to comply or perform, yet warrant the receipt of his compensation. *Buffalo & Lancaster Land Co. v. Bellevue Land Improvement Co.*, 165 N. Y. 247, 59 N. E. 5, 51 L. R. A. 951, and *Ward v. Hudson River Building Co.*, 125 N. Y. 230, 26 N. E. 256.

Schouler, in his work on Bailments (section 111, p. 118), seems to suggest the most favorable and certainly the just doctrine to apply in cases which the circumstances of this one reveals, when he says,

treating of the old maxim, "Res perit domino," and that is: Where a different obligation is imported by special contract, and a calamity ensues for which neither was to blame, preventing performance, then let the thing perish to the master and the services to the workman. The recovery had in this judgment, resting as it does upon the theory that, notwithstanding the obligation of the plaintiff's contract "to deliver in good order at the store of the plaintiffs" and his failure to comply therewith, prevented as it was by a fire for which he was not at fault, he was excused thereby and non constat entitled to compensation, cannot be sustained, and must be reversed.

Judgment reversed, and new trial ordered, with costs to appellants to abide the event. All concur.

SAMIELOFF v. NEW YORK & Q. C. RY. CO.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

1. MALICIOUS PROSECUTION—ACTIONS—INSTRUCTIONS.

An instruction, in an action against a street railway company for false arrest and malicious prosecution, that because of what plaintiff's counsel urged on the question of exemplary damages the court charged that the law only makes a master responsible for the malicious act of a servant when the master actually authorized it, had knowledge of it, or ratified it, and that all of these elements must be proven, left to the jury the question of exemplary damages.

2. MASTER AND SERVANT—INJURIES TO THIRD PERSONS—EXEMPLARY DAMAGES.

Exemplary damages cannot be recovered against a master for the malicious act of a servant, unless the master authorized the act, had knowledge of it, or ratified it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1273.]

3. MALICIOUS PROSECUTION—INSTRUCTIONS—DAMAGES.

Where, in an action against a street railway company for false arrest and malicious prosecution by one against whom complaint was made by a conductor, there was no evidence to sustain a finding of malice on the part of the company, it was error to leave to the jury the question of exemplary damages.

4. APPEAL—REVIEW—QUESTIONS OF FACT—WEIGHT OF EVIDENCE.

A verdict against the weight of evidence will not be permitted to stand on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3938-3942.]

Appeal from Trial Term.

Action by Joseph Samieloff against the New York & Queens County Railway Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and McLAUGHLIN, INGraham, CLARKE, and HOUGHTON, JJ.

Van Vechten Veeder (I. R. Oeland, of counsel), for appellant.

Abraham H. Sarasohn, for respondent

CLARKE, J. This is an action to recover damages for false arrest and malicious prosecution. The plaintiff testified that he was a pas-

senger on a car of the defendant, and was making a trip to the cemetery to visit his wife's grave; that, as the car upon which he was riding approached the cemetery, he saw a disturbance or fight around a preceding car between the conductor and the motorman of that car and a number of passengers; that he took no part in the fracas, but protested to the motorman upon his car, and was told to "shut up," with an opprobrious epithet, "or he would get his face punched in"; that on the way back to the terminus at the Thirty-Fourth Street ferry he again protested and received a similar reply; that he then told the motorman, "You so fresh to me, when the car stops in Thirty-Fourth street, near to the office to the ferry, then I be a witness. I go into the office, and I tell everything I saw what you do with these people"; that, when he got off the car at the ferry, he was arrested upon the complaint of the conductor of the car around which the fight had raged, whose head was cut and bleeding; that he was locked up overnight, held for the grand jury, was indicted, tried by a petit jury, and acquitted. The charge in that proceeding was that he had assaulted the conductor of the prior car with a stone. He produced no witnesses in regard to the occurrence at the cemetery. The conductor upon whose complaint the plaintiff was arrested is dead, but the company produced two employes and four apparently disinterested witnesses who were passengers, the substance of whose testimony was that the plaintiff took part in the fight, threw a stone at the conductor, and was about to throw another when he was stopped by the conductor of his own car, and that he had a wrestle and struggle with that conductor and tore his coat. The jury found a verdict for the plaintiff, and assessed the damages at \$2,000.

In charging the jury the learned court said:

"Because of what plaintiff's counsel urged on the question of exemplary or punitive damages, I charge you that unless the evidence satisfies you and persuades you, and not upon speculation or conjecture, that the defendant company had knowledge of any malicious act of the conductor, in the event that you should find that the conductor personally acted maliciously and with knowledge of the defendant company, even then there can be no recovery by way of exemplary damages or punitive damages against the defendant company, because of the individual malice of the conductor, even though you find that the act was within the conductor's duty. The law only charges and makes a master responsible for the individual malicious act of a servant when the master actually authorized it, had knowledge of it, or affirmatively ratified it. All of these elements must be proven to your satisfaction by evidence, and not by speculation or conjecture, namely, that the defendant company authorized the individual malicious act, that the defendant company had knowledge of it, and, having knowledge of a malicious act of the conductor, that it expressly ratified it."

Defendant excepted to the charge of the court, leaving to the jury all the question of exemplary damages. The respondent admits that the question of exemplary damages should not have been left to the jury. He says in his brief:

"This exception is without merit, because as matter of fact the court did not leave to the jury any question of exemplary damages. The court simply stated an abstract question of law favorable to the defendant, and a general exception to the charge is without purpose."

But from what the court said it is quite evident that plaintiff's counsel had very earnestly presented the question of exemplary damages

and claimed to recover therefor in summing up the case to the jury; and it is quite evident from the exception and the court's reply to the exception that it was leaving to the jury the question of exemplary damages. There is no evidence in the case, if the rules laid down by the trial court are correct, to sustain the finding of malice on the part of the company such as to charge them with exemplary damages.

In *Craven v. Bloomingdale*, 171 N. Y. 439, 64 N. E. 169, it was held that:

"A master cannot be held liable for punitive or vindictive damages by reason of wanton, oppressive, or malicious acts of the servant, unless there is proof to implicate him and make him particeps criminis of his servant's acts; and in an action brought against a master for an illegal arrest caused by his servant, it is reversible error for the trial court, after instructing the jury as to the law of compensatory damages, to instruct them that they had also the power, if they thought proper, to award punitive or vindictive damages in addition to the amount fixed by them for compensatory damages, without further instructing them that such damages should not be awarded unless there was proof showing that the acts of the servant were wanton, oppressive, or malicious, and that the master was implicated with the servant therein, or had either expressly or impliedly authorized or ratified them."

The learned court correctly charged the law, but, as there was no evidence upon which the jury could have charged the alleged malicious acts of the servant upon the master, when the court's attention was called by the exception to the fact that he had left to the jury the question of exemplary damages, he should have instructed them that compensatory damages were all that they could find. The considerable space given in the charge to the discussion of this question which was not properly before the jury had a tendency to confuse the issue, and was harmful to the defendant.

The verdict is against the weight of the evidence, and therefore the judgment and order should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

INGRAHAM, J. (concurring). I concur with Mr. Justice CLARKE. I also think that upon the evidence plaintiff failed to show a want of probable cause for the charge made against him. The question of probable cause is a question of law for the court and not for the jury, and upon the facts that appeared without substantial contradiction—assuming that the defendant was responsible for the plaintiff's arrest—it had probable cause to charge the plaintiff with being concerned in the assault upon the conductor of the first car.

I do not think that the defendant was liable for the act of the conductor of the first car in charging the plaintiff with an assault. The alleged assault occurred in the public street after the conductor had left his car, and there was nothing to show that the conductor was at the time of the assault or when he made the charge acting in the course of his employment, or in the performance of any duty imposed upon him by the defendant. The mere fact that the counsel for the conductor before the magistrate was also counsel for the railroad company does not connect the railroad company with the prosecution so as to make it liable therefor.

On both these points I think the plaintiff failed to prove facts sufficient to sustain his action, and that the complaint should have been dismissed.

HOUGHTON, J., concurs.

SHAW v. DUNN.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

1. ATTACHMENT—CLAIMS OF THIRD PARTY—FINDINGS OF SHERIFF'S JURY.

There is no provision of law allowing a review by motion or otherwise of the action of a sheriff's jury impaneled to try the validity of claim of a third person to property attached.

2. SAME—BOND BY PLAINTIFF.

Under Code Civ. Proc. §§ 657, 658, authorizing a jury to try the claim of a third person to property attached, and permitting the sheriff to deliver the property to the claimant unless an indemnifying undertaking is given, plaintiff in attachment can, by giving a satisfactory undertaking, recover the property, though he cannot review the finding of the jury.

Appeal from Superior Court, New York County.

Action by James G. Shaw against B. Sherwood Dunn. Appeal by defendant from a portion of an order. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

John Henry Hammond, for appellant.

HOUGHTON, J. The plaintiff obtained an attachment and delivered the same to the sheriff of New York county, who levied upon certain railroad bonds alleged to belong to the defendant. A third party made claim to the bonds, and thereupon the sheriff impaneled a jury to try the validity of such claim. By their verdict the jury found that the bonds belonged to the claimant at the time of the levy, and fixed their value. The plaintiff claimed that the inquisition was improperly conducted, and moved at Special Term to set aside the verdict of the jury, and to enjoin the sheriff from releasing the bonds from the levy and from delivering them to the claimant. An order was made restraining the sheriff from such delivery on condition that the plaintiff execute and deliver to him a surety company indemnifying undertaking in the sum of \$45,250.

The motion should have been denied. There is no provision of law allowing a review, by motion or otherwise, of the action of a sheriff's jury impaneled to try the validity of a claim of a third person to property attached. *Cohen v. Climax Cycle Co.*, 19 App. Div. 158, 46 N. Y. Supp. 4. Such a jury is permitted by sections 657 and 658 of the Code of Civil Procedure to be impaneled to try such a claim for the purpose of enabling the sheriff to demand from the plaintiff indemnity against the claim of a third party. Unless such indemnifying undertaking be given, the sheriff is permitted to deliver the property to the claimant; and, if it be given, he must retain the property

under his levy. Section 658 prescribes the kind of undertaking, the kind of sureties, and how they shall justify, and before whom and what notice shall be given. The plaintiff could have given an undertaking with two sufficient sureties who satisfactorily justified, and it was improper to confine him to an expensive surety company bond, even if the order was otherwise proper. The proceeding is plainly stated in the sections of the Code referred to, and complication has arisen from the plaintiff mistaking his right to move to set aside the verdict of the sheriff's jury. The better way to clear up the matter is to reverse the order, and thus remit the plaintiff to the practice prescribed by the Code.

The order should be reversed, and the motion denied, without costs. All concur.

(56 Misc. Rep. 621.)

MEYER v. BARTELS.

(Supreme Court, Appellate Term. December 20, 1907.)

1. BANKRUPTCY—RIGHTS OF BANKRUPT—CONCLUSIVENESS AND EFFECT OF DISCHARGE.

A discharge in bankruptcy is an absolute bar to all demands that were provable in the proceedings, and the burden rests upon a party attacking it to show why it is not effectual.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 772.]

2. SAME—NEW PROMISE TO PAY DEBT DISCHARGED.

Under the direct provisions of Personal Property Law, Laws 1897, p. 510, c. 417, art. 2, § 21, a new promise to pay a debt discharged in bankruptcy must be in writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 880.]

3. SAME—PARTIAL PAYMENT OF DISCHARGED DEBT.

A partial payment on a debt which has been discharged in bankruptcy is not sufficient to renew the original indebtedness or create a new obligation of the debtor to pay the balance due.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 854.]

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Diedrich A. Meyer against John Bartels. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Gustave Frey, for appellant.

Abraham J. Bernstein, for respondent.

McCALL, J. In 1902 the defendant was discharged in bankruptcy proceeding, the debt, the payment of which it is by this judgment sought to enforce, was created antecedent to that date, and the plaintiff concedes a discharge in bankruptcy. The trial proceeded upon the theory of a revival of the debt under a new promise and partial payment on account. The only evidence to support this contention upon the part of the plaintiff is shown in an alleged conversation with the defendant, which is said to have taken place in January of this year, and its purport was that plaintiff said he was hard up and would

like defendant to pay the debt—if not in full, then in part; that defendant gave plaintiff \$1, saying: "I will pay you balance later. I am short myself, and you will have to wait." This was practically all the proof offered, and at the end of the plaintiff's proof defendant made a motion to dismiss, and attempted to state the grounds, when the court, interrupting, denied the motion. The defendant, being put to his proof, denied the asserted payment and promise to pay balance, and, with the evidence of a man named Koster, who, he says, was with plaintiff at the time of this visit to defendant and saw the latter hand him a bill, this constitutes the entire proof, and at its close the motion to dismiss was again made and again denied.

The discharge in bankruptcy was an absolute bar to all demands that were provable in the proceedings, and the burden rests upon the party attacking a discharge to show some cause why it is not effectual. *Stevens v. King*, 16 App. Div. 377, 44 N. Y. Supp. 893. On the theory of partial payment and new promise, the statute of frauds specifically provides that such promise must be in writing. See section 21, art. 2, Personal Property Law (Laws 1897, p. 510, c. 417; *Birdseye's Code & General Laws* [3d Ed.] p. 2634). And *Wheeler v. Simmons*, 60 Hun, 404, 15 N. Y. Supp. 462, demonstrates that partial payment on account of a debt which has been discharged in bankruptcy is not sufficient to renew the original indebtedness or create a new obligation on the part of a debtor to pay the balance due. The motion to dismiss should, therefore, have been granted, and the judgment obtained must be reversed; and inasmuch as, from the conclusion we have reached and upon which our reversal is based, it would be useless to have another trial, the complaint is dismissed, with costs.

Judgment reversed, and complaint dismissed, with costs. All concur.

ETTLINGER v. TRUSTEES OF SAILORS' SNUG HARBOR OF CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

JURY—RIGHT TO TRIAL BY JURY—EQUITABLE CAUSE OF ACTION—COUNTERCLAIM—STATUTORY PROVISIONS.

Code Civ. Proc. § 968, provides that in ejectment an issue of fact must be tried by jury. Section 970 provides that, where a party is entitled to a jury trial in an action not specified in section 968, he may, upon notice, apply to have the issues of fact stated for trial accordingly, and rule 81 of the general rules of practice requires that such application shall be made within 10 days after issue joined. Code Civ. Proc. § 971, provides that, where a party is not entitled as of right to a trial by jury, the court may, in its discretion, upon application, direct that issues of fact be tried by jury. Section 974 provides that, where defendant demands an affirmative judgment on a counterclaim, issues of fact shall be tried as though they arose in an action brought by defendant against plaintiff. Plaintiff sued to set aside an umpire's award with reference to the renewal of his lease on defendant's property. Defendant filed a counterclaim, asking possession of the premises and damages for the wrongful withholding thereof. After the issues were joined, plaintiff served notice of trial at Special Term, and put the case on the calendar. More than three months thereafter he served notice of motion for an order settling issues for trial by jury. Two of such issues arose upon

the counterclaim. *Held*, that plaintiff had lost his right to demand a jury trial as of right; and it was not an abuse of discretion to deny the motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 81, Jury, § 183.]

Appeal from Special Term.

Action by Samuel Ettlinger, as administrator with the will annexed of Netty Ettlinger, deceased, against trustees of the Sailors' Snug Harbor of the City of New York. From an order denying plaintiff's motion to settle certain issues for trial by jury, plaintiff appeals. Affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Milton Mayer, for appellant.

Hawkins & Delafield (Lewis Delafield, of counsel, and Alfred Gregory, on the brief), for respondent.

CLARKE, J. The complaint alleges that on or about the 1st day of May, 1886, the defendant leased to one Lincoln a certain lot of land in the city of New York for the term of 21 years; that thereafter said Lincoln duly assigned said lease to plaintiff's decedent; that in said lease it was provided that, at the expiration of the term granted, if the said parties should agree upon a renewal thereof for the further term of 21 years, and should, by mutual consent, fix upon the annual ground rent to be reserved, the defendant would execute a new lease for the term of 21 years at the rent agreed upon, but if at the expiration of the first term the parties should not agree upon a renewal of the lease, or upon the amount of rent, each party should choose a disinterested person who should appraise the land demised, considering it as a vacant lot at its full and fair worth at private sale, and appraise the building on said lot at its then actual worth without reference to the ground on which it stands, and, in case said appraisers should differ in their valuation and appraisal, they should choose an umpire, whose decision, under oath, should be final; that plaintiff and defendant, being unable to agree upon the amount of the rent to be reserved on a renewal, entered into an agreement in writing under which they chose appraisers as provided for; that the said arbitrators could not and did not agree in their valuation, either of said lot or of the building thereon, and that thereupon the said arbitrators appointed an umpire; that on or about the 16th day of May, 1907, the said umpire announced that he had appraised the lot in question at \$40,000 and the building thereon at \$6,240; that the said award of said umpire was not made in a fair and impartial manner; that said umpire acted in an unfair, improper, and partial manner in certain particulars set forth, and valued the said lot at a grossly exorbitant figure, wherefore judgment was demanded that the award be vacated and declared to be null and void, and that plaintiff have judgment for the costs and disbursements of the action, and for such other and further relief as to the court may seem just.

The answer sets up the facts in regard to the making of the lease and the determination of the arbitrators and the report of the umpire,

and denies the allegations of misconduct and unfairness on the part of the umpire. The answer by way of counterclaim, after setting up the facts in regard to the lease, its terms, as set up in the complaint, and the award, further alleges that the lease provided that the defendant should have the full liberty and choice either to pay to the lessee the value of said building so determined, or to grant a renewal of the lease for the term of 21 years from and after the expiration of the term granted, at an annual ground rent at 5 per cent. on the valuation of said lot so determined; that in case the lessor, at the expiration of the term granted by the lease, should elect and choose to pay unto the lessee the value of the building to be ascertained as aforesaid, and should actually make such payment or tender of the same, the lessee should then deliver up the premises demised to the lessor without fraud or delay; that the defendant duly elected to pay to the plaintiff the amount awarded as the value of the building, and duly tendered to the plaintiff the amount awarded as aforesaid, and demanded that possession of said demised premises be surrendered to it, but that the plaintiff refused to accept the amount so tendered, and refused to surrender possession, and has since wrongfully withheld possession thereof from the defendant, and prayed that the complaint be dismissed, and that a judgment be made awarding to it the possession of the premises, and that it recover from the plaintiff for the use and occupation of said premises, or damages for the withholding thereof since the 1st day of May, 1907.

The reply repeats the allegations of the complaint and demands judgment for the relief prayed for in the complaint. Issue was joined on the 20th day of June, 1907, and thereafter, on the 27th day of August, 1907, plaintiff served a notice of trial upon the defendant, and on the 28th day of August said case was duly placed upon the calendar of the Special Term, Part 3, of this court. On October 2d plaintiff served notice of motion returnable at Part 1, Special Term, on the 14th day of October, for an order settling the issues for trial by jury. Three of the proposed issues were those arising on his equitable cause of action and two upon the counterclaim. Among said issues was:

"Fourth. Was the defendant entitled to the possession of said lot and building on the 31st day of May, 1907, or at any time subsequent thereto, and has the plaintiff wrongfully withheld from the defendant possession thereof?"

This motion was denied; and from the order entered thereon the plaintiff appeals.

The plaintiff claims that he was entitled to the relief prayed on the ground that the defendant has set up in counterclaim to his equitable cause of action an action in ejectment which is an action at law, and for the trial of the issues raised in said action in ejectment he is entitled as of right to a jury.

The plaintiff's complaint sets up a purely equitable cause of action to set aside an award for the improper conduct of the umpire. If the defendant had been content to meet the issues by the denials in its answer, it is evident that the case would have been triable at Special Term, and neither party would have had the right to a jury trial. If the plaintiff had not commenced his action, and the defendant had

commenced suit upon the cause of action set forth in its counterclaim, the present plaintiff would have been at liberty in answer thereto to have set up the matters here pleaded by way of reply. In that case there would be no doubt of his right to a trial by a jury because the cause of action set up in the counterclaim is in ejectment. But the plaintiff did not wait to be sued. He commenced his equitable action, and he recognized and asserted its character as an equitable action by serving notice of trial for the Special Term, and causing the cause to be put upon the calendar thereof.

The following are the provisions of the statute and rules invoked: Code Civ. Proc. § 968:

"In each of the following actions an issue of fact must be tried by a jury unless a jury trial is waived or a reference is directed. * * * (2) An action in ejectment. * * *"

Section 970:

"Where a party is entitled by the Constitution, or by express provision of law, to a trial by a jury of one or more issues of fact in an action not specified in section 968 of this act, he may apply, upon notice, to the court for an order directing all the questions arising upon those issues to be distinctly and plainly stated for trial accordingly. * * *"

Section 971:

"In an action where a party is not entitled, as of right, to a trial by a jury, the court may, in its discretion, upon the application of either party, or without application, direct that one or more issues of fact arising upon the issues be tried by a jury and may cause questions to be distinctly and plainly stated for trial accordingly. * * *"

Section 974:

"Where the defendant interposes a counterclaim and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact arising thereupon is the same as if it arose in an action brought by the defendant against the plaintiff for the cause of action stated in the counterclaim and demanding the same judgment."

Rule 31 of the general rules of practice provides that:

"In cases where the trial of issues of fact is not provided for by the Code, if either party shall desire a trial by jury, such party shall within ten days after issue joined, give notice of the actual motion to be made upon the pleadings that the whole issue, or any specific question of fact contained therein, be tried by a jury. * * *"

In the cases which have considered these provisions, where a common-law action has been presented by a counterclaim, the demand for a jury trial has usually been made by the defendant who interjected the common-law cause of action. Here the defendant is content to try the issue raised by it in the forum selected by the plaintiff; and it is the plaintiff who, after ratifying his choice of the forum by notice of trial and note of issue, moves for a change and demands it as matter of right.

The controversy in this case, the cause of action set up in the complaint and in the counterclaim, is founded upon the same transaction, viz., the lease and the award by the umpire. The plaintiff asserts that that award is invalid, the defendant that it is valid, and upon the settlement of that question the appropriate remedy will follow. There is

in reality but one issue—the validity of the award. There could be no dispute about the terms of the lease, and there is none that an award was made, a tender, and a continuance in possession. In considering section 974 of the Code of Civil Procedure, Judge Danforth, in *Mackellar v. Rogers*, 109 N. Y. 468, 17 N. E. 351, said:

"The conditions upon which the right depends exist, * * * but that right is not absolute or unqualified. It is relative and limited, and, in the words of the heading of section 974, 'within' certain 'foregoing sections' only is 'a counterclaim to be deemed an action.' * * * It is to be conceded that the mode of trial of the issue tendered by his counterclaim might be the same if it had arisen in an action. But a counterclaim in an equity suit is not a case where a right to a jury trial existed at common law. *Chapman v. Robertson*, 6 Paige, 627, 81 Am. Dec. 264; *Jennings v. Webster*, 8 Paige, 503, 35 Am. Dec. 722. It is not secured by the Constitution. It is not to be had as of course, for the action is not within section 970 of the Code, the complaint demanding judgment other than for a sum of money. It is conferred by statute (section 974); and so is within section 970, which requires an application upon notice to the court for an order directing the questions arising upon the issues to be stated for trial."

That was a case in which the defendant was demanding a jury trial of the counterclaim interposed by him. The court proceeded:

"Moreover, the right given by section 974 attached when by reply the issue was joined upon the allegations of the answer. The subsequent step taken by the defendant in noticing the issues so joined for trial at a court of which a jury forms no part was inconsistent with any intent to take advantage of the right to a jury trial. That right could be waived, and by this notice the defendant must be held to have consented to a trial before the court without a jury."

In *Arnot v. Nevins*, 44 App. Div. 61, 60 N. Y. Supp. 401, the defendants interposed a counterclaim in an equitable action, and, after the case had been noticed for and put upon the Special Term calendar, defendants moved to frame issues for a jury trial. The motion was denied below on the ground that it was made too late. Mr. Justice Ingraham, after citing *Mackellar v. Rogers*, *supra*, and *Smith v. Fleischman*, 23 App. Div. 359, 48 N. Y. Supp. 324, and rule 31, *supra*, said:

"It would seem that this rule applied. The trial of the issues of fact in this action is not provided for in the Code. Provision is therein made for an application upon notice that the issues of fact arising out of the counterclaim may be tried by a jury where such trial would be allowed in a cause of action brought by the defendant against the plaintiff for a cause of action stated in the counterclaim; but to claim such a trial when such a counterclaim is interposed in an equitable action the motion must be made under section 970 of the Code, and such a motion under rule 31 must be made within 10 days after issue is joined. By not making the motion within 10 days the appellant lost the right to have the issues sent to a jury for trial."

It seems to me that those two cases furnish a complete answer to the appellant's contention. He chose his own forum in the first instance by commencing an equitable action. After the issues were joined, he served notice for trial at Special Term, and put the case on the calendar. He waited from the 20th of June until the 2d of October before making his motion. He had lost his right to demand a jury trial as of right; and, while as matter of discretion the court below might have

granted the motion, it was not an abuse of discretion, under the circumstances of this case, to deny it.

The order appealed from should therefore be affirmed, with \$10 costs and disbursements to the respondent. All concur.

In re GOODWIN'S ESTATE.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

1. WILLS—TESTAMENTARY TRUSTS—CONSTRUCTION—DISCRETION OF TRUSTEES.

Where a will directed testamentary trustees to apply from the share of each of testator's children so much as might be necessary for the support, maintenance, and education of such child, the trustees did not have discretion as to the amount to be allowed; but the question was one to be judicially determined by the surrogate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1605, 1606.]

2. SAME—RIGHTS OF CESTUIS QUE TRUST.

On a petition by the guardian of minor children for an allowance for their maintenance and education from their shares under the will of their father, evidence considered, and *held* to show that an allowance of \$2,000 per year each should be allowed.

Appeal from Order of Surrogate.

Judicial proceedings on the estate of John Goodwin, deceased. Appeal by the guardian of certain infant children of decedent from an order denying a motion to direct the executors and trustees under the will of decedent to pay to petitioner a certain sum per month for the support of each of the infants. Reversed, and application granted, with directions.

Argued before PATTERSON, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

John J. Lenehan, for appellant.

John T. Booth, for respondents.

INGRAHAM, J. There are three infant children, aged five, three, and one year, respectively. The testator died on April 12, 1906, and the petitioner, the mother of the children, was appointed their guardian by the surrogate. The estate consists of real and personal property of the value of about \$800,000. The share of each of the infants will amount to about \$125,000; the net income of such share being upwards of \$4,000 per year. The will of the testator gave \$5,000 to his wife, which he directed the executors to pay to her immediately after their qualifying as such for the immediate wants of herself and children, appointed his wife guardian of the persons of his children, appointed two executors and trustees, and gave to his said executors and trustees all the remainder of the estate after certain specific legacies in trust to divide the estate as follows: One share to consist of one-third of all his residuary estate to be paid to his wife, and the other two-thirds to be divided into as many shares as he should leave him surviving children. Until the division of his estate, he directs that the income be paid one-third to his widow for her sole use and ben-

efit and the balance of the income to be held in equal shares for the benefit of his children, and become part of the trust fund provided for each of them, "applying however from each of such shares so much as may be necessary for the support, maintenance and education of each of my children except my son Charles Laracy Goodwin, his support and maintenance being sufficiently provided for under the will of his mother." The residuary estate has not yet been partitioned, and the trustees have received as the net income of the estate for the year ending April 22, 1904, over \$4,000 belonging to each of the infants. The executors and trustees during the year ending April 22, 1907, paid to the petitioner, the mother of the infants, for their support and maintenance \$2,000 per year for the two older children and \$1,500 a year for the youngest child. The executors and trustees interposed an answer to the petition in which they state that they had offered to allow the petitioner the sum of \$1,500 a year for each of the said children for their support and maintenance, which sum they deem a suitable and proper amount for their support, and the executors and trustees respectfully submit the question as to the amount that should be applied for the maintenance and support of the said children to the court, and ask that an order be made fixing the amount of such allowance. Instead of acceding to this request, the learned surrogate denied the application.

It does not seem to me that this disposition of the matter was justified. The will does not give to the trustees discretion as to the amount to be allowed for the support and maintenance of the children; but directs that there shall be applied from each the income to be held for the children so much as may be necessary for their support, maintenance, and education. The question as to the amount that should be awarded for the support, maintenance, and education of the children was a question to be judicially determined by the surrogate. None of the facts stated in the affidavit and petition of the children's mother are disputed. It appeared that she had expended from May, 1906, to May, 1907, for the support of the three children the sum of \$5,622.79; that all three of the children are delicate, and their health requires constant care and many unusual expenditures; that the petitioner has been compelled to have a physician in almost daily attendance on the children with consultations of other physicians and a specialist; that she has sometimes required two trained nurses, for which she has paid over \$500; that the proportion of each child's household expenses is \$2,100 a year. Considering the condition of the children and the necessity of physicians and nurses it seems to me that the sum of \$2,000 per year for each child is not excessive. It is less than one-half their income. There is not the slightest suggestion that the mother of these children is not devoting herself solely to their welfare, or any fact from which it would appear that any of the money that has been paid to the petitioner has been applied in any way except for the proper support, maintenance, and welfare of the children.

I think, therefore, the order appealed from should be reversed, and the application granted, and the trustees be directed to pay to the petitioner the sum of \$2,000 per year from the income of each of these children until the final partition and division of the estate, with leave

to either party to apply to the surrogate to change this amount in case the present conditions should change, with \$10 costs and disbursements of this appeal to the petitioner, to be paid out of the accumulated income of these three infants. All concur.

(56 Misc. Rep. 406.)

BOENHARDT v. LOCH et al.

(Supreme Court, Special Term, New York County. November, 1907.)

1. CHARITIES—TRUSTS—ENFORCEMENT—DISTRIBUTION OF FUNDS.

Where a fund is in the hands of a committee appointed to accept donations for relief of sufferers in a certain steamboat disaster, its distribution, regardless of the exercise of good faith by such committee, will not be directed.

2. SAME—TERMINATION.

Where money was donated for the relief of sufferers in a certain disaster, if the money should prove more than sufficient for the purpose, the surplus would revert to the donors, if ascertainable; otherwise, to the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Charities, § 62.]

Action by Albin Boenhardt against Jacob W. Loch and others for an accounting by trustees. Complaint dismissed.

House, Grossman & Vorhaus (Louis J. Vorhaus and Charles Goldzier, of counsel), for plaintiff.

Decker, Allen & Storm (Charles A. Decker, of counsel), for defendant trustees.

Marks & Wielar, for defendant Attorney General.

MacLEAN, J. The plaintiff, in his own behalf and in behalf of all others similarly situated, alleged that on or about June 15, 1904, he was a passenger on the steamboat General Slocum, and received serious and permanent injuries in the disaster that overtook that boat; that the defendants, other than the Attorney General, as members of the "Ministers' Committee," so styled, received contributions "expressly made for the benefit of the sufferers of the said calamity and for the purpose of being distributed among persons who had sustained injury thereat"; that some of the moneys so contributed have been distributed for the benefit of such persons, among whom is the plaintiff; that a large amount of said contributions remains unexpended in the hands of the defendants, other than the Attorney General; that he has demanded a further share, but has been refused; and that the said committee has refused to make any distribution of the moneys so remaining, or "further to perform their duties as such committee, in violation of the trust imposed upon them, and retain the said fund, or the unexpended balance thereof, in their hands, in violation of such trust, and for their own use, benefit, and behalf"—and prays that it be decreed that the plaintiff and others injured as aforesaid are entitled to distributive shares of the funds in the hands of the committee, and that said committee be removed for neglect and be required to account for all moneys by them so received. It would seem, as stated in the

case of *Loch v. Mayer*, 50 Misc. Rep. 442, 444, 100 N. Y. Supp. 837, that:

"The donors gave the funds now in the possession of the plaintiffs (herein the defendants, 'Ministers' Committee') without reservation and without specific instructions, and merely upon the understanding that in the exercise of good faith and discretion the plaintiffs (herein the defendants, 'Ministers' Committee') should apply the donations to the relief of suffering incident to the Slocum disaster. The expression of this purpose, by oral and written declarations and by conduct, impressed upon the funds received by the plaintiffs (herein the defendants, 'Citizens' Committee') the character as a valid trust for the benefit of an unascertainable and definite class of beneficiaries."

Evidence of misfeasance or of malfeasance herein there is none. Therefore the removal of the committee and an accounting may not be decreed, even were this plaintiff entitled to maintain this action therefor. The claim of the plaintiff, suing for himself and others similarly situated, therefore reduces itself to a claim for distribution, regardless of the further exercise of good faith and discretion by the trustees in the matter of the relief of suffering incident to the Slocum disaster, of proceeds or funds donated for relief and not as a gift. If the funds may still be expended for such relief, it is the duty of the trustees, and not the province of this court, to act and to exercise discretion therein and thereto. If the moneys donated should prove more than sufficient for the purpose for which they were donated, it does not follow that the surplus belongs of right to the sufferers in or from said disaster; but it is to be held as a resulting trust in favor of the donors. If they are not ascertainable, such surplus, the legal estate of which is in the trustees, failing of ownership, would revert to the state, as it is unaffected by Laws 1893, p. 1748, c. 701, as amended by Laws 1901, p. 751, c. 291; the amendatory act reciting that "the Supreme Court shall have control over gifts, grants, bequests and devises in all cases provided for by section one of this act," and section 1 provides that "no gift, grant, bequest or devise to religious, educational, charitable or benevolent uses, which shall in other respects be valid under the laws of this state, shall or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder," which is not this case, as here the beneficiaries are persons within an ascertainable and defined class, and so not within the provisions of the act or of the application of the *cy-pres* doctrine thereunder, to which distribution under the present claim would seem to be tantamount. The complaint will therefore be dismissed, with costs.

Complaint dismissed, with costs.

(56 Misc. Rep. 378.)

SCHENCK v. EGBERT et al.

(Supreme Court, Trial Term, New York County. November, 1907.)

TENANCY IN COMMON—ADVERSE POSSESSION.

The owner of certain land died intestate in 1828, leaving her husband tenant by the curtesy and two children, a son and daughter, tenants in common of the remainder. In 1845 the life tenant executed and delivered to the son two deeds of the entire premises. The last was not recorded until 1903. The son entered into possession and received the rents prior

to 1860. The life tenant died in 1866, and the son continued in possession and collected the rents until his death in 1901. Thereafter his heirs continued in possession. *Held*, that the possession of the son, commencing on the death of the life tenant, as a tenant in common, had ripened into adverse possession as against his sister or her heirs, and amounted to an ouster of his co-tenant, and made his possession solely that of a separate and hostile owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, §§ 42-52.]

Action by Edward F. Schenck against Ida Egbert and others. Judgment for defendant.

Eugene V. Daly, for plaintiff.
Alexander Thain, for defendants.

BRADY, J. The plaintiff sues in ejectment to recover the immediate possession of one undivided sixth part of or interest in the plot of land, with the buildings and improvements thereon, situate in the city and county of New York, known by the street number 224 Division street. The premises were formerly known as No. 248 Division street. The complaint alleges that the defendants claim title to and the right to possession of said premises adversely to the plaintiff, and that the defendants are in possession of and withhold the same from the plaintiff unlawfully and without plaintiff's consent, and demands judgment that he is seised in fee of an undivided one-sixth part of the premises, and that he recover possession thereof with the sum of \$1,000 damages for the withholding possession thereof, together with the costs of this action. The defendant Egbert, in her answer, denies the rights and interests asserted by plaintiff, and by way of defense avers that for more than 20 years next before the commencement of this action she and her predecessors in interest were and have been in actual, physical, continued, and notorious possession of said premises, claiming title thereto in fee simple; the said claim being founded upon a written instrument conveying the title thereto in fee simple, exclusive of any other rights, etc. The action appeared regularly for trial in Trial Term, Part 11, of this court, on the 21st day of March, 1907, and after the submission of proof counsel for both sides stipulated upon the record in open court that the matter be submitted to the court for decision on the facts and on the law without a jury. Upon the admissions of counsel it appears that Mary Egbert died intestate in June, 1828, the owner in fee and in possession of the premises described in the complaint, leaving her surviving Abraham Egbert, her husband, and their two children, viz., Abraham William Egbert, a son, and Eliza Jane Egbert, a daughter. The premises consisted of a lot of land, with buildings and improvements thereon. Said daughter, Eliza Jane Egbert, thereafter married Edmund Crocheron, and died intestate in August, 1842, leaving her surviving her husband, Edmund Crocheron, and their son, Abraham W. Crocheron, her only heir at law. Said son, Abraham W. Crocheron, died in October, 1842, an infant, intestate, leaving him surviving his father, said Edmund Crocheron. Said father, Edmund Crocheron, remarried, and by his second wife had three children, and died intestate in April, 1870, leaving him surviving his said three children—Frederick,

a son; Edmund, a son; and Carrie, a daughter. His second wife, Ann Eliza Crocheron, died December 4, 1880. Said daughter, Carrie, married the plaintiff July 8, 1875, and died intestate June 18, 1879, leaving her surviving her husband, the plaintiff, and Harold C. Schenck, their son and only heir at law. Said son, Harold C. Schenck, died an infant, intestate July 26, 1879, leaving him surviving his father, the plaintiff, his only heir at law. Upon the death of Mary Egbert, therefore, her husband, Abraham Egbert, became entitled by the curtesy to a life estate in said premises, and subject to such life estate the fee descended to her said two children, Abraham William Egbert and Eliza Jane Egbert. The undivided one-half interest in remainder which descended to Eliza Jane Egbert (afterward Crocheron), unless conveyed by her in her lifetime, passed on her death to her son, Abraham W. Crocheron, and upon his death to his father, Edmund Crocheron, and upon the father's death (subject to the dower of the widow, Ann E. Crocheron, since deceased) to his three children, Edmund, Frederick, and Carrie, and the share of said Carrie therein, upon her death, passed to her son, Harold Schenck, and upon his death to his father, the plaintiff, who thus became seised of one equal undivided one-sixth of said premises.

Abraham Egbert, the husband of Mary Egbert, who, upon her death in 1828, became by curtesy a life tenant in the whole of said premises, died in 1866. Abraham William Egbert, his son, entered into possession of the whole of said premises prior to 1860, and remained in possession of the same up to the time of his death in 1902, and his title is now vested in the defendants. By deed dated July 14, 1845, recorded in the office of the register of the county of New York, in Liber 466 of Conveyances, page 141, July 24, 1845, put in evidence by defendant, Abraham Egbert, the life tenant, together with Emeline, his second wife, granted, conveyed, and confirmed to Abraham William Egbert, his son, the premises in question. This is in form a bargain and sale deed, and expresses a consideration of one dollar. It describes the premises conveyed as No. 248 Division street, the proper number at that time, but erroneously described the name of the owner of the land by which the same were bounded. The defendant further put in evidence a deed dated July 14, 1845, but not recorded until June 23, 1903, made by said Abraham Egbert and Emeline, his wife, to said Abraham William Egbert, which for the expressed consideration of \$1 granted, bargained, and sold the premises in question by a correct description. Both these deeds purported to convey the entire premises. Just when the grantee entered into possession of the premises does not appear; but Stephen B. Brooker, a witness called by the defendant, testified that from a period prior to the year 1860 he had collected the entire rents of the premises and paid them over to Abraham W. Egbert, the grantee in said deeds, up to the time of his death in 1901, and thereafter to his son, Lincoln Egbert, for about a year, and thereafter to the defendant Ida Egbert. The life tenancy of Abraham Egbert ended with his death in 1866, and from that date down to the present time the defendant Egbert and her predecessors in interest have been in possession of the entire premises, collected the entire rents,

made leases to tenants from time to time, and have never accounted to the plaintiff for any part thereof, and as appears by the evidence the plaintiff never knew that he had a possible claim to the property until a short time before the commencement of the action in 1904. If the deeds aforesaid are sufficient paper title upon which to base a claim of title to the whole premises hostile and adverse to the rights of every other person, the possession of the defendant and her predecessors under them was quite sufficient to defeat the plaintiff's claim.

The plaintiff contends, however, that by the deeds aforesaid Abraham Egbert, who, so far as the record showed, owned only a life interest, granted only what he owned, and vested in his son, Abraham W. Egbert, who was a remainderman in an undivided one-half in fee, only the grantor's life interest, and that the continued possession of Abraham W. Egbert after his father's death was as remainderman in the said one-half, and that such possession was not of itself evidence of a claim of title adverse or hostile to the rights of his co-tenants. Summarizing the evidence appearing either by admission of counsel or by the testimony of witnesses, we have the following facts, to wit: That Mary Egbert died intestate, seised in fee of the entire premises, in the year 1828, leaving her husband, Abraham Egbert, tenant by the curtesy, and his two children, Abraham William Egbert and Eliza Jane Egbert, as equal tenants in common in the remainder in fee; that Abraham Egbert, the life tenant, executed and delivered in 1845 to the son, a remainderman, two bargain and sale deeds of the entire premises; that said Abraham W. Egbert entered into possession of the premises and received the rents prior to the year 1860; that the life tenant died in the year 1866, and said Abraham W. Egbert continued in possession of the premises and collected and retained the entire rents until his death in 1901, and that thereafter his heirs continued in such possession and received and retained the entire rents up to the present time; that in the meantime leases had been made at various times by the said Abraham W. Egbert, and about October, 1897, he leased the entire premises in conjunction with adjoining property for a period of 21 years, with right to renewal, and permitted the demolition of the old buildings and the erection of a substantial structure upon this site; that the interest claimed by the plaintiff is deduced from Eliza Jane Egbert, the daughter of Mary Egbert, and was vested at the time of the death of the life tenant in 1866 in Edward Crocheron; and that the interest claimed by the plaintiff became vested in him in 1879. There is no evidence in the case that any claim to an interest in the property was ever made by any person through whom the plaintiff claims his title, except that John Schreyer, a witness, testified that in 1897, when the lessee desired to procure from him a mortgage loan on the building about to be constructed, he told the witness that a man named Crocheron had told him that his wife had a claim in one of the lots, and that he (Crocheron) had gone to Mr. Egbert and wanted his wife's share, but he could not get any satisfaction. The witness stated that before he made the loan he consulted his lawyer, who advised him that as the claim was made over 30 years before that time it was outlawed, and it appears from

the evidence that plaintiff was unconscious of having any interest therein until a short time before the commencement of this action, or about the year 1904. Inasmuch as it appears that Abraham Egbert owned only a life interest at the time the deeds were given, and as the deeds were without covenants or warranty and were in proper and apt form for the purpose, it must be held that he conveyed by them to his son, Abraham W. Egbert, only his life estate, and, as the grantee's right to exclusive possession could not be questioned during the continuance of said life estate, such possession cannot be made a basis for a claim of adverse possession until the death of the life tenant in 1866.

The question now to be decided is whether the possession of Abraham W. Egbert, commencing then as a tenant in common and continued for the period and in the manner above stated, ripened into an adverse possession and amounted to an ouster of his co-tenants, and made his possession no longer theirs, but solely his as a separate and hostile owner. It is undoubtedly true that the possession of one tenant in common is ordinarily accepted to be consistent with the rights of his co-tenants; but it is likewise true that the plea of adverse possession is available to a tenant in common in a proper case against his co-tenants, the only difference being in the fact that stronger evidence is required to sustain the plea of a tenant in common than that of a stranger. I have made an exhaustive examination of the very numerous cases where the question of adverse possession was involved and decided, but have been unable to find a single case which can be said to be on all fours with the case at bar. In *Culver v. Rhodes*, 87 N. Y. 348, Finch, J., in an exhaustive opinion holding against the sufficiency of the plea in that case, says:

"We are thus led to consider the reason and justice of rule, which should measure the adverse possession necessary to effect the ouster of a co-tenant. Assuredly it should be one which requires notice in fact to the co-tenant, or unequivocal acts, so openly and public, that notice may be presumed of the assault upon his title, and the invasion of his rights. The adverse possession sets running a limitation, which in the end may operate as a bar. It does so only upon the theory that the party disseised has slept upon his rights, and by silence and inaction has waived them. The rule is just if the ouster or adverse possession is brought home to the knowledge of the owner, or is of such definite and hostile and public character that such knowledge may be fairly presumed; but it is unjust and unreasonable if enforced without such limitation. * * * If no explicit notice is given to the co-tenant of the denial of his right, the occupant must make his possession so visibly hostile and notorious, and so apparently exclusive and adverse, as to justify an inference of knowledge on the part of the tenant sought to be ousted, and of laches if he fails to discover and assert his rights."

An analysis of the various cases indicated that the possession must be unequivocal, and that the acts of the one in possession must be such as to apprise a co-tenant that his rights are invaded. Had the premises simply been occupied by Abraham W. Egbert himself, such occupation might be construed as an exercise of his own right simply, and not hostile to his co-tenant, as it might be contended that he had a right as a tenant in common to so occupy; but when it is considered that the premises were during the entire period rent-producing, and that the entire rents were received and appropriated by him ever since the death of the life tenant in the year 1866, can it be said that

such appropriation was not in hostility to all other claims, or that it did not constitute sufficient notice to the co-tenants that their rights were invaded, nor justify an inference of knowledge on the part of the tenants sought to be ousted and of laches if they failed to discover and assert their rights? When the life estate of Abraham Egbert ended in 1866, Edward Crocheron was entitled to take or demand possession of his interest or his share of the rents, and the statute then commenced to run. It does not appear that he was under any disability. At all events, in 1879, when plaintiff's interest accrued to him, he was of full age and under no disability. Exclusive possession of the premises and of the rents and profits thereof was maintained by the defendants and their predecessors continuously since 1866. The exclusive receipt of the rents and their retention was sufficient evidence of a declaration of a hostile holding by the one in possession, and, having continued for a period much longer than that required by the statute, the defendants are entitled to judgment.

Judgment for defendants accordingly.

SCHNEIDER v. SCHNEIDER.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

1. GIFT—INTER VIVOS—ELEMENTS.

To constitute a valid gift inter vivos, there must be on the part of the donor an intent to give, delivery of the thing given to or for the donee pursuant to such intent, and an acceptance by the donee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, § 3.]

2. SAME—BURDEN OF PROOF.

Where, in a suit to recover a bank deposit, defendant set up a counter-claim alleging a gift of one-half of the deposit, the burden was on her to establish all the essentials of a completed gift in presenti by a preponderance of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, § 81.]

3. HUSBAND AND WIFE—GIFTS.

Opening a bank account in the joint names of husband and wife, with a direction to "pay to either or the survivor of either," did not of itself establish a gift of one-half of the deposit by the husband to the wife.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Husband and Wife, §§ 253, 254.]

4. SAME—RELINQUISHMENT OF CONTROL.

Where a husband, after marriage, went to a bank in which he had a deposit, and changed the account into the joint names of himself and wife, with directions to pay to either or the survivor of either, and the wife subsequently notified the bank not to permit the husband to withdraw any part of the deposit without her joining, there was no relinquishment of control by the husband such as to establish a gift inter vivos by the husband to the wife of one-half of the deposit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Husband and Wife, § 251.]

Appeal from Special Term.

Action by Gottfried Schneider against the Citizens' Savings Bank to recover a deposit, in which Anna M. Schneider was interpleaded and set up a counter claim as to part of the deposit. From a judgment in

favor of said defendant Anna M. Schneider, plaintiff appeals. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Charles P. Hallock, for appellant.

William J. Barr, of counsel (Henry W. Pollock, on the brief), for respondent.

CLARKE, J. This action was brought to recover a savings bank deposit in the Citizens' Savings Bank. The bank interpleaded the defendant, and holds the money subject to the final determination of the action. The complaint alleges that plaintiff is the owner of the deposit, and demands judgment for the recovery thereof. The answer denies that plaintiff is the owner of the deposit, and sets forth a counterclaim that the defendant became the owner of one-half of said fund by a gift thereof from plaintiff pursuant to an antenuptial agreement, and demands judgment for one-half of said deposit. The reply denies the gift or the antenuptial promise, and pleads the statute of frauds as a bar thereof.

Plaintiff is a machinist. The defendant is his second wife, whom he married in November, 1905. Prior to said marriage, and during the life of his first wife, he had on deposit in the Citizens' Savings Bank about \$2,800 and in the German Savings Bank about \$2,900. These sums represented the savings of 20 years. During the lifetime of his first wife, who died April 13, 1904, these accounts had stood in the names of the plaintiff and his first wife, as joint accounts, and at her decease came to the plaintiff as survivor, and it is conceded that thereafter, and up to the time of the transaction hereafter to be considered, the account here under consideration had been deposited by and belonged exclusively to the plaintiff. On January 11, 1906, about two months after the marriage of the parties, plaintiff and defendant went to the bank and had his account, which then stood in his own name and that of his former wife, transferred to a new book account, which new account was opened in the name of "Gottfried or Anna M. Schneider pay to either or the survivor of either."

The plaintiff testified: That, before going to the bank, "I told her we were going down to the bank, and I am putting her name in the bank book, so that in case I am sick or dead, or anything happen to me, that she can draw the money without any trouble." That, in the presence of his wife, he said to the cashier: "'I want to have my wife's name on this. * * * I want her name in the book, so that in any case anything happens to me, or sickness or accident, or if I die, then she could draw the money without any trouble.' That was all the talk we had in the bank." The bank book was then taken to their home and put in a locked tin box belonging to the plaintiff, which had theretofore been used, and continued to be used, as a depository for this and other bank books, plaintiff's business papers, the will of his first wife, and the like things. The key of said box was on the dresser in their apartment until the plaintiff took personal possession of it, and put it in his pocket a few days prior to July 20, 1906. On said day the

defendant, for some reason not disclosed in the record, left him. They have not since said date lived together. On the 19th of July, 1906, she caused the following notice to be served upon the bank:

"I beg to notify you that account in your bank, represented by bank book No. 291,341, in which there is a balance of \$2,800.88 and interest, which account stands in the name of my husband, Gottfried Schneider and myself, Anna M. Schneider, is not to be drawn on by my husband without my joining in the withdrawal of any sum whatsoever."

Between the 11th of January, 1906, when the transfer of the account was made, and the 20th day of July, when she left the plaintiff, the defendant had not drawn any money from the bank upon this account. Upon the trial counsel for the defendant stated:

"We realize that under the decisions the form of this deposit on the face of the book would indicate survivorship; but we rest upon an oral agreement to execute a gift, and that gift was executed and was represented to be executed, and then that the transfer was made in the bank, but we limit our demand to half because that was all that was promised; that the plaintiff made a gift of one-half of his interest in these moneys to the defendant on that day, though he adopted a form which would warrant her in taking the whole of this if she had drawn them out at the same time. It is our contention that pursuant to an earlier promise in the days of their courtship he gave her half of these moneys."

The defendant testified, in substance: That prior to the marriage the plaintiff had told her how much money he had and he had said to her:

"You know this is going to be half and half; half to you and half to me. This belongs to you, half of this money."

That at the bank, after the new book was handed out by the officer of the bank, the plaintiff said:

"Now I fixed it up. Half of that belongs to you. This belongs to you just as much as to me."

Upon cross-examination she was asked whether she promised to marry him just because he spoke to her about this money, and she answered:

"No; I did not promise to marry him because he spoke to me about this money. That was not my reason for promising to marry him. I thought I was getting a good husband. That was my reason. I had some affection for him at that time. I had as much affection for Mr. Schneider as I have for any man in this world. I did not marry him because he spoke to me about the money."

She also testified that, when they went down to the Bank in January, he said:

"Anna, I promised you that when I went in it. I don't want to lose a day's time. We will go down and have that money put in your name. I promised you that before, and you shall have it half and half."

She testified that she knew the account was made out in his name as well as her own; that he could draw all the money at any time, and that she never asked him to put half of the money in her separate name. The plaintiff denied that he had ever told his wife that he would give her any part of the money, or that he had ever said, "Now, half of the money is yours."

The determination of this controversy depends upon the question whether the facts sustain a completed gift in *præsenti inter vivos* by the plaintiff to the defendant of one-half of his own money represented by this savings bank account. It being conceded that the whole amount in bank was originally the exclusive property of the plaintiff, and the defendant having alleged by way of counterclaim a gift of one-half thereof to her, the burden was cast upon her of establishing by a preponderance of evidence all the essentials of a completed gift in *præsenti*. The elements necessary to constitute a valid gift are well understood, and are not the subject of dispute. There must be on the part of the donor an intent to give and a delivery of the thing given to or for the donee, in pursuance of such intent, and on the part of the donee acceptance. *Beaver v. Beaver*, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531. The mere fact of the opening of the account in their joint names "pay to either or the survivor of either" did not in and of itself establish any such gift. Exclusive control was not given to the defendant by the manner of opening this account over one-half thereof, or any part thereof, for the plaintiff thereunder retained the right to draw every dollar of the fund, and use it for his own purposes.

In the *Matter of Bolin*, 136 N. Y. 177, 32 N. E. 626, Judge Gray said:

"That the moneys were deposited to the account of Julia Cody or daughter Bridget Bolin is not a fact upon which any inference of a transfer or of a gift arises. In the absence of other evidence, these transactions simply evidenced a purpose of the depositor of the money that they should be drawn out by either of the persons named. The only presumption would be that the depositors so arranged for the purposes of convenience."

The case of *Slee v. Kings County Savings Institution*, 78 App. Div. 334, 79 N. Y. Supp. 630, was an action brought to recover a sum of money deposited with a savings bank and claimed by both the plaintiff and his wife, the money having originally belonged to the plaintiff and deposited in their joint names, "either to draw." In that case the bank book was placed by the husband in a tin box for which he for a time kept the two keys, but finally gave one to his wife in order to enable her to pay bills. He also made out and signed a written statement, in which he promised that he would lay no claim to the money and asserted that it belonged exclusively to her, but he never delivered the statement. She found it, and refused to return it on demand. The court sustained a judgment for the husband, stating that:

"The facts did not justify the claim on the appellant's part of a consummated gift. The deposit for the purpose alleged by the plaintiff, with retention by him of custody of the bank book, did not operate to transfer title to the money, and the subsequent taking of the bank book by the appellant could not accomplish such a transfer."

In *Wood v. Zornstoff*, 59 App. Div. 538, 69 N. Y. Supp. 241, the court said of a joint account:

"It may have been placed in the names of the two either to insure title in the survivor or as a matter of convenience for this father in his advanced years to enable his daughter to transact the business for him."

This court said in *Bowron v. De Selding*, 105 App. Div. 500, 94 N. Y. Supp. 292:

"There is no doubt about the law as to what is necessary to constitute a valid gift *inter vivos*. It is a delivery by the donor of the subject of the gift with intent to at once vest title to the thing given in the donee."

It has been held that whoever alleges a gift must establish it by satisfactory proof. Where the matter is left in doubt, upon the whole case, the case must fail. *Matter of Rogers*, 10 App. Div. 593, 42 N. Y. Supp. 133; *Bray v. O'Rourke*, 89 App. Div. 400, 85 N. Y. Supp. 907. "An absolute gift requires a renunciation by the donor and an acquisition by the donee of all interest in and title to the subject of the gift." *Curry v. Powers*, 70 N. Y. 212, 26 Am. Rep. 577.

It follows that the manner in which the account was opened upon the face thereof furnishes no support for the conclusion of a completed gift *inter vivos* of one-half of the account. Exclusive control thereof was not lost by the plaintiff, nor acquired by the defendant, and the inference from the account, pointed out by the cases, is entirely borne out by the testimony of the plaintiff that it was so opened to permit the defendant to draw from said account in case of necessity or sickness, and to vest her with the title to the same upon plaintiff's death. Her own claim finds no support in the notice which she served upon the bank, for therein she asserted title to the whole account in contradiction to her present position that she was entitled to only one-half. Nor is it supported by her conduct, because, if her testimony is true that her husband had promised her one-half the amount, there would have been no difficulty when the transfer of the account was made to have had an account opened in her own name for one-half thereof, which would have furnished conclusive proof of a gift thereof to her, if it had been coupled with a delivery of the bank book and exclusive dominion thereof by her.

We do not think that respondent's testimony as to her prenuptial talk with the plaintiff aids her. She distinctly repudiated the suggestion that she entered into the marriage upon the inducement of any such promise. Nor does she now stand upon the enforcement of a contract made in consideration of marriage, for such contract is required to be in writing by the statute of frauds; but she offers the evidence as bearing upon the intent with which the account was opened in support of her claim of a completed gift.

Upon the whole case, we are satisfied that the evidence does not sustain the judgment, and it must therefore be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

(56 Misc. Rep. 618.)

SCHWARTZ et al. v. HIRSCH et al.

(Supreme Court, Appellate Term. December 20, 1907.)

1. SALES—CONSTRUCTION OF CONTRACT—ENTIRE CONTRACT.

The mere fact that a contract for a bill of goods calls for their delivery in several installments does not render the contract separable, so that there can be no recovery of the price before the whole quantity contracted for is delivered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 171-179.]

2. SAME—USE BY PURCHASER OF ALLOTMENT BEFORE ENTIRE DELIVERY.

Where a bill of goods is purchased by sample, delivery to be made in three allotments, the buyers have a right to receive and use the first allotment without waiting to see whether the sellers will fulfill their contract by delivering the residue, and by doing so they do not become liable for the price of that allotment, regardless of whether or not the sellers fulfill their contract.

3. ACCORD AND SATISFACTION—DISPUTED CLAIMS—ACCEPTANCE OF PART OF CLAIM.

Defendants purchased goods from plaintiffs by sample, delivery to be made in three allotments. The first allotment was received and used; but defendants, claiming that the goods were defective, refused to receive the other allotments, and sent a check for the amount due on the first allotment, which was to be in full satisfaction and settlement of all claims by them and of all disputes and matters between plaintiffs and defendants, and returned the rest of the goods that had been delivered. Plaintiffs accepted the check and credited the amount on defendants' account as part payment. *Held*, that there was a genuine and unquestioned dispute between the parties, and hence the acceptance and retention of the check constituted a complete accord and satisfaction, since the acceptance of the check involved the acceptance of the conditions imposed.

[*Ed. Note.*—For cases in point, see *Cent. Dig.* vol. 1, *Accord and Satisfaction*, §§ 66-88.]

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by Mendel Schwartz and others against Joseph Hirsch and another. Judgment for plaintiffs, and defendants appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Wentworth, Lowenstein & Stern (Edwin F. Stern, of counsel); for appellants.

Morrison & Schiff (Jacob R. Schiff, of counsel), for respondents.

McCALL, J. I do not see, unless we are to reject the rulings of our appellate courts, but that an absolute case of accord and satisfaction has been demonstrated in the proof submitted upon the trial of this case. The learned trial justice, in disposing of the issues, seems to have been controlled by the idea that the claim was a liquidated one, the amount due certain, and the check sent represented an amount that would have to be paid in any event, as concededly the defendants had received, retained, and used the merchandise forwarded at least up to a value equivalent to the sum so paid, and under such conditions the claim of accord and satisfaction was not tenable.

The facts may be practically taken as conceded. The defendants purchased from the plaintiffs a certain bill of merchandise, predicated the same upon a sample submitted by a traveling salesman. The delivery of the goods was to be made in three separate allotments, and the first allotment, representing a value of about \$39, was received, used, and partially disposed of by the defendants. Under the claim of the defendants that the goods were defective in the material used or manufacture thereof, the defendants refused to receive any but the first allotment, returning the rest to the plaintiffs, and inclosing a check for \$35.10 in payment; the said amount representing the value of the first

allotment less a sum allowed the defendants under some custom of the trade for commissions. This check was on an Oklahoma bank, and was returned to defendants in a letter dated December 14, 1905. Thereafter, and on February 7, 1906, the defendants wrote a letter to the plaintiffs, inclosing a check on the Citizens' National Bank of New York for the same amount, payable to the plaintiffs, and by the terms of the letter the defendants notified the plaintiffs that the check was forwarded in full satisfaction and settlement of all claims by the plaintiffs, and in settlement of all disputes and matters between the plaintiffs and defendants; and this check the plaintiffs retained, indorsed, and collected the amount the payment of which it provided for. It is true that the plaintiffs immediately wrote to defendants, acknowledging the receipt of the check and that they intended to credit it on full account, and demanded payment of balance due. Now what does such a state of facts show?

First. Unquestionably that the contract was an entire one, even though the delivery of the goods was by installment, and no right of action accrues, nor can a recovery be had, until the whole quantity contracted for is delivered (*Nightingale v. Eiseman*, 121 N. Y. 288, 24 N. E. 475); and by the doctrine announced in the same case (50 Hun, 189, 2 N. Y. Supp. 779) these defendants had a right to receive and use the first allotment without waiting to see whether the plaintiffs would fulfill their contract by delivering the residue. So that it will be observed that it was erroneous to assume that:

"In any event, the defendants, on their own showing, were liable to the plaintiffs for \$35.10."

Secondly. A genuine and unquestioned dispute between the parties; and under such circumstances the acceptance and retention of this check constituted a complete accord and satisfaction, and this, too, whether the claim is to be regarded as liquidated or unliquidated. *Le Page v. Lalanc & Grosjean Mfg. Co.*, 98 App. Div. 179, 90 N. Y. Supp. 676. The situation is not ameliorated by the writing of the letter of February 15th stating the amount received would be credited to the full account, and demanding payment of balance; for when that check was sent in full payment, etc., the plaintiffs either had to accept under the conditions imposed or return it. They could not keep it and impose other conditions. The acceptance of the money involved the acceptance of the conditions. *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; *Dunn v. Whalen*, 120 App. Div. 729, 105 N. Y. Supp. 588; *Williams v. Bienenzucht et al.* (Sup.) 104 N. Y. Supp. 438.

For the reasons thus advanced, this judgment must be reversed, and a new trial ordered, with costs to appellant to abide the event.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

(37 Misc. Rep. 1.)

In re JACKSON, Attorney General (two cases).

(Supreme Court, Special Term, New York County.)

MONOPOLIES—COMBINATION—RESTRAINT OF TRADE.

The Donnelly anti-trust act (Laws 1899, p. 1514, c. 690), providing for the prevention of monopolies in the manufacture, production and sale of commodities, and for the punishment of such monopolies, does not apply to telegraph companies; and hence an order directing certain persons as officers and directors of the offending telegraph companies to appear before a referee to testify regarding contracts between them as a preliminary to the institution of an action under said law will be set aside.

Applications by William S. Jackson, Attorney General, under the Donnelly anti-trust act (Laws 1899, p. 1514, c. 690), directing Clarence H. Mackey and others to appear before a referee for examination. Motions by respondent to set aside ex parte orders of reference. Motions granted.

William S. Jackson (W. A. De Ford, of counsel), for the Attorney General.

J. H. Fearons (H. D. Estabrook and F. R. Stark, of counsel), for Western Union Telegraph Co.

W. D. Cook (Thomas Jones, of counsel), for Postal Telegraph & Cable Co.

HENDRICK, J. These are motions to vacate and set aside orders of reference granted ex parte in these proceedings in pursuance of an application by the Attorney General, under chapter 690, p. 1514, Laws 1899, sometimes called the "Donnelly Anti-Trust Act." The petition of the Attorney General, upon which the orders were granted, sets forth that the petitioner, as such Attorney General, intends to begin an action, under chapter 690, p. 1514, Laws 1899, in behalf of the people of the state of New York, against the "Postal Telegraph & Cable Company" and the "Western Union Telegraph Company," domestic corporations organized and existing under and by virtue of the laws of the state of New York, and engaged in the business of receiving, transmitting, and delivering messages by electric telegraph in the state of New York and elsewhere, to restrain the said telegraph companies, their officers, or agents, from doing in this state any act in, towards, or for the making or consummation of the contracts, agreements, arrangements, or combination set forth in the petition. The petition alleges that said companies are engaged in the business of receiving, transmitting, and delivering messages by electric telegraph for pay, and that said telegraphic service is an article and commodity in common use in the state of New York. It also alleges that said companies have entered into an agreement to charge rates mutually agreed upon between them for the transmission of telegrams, and sets forth various charges agreed to be made for the transmission of telegrams to various points, and that, by the establishment of said rates for transmission of telegrams from the state of New York to such other points, the rates of charge have been materially increased by both of said

companies. It further alleges that said companies have agreed that they would establish at certain common points of service in certain cities, towns, and villages in the state of New York common offices and agencies for the receipt and transmission of messages as aforesaid under an agreement for a division between the said companies of the receipts and profits from the business thereof, and that they would divide equally between them the gross proceeds of the business transacted in certain hotels and other public places in the city of New York in which they were each maintaining offices. It also alleges that said contracts and agreements are an arrangement and combination whereby a monopoly in the receipt, transmitting, and delivery of telegrams in this state is maintained, and whereby competition in this state in the price of transmitting telegrams is prevented, and the free pursuit of the business of transmitting telegrams is restricted and prevented. As a preliminary to the institution of said action by the Attorney General, the court was asked for orders directing various persons who are officers and directors of the Western Union Telegraph Company and of the Postal Telegraph & Cable Company to appear before a referee to testify regarding said contracts and arrangements, and to produce before the referee various contracts, records, books, and papers of said companies which contain evidence of the terms of said contracts and combination. The general purpose of chapter 690, Laws 1899, is expressed in its first section. Its object is to destroy monopolies in the manufacture, production, and sale in this state of commodities in common use. The act in this respect has been held to be little more than a codification of the common law on the subject (*Matter of Davies*, 168 N. Y. 89-101, 61 N. E. 118, 56 L. R. A. 855; In the *Matter of Application of the Attorney General, etc., v. Consolidated Gas Company* [Sup.] 106 N. Y. Supp. 407), and is to be construed with reference to the common law. The vital question to be determined in this matter is whether or not a telegraph company manufactures, produces, or sells a commodity or article in common use, such as is within the prohibition of said act. If it does, then the motions should be denied. If not, they should be granted.

Telegraph companies are not included in the Donnelly anti-trust act. Whether or not the service of transmitting from one place to another a communication is a "commodity" in any contingency, it is not a commodity within the meaning of the act under consideration. The Donnelly anti-trust act, as is shown by its history and by all of the proceedings in the Legislature prior to its passage, had for its object the prohibition of monopolies in tangible articles of trade and commerce in common use and such as are capable of manufacture, production, and sale. Senate Journal of 1897, January 15th, p. 43; January 20th, pp. 67-69; Resolution January 15th, p. 50. The resolution appearing in the Senate Journal of 1897, at page 50, indicates clearly, when read in connection with the laws referred to therein (chapter 716, p. 1782, Laws 1893, and chapter 267, p. 212, Laws 1896), the evils to remedy which the Donnelly anti-trust act was passed. Chapter 716 of the Laws of 1893, to which reference is made in the resolution, is entitled, "An act to prevent monopolies in articles of general necessity," and provides in the first section that:

"Every contract or combination in the form of trust or otherwise, made after the passage of this act, whereby competition in the state of New York in the supply or the price of any article or commodity of common use in said state for the support of life and health may be restrained or prevented, for the purpose of advancing prices, is hereby declared illegal."

Chapter 267, Laws 1896, amends chapter 716, Laws 1893. Both these laws were repealed by the act under consideration. They are all in *pari materia*, relating to the same subjects, and prohibiting combinations in the manufacture, sale, or production of commodities in common use "for the support of life and health." To apply on these motions a doubtful meaning to the term "commodity," in view of the evils aimed at by the Donnelly anti-trust act as disclosed by the history of the act itself and of the legislation of which it was the culmination, would be contrary to firmly established principles of construction. As was said by Mr. Justice Daniel in *Maillard et al. v. Lawrence*, 16 How. (U. S.) 261, 14 L. Ed. 925:

"The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions."

In the popular and received import of the word, a "commodity" is a tangible article; and, in view of the laws of this state relating to telegraph companies, it would be wresting the meaning to a particular purpose to hold that the service or labor of transmitting a telegram is such a commodity as is contemplated by the act under consideration. Chapter 690, Laws 1899, makes no reference to the laws relating to telegraph companies, nor does it seek to repeal such laws, nor does it repeal all laws inconsistent therewith. The repealing clause specifies only chapter 383, p. 310, Laws 1897. If the laws relating to telegraph companies confer upon the companies involved in these motions the right to do the things complained of, the act under consideration does not impair such right. The case of *Whipple v. Christian*, 80 N. Y. 523-526, holds it to be a well-settled rule that "a special act will not be deemed repealed by implication in consequence of the passage of a general law, containing a general repealing clause of inconsistent legislation." That telegraph companies in this state enjoy the protection of special statutes and enjoy special rights, powers, and privileges is demonstrated in *Benedict v. Western Union Telegraph Company*, 9 Abb. N. C. 214, and in *Hatch v. American Union Telegraph Company*, 9 Abb. N. C. 223. In the *Benedict Case*, *supra*, after referring to the express powers granted to telegraph companies by the laws of this state, Mr. Justice Van Brunt says (page 220 of 9 Abb. N. C.):

"What arrangements two telegraph companies could make in reference to the conduct of their business which would not be protected and come within the scope or meaning of the foregoing acts I am totally at a loss to imagine. * * * It would seem to have been the intention of the Legislature to give to telegraph companies the power to make any and all arrangements for the conduct of their business, either jointly or separately, which natural persons could possibly enter into, requiring, in some instances, to such arrangements, the consent of three-fifths or two-thirds, as the case may be, of the directors and stockholders of the corporation. * * * Such being the intent of the Legislature, as is abundantly evidenced by the broad and general language of the act above referred to, it would be difficult to say that any arrangement

for the conduct of their business which might be entered into between two telegraph companies could be ultra vires if duly assented to by their stockholders, provided the same was not clearly against public policy."

And further on in the opinion in this same case, the facts in which are very like those in the case under consideration, the learned justice continues:

"In the absence of any legislation, it might be argued, as I have said, that such arrangements were against public policy, as tending to prevent competition; but in view of the legislation which authorizes the consolidation of these corporations, the purchase and sale of their franchises, the joint construction and use of telegraph lines, all of which tend to prevent competition, it cannot be said that any such public policy is countenanced by the Legislature of this state."

In the Hatch Case, another learned justice (Mr. Justice Barrett) agrees with the views expressed by Mr. Justice Van Brunt in the Benedict Case. The following extracts from the opinion of Justice Barrett are very pertinent to the matters under consideration on the motions now before the court:

"It is also urged that the consummation of this agreement will result in giving to the corporation vendee a practical monopoly of the business of telegraphy in this country; that competition, for the present at least, will be at an end; and that the Western Union Telegraph Company will thus have the power to increase rates with substantial impunity. All this is vehemently denounced as contrary to public policy, and in its tendency injurious to trade and commerce. * * * We repeat, then, that considerations of policy in the sense of general public feeling cannot avail in the courts against express legislative authority constitutionally granted. We are not to feel the public pulse before making up our minds to enforce the law. That would be an unwarrantable usurpation of the legislative function, and would throw all legal rights into a sea of doubt and confusion. As was said by Chief Justice Marshall, in *Osborne v. United States Bank*, 9 Wheat. (U. S.) 738, 866, 6 L. Ed. 204: 'Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.' * * * The court may even have a pretty decided opinion as to the transaction under consideration, but no useful purpose is served by the expression of an opinion not essential to judicial judgment. If we cannot properly restrain these people by such judgment, our opinion as to their conduct will have little weight to check the completion of their design."

The reasons urged upon the court by the learned Attorney General for the denial of these motions might be laid before the Legislature, to the end that laws may be enacted to correct any evils found to exist under the present statutes of this state. It is my duty simply to declare the law as I find it; and, after very careful examinations of the questions involved, I am of the opinion that the motions should be granted.

The motions to vacate and set aside the orders herein granted *ex parte* July 8, 1907, are granted.

MOORE v. SIMPSON.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

BROKERS—ACTION FOR COMPENSATION—EVIDENCE—SUFFICIENCY.

In an action by a broker to recover a balance of commissions due him, evidence held sufficient to show that he had been paid in full.

Patterson, P. J., dissenting.

Appeal from Trial Term.

Action by Ernest C. Moore against Clarence D. Simpson. From a judgment in favor of plaintiff, and from an order denying motion for a new trial, defendant appeals. Judgment and order reversed, and new trial granted.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Edward J. Patterson (Benjamin S. Harmon and Charles P. Mathewson, on the brief), for appellant.

Thomas F. Conway, for respondent.

LAUGHLIN, J. This is an action by a broker to recover an alleged balance of commissions earned on the sale of 23,168 shares of the capital stock of the New York & Queens County Railway Company under an employment by the defendant and one Shelmerdine. The amount of commissions agreed to be paid to the plaintiff by the defendant and Shelmerdine was \$20,000. It is alleged in the complaint that, after the commissions were earned, plaintiff was paid, by direction of the defendant, \$10,000 on account thereof, and that, upon the agreement of one Brady, the duly authorized attorney in fact for the defendant, that the defendant would pay the balance of \$10,000 owing to the plaintiff, he released Shelmerdine from liability. The stock was not owned jointly by the defendant and Shelmerdine. The defendant owned 8,034 shares and Shelmerdine owned 15,134 shares. By a letter under date of July 21, 1903, the defendant and Shelmerdine jointly, however, promised to pay to the plaintiff the sum of \$20,000 for his services in effecting the sale, in the event that an offer which they had made to one Giles to sell their stock should be accepted and consummated. The offer was accepted, and the sale was consummated; and it is conceded that plaintiff became entitled under the contract to receive from the defendant and Shelmerdine the sum of \$20,000. Giles was also a broker, and he was acting for the brokerage firm of Ford, Bacon & Davis, who represented a syndicate of purchasers. The firm of Ford, Bacon & Davis, through Giles, on the 20th day of July, 1903, as an inducement to the defendant to persuade Shelmerdine to sell his stock at \$75 per share, agreed to pay the defendant a commission of \$20,000, provided he was successful in procuring Shelmerdine's stock for them at the rate of \$75 per share. This arrangement the defendant concealed from Shelmerdine, and not only induced Shelmerdine to sell his stock at \$75 per share, but obtained from him an agreement to pay the entire expense to them of selling their stock, which meant the payment of plaintiff's commis-

sions. The firm of Ford, Bacon & Davis originally agreed to pay Giles a commission of \$1 per share for negotiating the purchase of this stock, but this agreement was subsequently modified by mutual consent, and Giles agreed to accept from the firm in full for his services the sum of \$13,284, to be paid one-half in cash and one-half in two notes of \$3,321 each. In the meantime, before the change in the agreement for compensation between Giles and the firm of brokers who employed him, he and the plaintiff had agreed to divide equally the commissions received by them. The defendant was required to be absent at the time of consummating the sale; and, in order that plaintiff might receive his commissions promptly, it was agreed that Giles should pay the \$20,000 to be received from the firm for the defendant to the plaintiff. Evidence was given on behalf of the defendant, which is scarcely denied by the plaintiff, that this was to be concealed from Shelmerdine, and that the plaintiff was to assist the defendant in subsequently obtaining reimbursement from Shelmerdine. At the time the sale was consummated Giles received from the firm of Ford, Bacon & Davis \$20,000 in cash for the defendant and a check for \$12,642, being the amount of his commissions, less the discount on the notes which were delivered in part payment, and thereupon discounted by the firm for him. Giles thereupon paid to the plaintiff the sum of \$16,321, being one-half of the \$20,000 received on account of the defendant, which he was authorized to apply in payment of plaintiff's commissions, and one-half of which he retained for himself under his agreement with the plaintiff for a division of the commissions, and one-half of the commissions received for his own services. Giles did not testify. It appears that defendant made some effort to procure his attendance as a witness, but there is no evidence that plaintiff attempted to subpoena him. The plaintiff as a witness in his own behalf repeatedly admitted that he received one half the amount received by Giles from the firm of brokers, and that he understood that Giles retained by virtue of the agreement between them the other half; but he also gave testimony conflicting with this, to the effect that Giles represented to him that the firm cut down the defendant's commissions to one-half, and that only \$10,000 was received by Giles for the defendant. There is no evidence to corroborate his statement that he was informed by Giles that defendant's commissions had been cut; and it now appears as an uncontroverted fact that they were not. He, however, admitted that the division of the commissions between himself and Giles was a full settlement as between them on the basis of their agreement, and he also specifically admitted that he understood that \$10,000 of the amount he received was on account of the liability of the defendant and Shelmerdine to him. In view of his arrangement with Giles for a division of commissions, he was only entitled to receive \$10,000 of the amount received by Giles for the defendant, and, if this part of his testimony were true, it would indicate that he still owed Giles on account of the commissions \$10,000, and that any recovery herein should inure to the benefit of Giles.

The plaintiff attempts to explain his admissions upon the theory that he understood that Giles was to receive \$1 per share for his serv-

ices in purchasing the stock, and that he was not aware of the change of the agreement with respect to this compensation, and supposed that all that he received over \$5,000, which would be one-half of the \$10,000 paid on account of defendant, was his one-half of Giles' commissions; but the figures do not corroborate this theory. He further contends that the alleged change in the agreement for Giles' commissions occurred after they had been earned, and that it is improbable that Giles would then have agreed to such a reduction, or that it was a collusive arrangement made to deprive him of receiving one-half of the full amount of Giles' commissions according to the original contract. The evidence leaves the modification of the agreement as to Giles' commissions uncontroverted, and it must be regarded as establishing the modification. It does not appear that the firm of Ford, Bacon & Davis had any knowledge that the plaintiff was interested in the commissions to be paid to Giles at the time the agreement therefor was modified. Whether plaintiff understood at the time that all of the commissions due to him and Giles were paid is quite immaterial; for it now appears that they were, and he has been paid in full, and therefore was not entitled to recover.

There is no force in the contention that he is entitled to recover upon a subsequent agreement made by Brady in behalf of the defendant to pay him \$10,000. That agreement, if made, was made upon the erroneous understanding based on plaintiff's assertion that the defendant's commissions had been reduced one-half by the firm of Ford, Bacon & Davis, and that the latter firm had not paid the entire amount of \$20,000 to Giles. It appears that the plaintiff, shortly after the consummation of the sale, asserted to Brady as the attorney in fact for the defendant and to Shelmerdine that he had only received one-half of his commissions, and that he claimed the balance of \$10,000 under his contract, and that subsequently Shelmerdine gave a check to the order of the defendant, which was deposited to the credit of his account, and collected for the full \$20,000 under the agreement by which Shelmerdine was to pay the commissions, or, rather, the entire cost of effecting the sale of the stocks owned by himself and by the defendant, and that this he refused to do until the plaintiff executed to him a release of any liability on account of the commissions. It is not, of course, claimed by the plaintiff that at that time he was still entitled to \$20,000. In thus aiding the defendant in obtaining reimbursement for the commissions already paid, the plaintiff was merely discharging his obligation to the defendant. Assuming the testimony of the plaintiff to be true that Brady, representing the defendant at that time, agreed to pay him the balance of \$10,000 which he claimed, and assuming also that Brady was authorized to represent the defendant in that behalf, which is not at all clear, it is evident that there was no consideration for the agreement, because every obligation of the defendant to the plaintiff had at that time been discharged. The plaintiff assented to the arrangement by which he was to receive his commissions through Giles, who received on account of the defendant \$20,000, to which the plaintiff would have been entitled had it not been for his arrangement to divide his commissions with Giles, and which doubtless but for that arrangement Giles would have voluntarily turned over to him.

He acquiesced, without objection, in Giles retaining one-half of this amount on account of their contract for the division of their commissions which he recognized and thereby performed. He therefore had no further claim upon the defendant. If the defendant had sued Giles for the \$10,000 which the latter thus retained by consent of the plaintiff and applied on the contract for a division of the commissions, Giles could have successfully defended upon the ground that he had, in effect, paid it to plaintiff as authorized by defendant.

It follows that the judgment and order should, therefore, be reversed, and a new trial granted, with costs to appellant to abide the event. All concur, except PATTERSON, P. J., who dissents.

(56 Misc. Rep. 649.)

GROSS v. GORSCH.

(Supreme Court, Appellate Term. December 20, 1907.)

1. COURTS—NEW YORK MUNICIPAL COURT—PROCEDURE.

On adjournment of a case in the Municipal Court to a specified date at request of plaintiff, the court imposed \$10 costs upon him. On the date specified defendant stated that the costs had not been paid, whereupon the court dismissed the complaint and judgment was entered against plaintiffs. *Held*, that the dismissal was erroneous, there being no provision of the Municipal Court act authorizing the court to dismiss an action for the nonpayment of such costs, and Code Civ. Proc. § 779, which directs a stay if such costs are not paid, being inapplicable to Municipal Courts by express provision of Code Civ. Proc. § 3347.

2. APPEAL—QUESTIONS PRESENTED BY RECORD—EXTENT OF REVIEW.

The Appellate Term is bound by the record as it is filed, and where the return of the justice of the Municipal Court contains nothing in support of defendant's contention that the dismissal of the complaint was based upon plaintiff's failure to proceed with the action, that question cannot be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2867-2872.]

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Paul Gross against Hugo Gorsch. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Benjamin Patterson (Herman Kahn, of counsel), for appellant.
Flynn & Hess, for respondent.

GILDERSLEEVE, P. J. After several adjournments had in this case the parties met for trial on October 15, 1907, and upon plaintiff's request the case was again adjourned until October 21, 1907; the court imposing the sum of \$10 costs upon the plaintiff. Upon October 21, 1907, when the case was reached upon the call of the calendar, the defendant stated to the court that the \$10 costs, theretofore imposed, had not been paid. Thereupon the court dismissed the complaint for nonpayment of such costs, and judgment was entered against the plaintiff, from which judgment he appeals.

The dismissal of the complaint for nonpayment of costs was error. There is no provision of the Municipal Court act which authorizes the court to dismiss an action for the nonpayment of costs, imposed as a condition for granting an adjournment; and section 779 of the Code of Civil Procedure, which directs a stay if such costs are not paid, is not applicable to Municipal Courts. Section 3347, Code Civ. Proc. The remedy is for the party awarded such costs to add them to the judgment, if successful, or to offset them against the judgment obtained by the other party. *Farber v. Flauman*, 30 Misc. Rep. 627, 62 N. Y. Supp. 784. The court was therefore wrong in dismissing the complaint. *Fallon v. Crocicchia* (Sup.) 102 N. Y. Supp. 541, 543.

The respondent admits in his brief that the court was without jurisdiction to dismiss the action for failure to pay the costs, but urges that such dismissal was also based upon the plaintiff's failure "to proceed with the action" when the same was called for trial. This court is bound by the record as it is filed. *Eisenbud v. Gellert*, 26 Misc. Rep. 367, 55 N. Y. Supp. 952; *Forman v. N. Y. Transportation Co.* (Sup.) 95 N. Y. Supp. 581. The return herein contains nothing in support of the respondent's contention. If the return is defective in material respects, this court is always open for a motion to amend the same, and it is the duty of both the appellant and respondent to promptly examine it as soon as filed, for the purpose of ascertaining defects therein. *Bevins & Rogers*, App. Term Pr. 46.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

McCALL, J., concurs. FORD, J., concurs in result.

WAGNER v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Term. December 20, 1907.)

CARRIERS—CARRIAGE OF PASSENGERS—SETTING DOWN PASSENGERS.

A street railway company is not liable for injuries sustained by a passenger in alighting, where the signal to the motorman to start was given by another passenger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1228, 1228½.]

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by Charlotte Wagner for personal injuries against the New York City Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

William E. Weaver, for appellant.

Abraham G. Meyer, for respondent.

McCALL, J. The question upon which this case turns is: By whom was the signal given that caused this car to start after it had

stopped and while the plaintiff was in the act of alighting? That the car did stop, that the passenger sought to alight, and was thrown by the sudden propelling of the car forward, seems to admit of no doubt whatever from the proof, if, indeed, it is not practically conceded. There is a conflict in the proof as to who signaled the motorman to stop. The plaintiff says she asked the conductor, who was in the body of the car at the time, to stop; that she saw him reach and catch the strap and pull the bell. The witness Thiele swears that the plaintiff asked a passenger to stop the car, and that the passenger rang the bell for the car to stop; but that is of little moment, as both sides establish the fact that the car did stop before the passenger sought to step therefrom. But, when we come to consider the proof on the question of who gave the signal to start, the record is absolutely silent in so far as plaintiff's case on the direct examination is concerned, while the defendant's proof is directly and positively given on the point that the bell to start was given, not by the conductor, but by "a young man standing on the back," who "rang the bell twice and the car went ahead," who got off the car before the conductor got to the back platform. This testimony was not rebutted, stands absolutely uncontradicted, and is the only testimony in the case on either side as to the cause of the car's starting while the passenger was alighting.

Under such circumstances the verdict cannot stand. It is in absolute derogation of the court's instructions as to the law he laid down in his charge. How can negligence of this defendant be predicated upon the unauthorized act of this passenger? Certainly the motorman, in receiving the signal and starting his car, was not guilty of an act from which negligence can be deduced. *McDonough v. Third Ave. R. Co.*, 95 App. Div. 311, 88 N. Y. Supp. 609. In the case at bar there is no conflict of proof as to who gave the starting signal, and it is established that it was the meddling act of a man unknown, who was a passenger on the car. We have held in a case of similar purport, upon conflicting proof on this fact, where the weight of evidence only seemed to favor the defendant, that the interests of justice required a reversal. *Fitzpatrick v. Int. St. Ry. Co.* (Sup.) 89 N. Y. Supp. 1105.

At the end of the case the defendant's counsel sought to have the trial justice instruct the jury upon this feature, in a request to charge which he had but started to frame when the court, interrupting, stopped him, and then, unquestionably misinterpreting him, in that the request about to be made affected the signal given to stop, not start, the car, charged the jury: "It matters not who rang the bell," etc. The court should have allowed counsel to fully state his request to charge, as most clearly manifested in his misinterpretation of the request about to be made; for, if it was not misinterpretation, and there was nothing else in the case to constitute error but his subsequent charge, then it constituted reversible error.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

(56 Misc. Rep. 667.)

CLIFFORD v. DUFFY.

(Supreme Court, Appellate Term. December 20, 1907.)

1. LIMITATION OF ACTIONS—NEW ACTION AFTER NONSUIT OF FORMER ACTION.

Under Code Civ. Proc. § 405, providing that, where an action commenced within the time limited is terminated in any other way than by voluntary discontinuance, dismissal for neglect to prosecute, or final judgment on the merits, a new action may be commenced within one year after such termination, a plaintiff in an action for money loaned, brought after limitations had run against it, who claims that the action was brought within one year after the termination by nonsuit of an action thereon brought before the running of the statute, must prove it, to recover, unless it is admitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 83, Limitation of Actions, §§ 553-566, 713.]

2. JUDGMENT—PLEADING JUDGMENT.

In an action for money loaned, brought after limitation had run against it, an answer which alleges that defendant recovered judgment on the merits in a former action does not admit that the former action was terminated by nonsuit, under Code Civ. Proc. § 405, providing that, where an action is commenced within the time limited therefor and it is terminated in any other way than by voluntary discontinuance, dismissal for neglect to prosecute, or final judgment on the merits, a new action may be commenced within one year after the termination.

Ford, J., dissenting.

Appeal from Municipal Court, Borough of Manhattan, Thirteenth District.

Action by Mary Clifford against Thomas Duffy. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

J. J. Bennett, for appellant.

Paul Jones, for respondent.

GILDERSLEEVE, P. J. The plaintiff sued upon a claim for money loaned to the defendant, and recovered a judgment. The complaint alleged that between August 20, 1897, and February 1, 1898, the plaintiff loaned to the defendant the sum of \$387, to be paid in one year; that the defendant made several payments to the plaintiff, aggregating in amount the sum of \$135; and "that the last payment, amounting to \$2, was made on or about August 27, 1900." The answer denied the allegations of the complaint and set up the statute of limitations. The proof showed that no payments were made to apply upon the loan later than 1900. At the close of the plaintiff's case the defendant moved to dismiss the complaint, upon the ground that the statute had run against the claim. This motion was denied. At the close of the entire case this motion was renewed, and again denied.

It appears, by an allowed amendment to the record, that when the motion to dismiss was made a colloquy took place between the counsel and the court, substantially as follows: The plaintiff's counsel said that an action was commenced on August 2, 1906, that at the trial the plaintiff was nonsuited, that the former action was brought within the time limited by the statute, that under section 405 of the Code of Civil Procedure, the plaintiff had one year after the termination of

the first action within which to bring a second one, and that, as the present action was brought within the year thus provided, the defendant's motion should be denied. The court said: "But you have not proved by your witness that a former action was brought as you stated." Plaintiff's counsel: "Your honor, all that is admitted by the defendant, and, besides, he sets up this matter in his answer as a defense." The respondent's counsel claims that this discussion discloses the fact that a former action was brought within the statutory period and terminated by a nonsuit, and that the present action was brought within one year after the termination of the first. It will be noticed that the plaintiff's counsel said, in response to the suggestion of the court that there was no proof of the fact of a former action having been brought, etc.: "All that is admitted by the defendant, and, besides, he sets up this matter in his answer as a defense." The defendant made no such admission, and this statement of the plaintiff's counsel cannot be regarded as an admission of any fact other than what is set up in the answer; and proof that the action was terminated by a nonsuit was an essential to entitle plaintiff to recover. The admission in the answer is as follows:

"For a further answer and defense, that on or about the 3d day of December, 1906, in an action brought in this court by the plaintiff against the defendant for the same cause of action as set forth in the complaint herein, said defendant recovered a judgment duly given upon the merits thereof against said plaintiff, dismissing the complaint herein upon the merits, with \$10 costs."

If the plaintiff relies upon this pleading as an admission, he must take the entire admission, and that is fatal to his recovery in the present state of the proof. Section 405, *supra*, provides that:

"If an action is commenced within the time limited therefor and a judgment therein is reversed on appeal without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, or a dismissal of the complaint for neglect to prosecute or a final judgment on the merits, * * * a new action may be commenced after the expiration of the time limited and within one year after such reversal or termination."

Unless, therefore, the plaintiff could show that an action had been commenced between the parties for the same cause of action within the time limit, and had been terminated in one of the ways set forth in that section, but not by a final judgment on the merits, and that the present action was begun within one year after such termination, he must fail in this action; for his own proof showed that the statute of limitations had otherwise run against his claim, and he could not recover. There was no proof whatever in the case as to these essential facts, and the allegation in the answer, heretofore quoted, does not aid the plaintiff; for it shows that in the former action a judgment was rendered in favor of the defendant "on the merits," which is a final judgment, and an effectual bar to another action between the parties for the same cause of action. The judgment herein must therefore be reversed, and a new trial ordered.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

McCALL, J., concurs. FORD, J., dissents.

PEOPLE v. FEDERAL BANK OF NEW YORK.

In re SELMA NAT. BANK.

(Supreme Court, Appellate Division, First Department. December 13, 1907.)

1. CORPORATIONS—DISSOLUTION—CLAIMS—DEDUCTIONS.

The president of a bank, without authority, deposited the bank's money in another bank, for which a receiver was later appointed. To cover the loss arising from the unauthorized deposit, the president gave his bank a note, with the understanding that he was not to become liable thereon in excess of the loss actually sustained. *Held*, that the taking of the note did not operate to reduce the claim by the amount of the note.

2. SAME—DISPUTED CLAIMS—DETERMINATION OF REFEREE—REVIEW BY CLAIMANT.

Laws 1902, pp. 115, 116, c. 60, relating to proceedings for the dissolution of corporations, provides in section 5 for the appointment of a referee to hear and determine disputed claims. Section 6 provides for a final accounting by a receiver. Section 8 requires the receiver to file his account and to serve a duplicate thereof on the Attorney General, who is authorized to serve objections thereto, and further requires the receiver to mail to each creditor within 10 days after filing the account notice of the time and place of presentation of the account to the court. It further provides that, unless objections are made to the items of the account by a creditor or on behalf of the Attorney General, no referee shall be appointed to pass thereon, but the same shall be examined and settled by the court. In proceedings for the dissolution of a bank, a referee was appointed to determine disputed claims. Claimant had no opportunity to review the determination of the referee rejecting its claim, as its attorney had no notice thereof until after the application for the approval of the receiver's account had been made, or of the filing of the account until after the order of approval was made, although its attorney had served notice of general appearance on the receiver's attorneys. *Held*, that it was the duty of the receiver to bring the matter to the attention of the court, so that a final order of distribution should not be made until the validity of the claim was finally decided.

3. SAME.

Under said sections the determination of the referee was not final, nor was the claimant concluded by the order approving the receiver's accounts.

4. SAME—EXCEPTIONS TO REFEREE'S REPORT—PRACTICE.

Supreme Court Rule 30, relating to the filing of exceptions to referee's reports, provides that in references other than for the trial of issues in an action, etc., the report shall become absolute and stand in all things confirmed, unless exceptions thereto are filed and served within eight days after service of notice of filing of the same. *Held* that, in proceedings for the dissolution of a corporation, a claimant whose claim was rejected by the referee appointed to determine disputed claims followed the proper practice in filing exceptions to the referee's report, and bringing the same to a hearing at Special Term.

Appeal from Special Term.

Action by the people for the dissolution of the charter of the Federal National Bank. From an order overruling its exceptions to the determination of a referee as to disputed claims, and denying its motion to have its exceptions allowed and to have the report of the referee set aside, the Selma National Bank appeals. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and HOUGHTON, JJ.

Francis C. Caffey, for appellant.
George W. Glaze, for respondent.

LAUGHLIN, J. This action was brought by the Attorney General for the dissolution of the charter of the Federal National Bank of New York, a domestic banking corporation. Pending the action the respondent, Lee Schlisinger, was appointed temporary receiver, and by the judgment of dissolution he was made permanent receiver in December, 1904. Pursuant to the receiver's notice, duly given, for the presentation of claims, the appellant duly filed with him on the 2d day of May, 1905, proof of claim for a balance of money on deposit on April 14, 1904, the date upon which the Federal Bank suspended payment, of \$7,271.14, and by an indorsement thereon receipted for a dividend of 20 per cent. paid by the temporary receiver, making the balance claimed \$5,816.92. The receiver disputed the claim, and on the 14th day of September, 1905, procured the appointment of a referee pursuant to the provisions of section 5, c. 60, p. 115, Laws 1903, to hear and determine this and other disputed claims. Upon the hearing before the referee the claim was proved as filed, but the Attorney General and the receiver contended that it should be reduced by the sum of \$3,000 on account of the fact that the Selma National Bank had taken and withheld a note given by one John Carraway, president of that bank, to cover the loss which it was estimated, in a settlement between the Selma National Bank and its president, would be sustained on account of its money having been deposited by him without authority in the Federal Bank; it having been expected at the time of such settlement that the Selma Bank would receive on account of its claim against the receiver about 60 per cent. thereof. This contention was successful before the referee, who decided that on account of receiving the note of its president for this anticipated loss, the claim of the Selma National Bank against the receiver should be reduced by \$3,000, and that it had therefore received on the 20 per cent. dividend on the entire claim \$600, more than 20 per cent. of its claim as thus reduced, and he accordingly decided that it should refund to the receiver the \$600, or that the same should be credited upon subsequent dividends. The learned referee in an exhaustive opinion carefully reviews the authorities upon the question as to the effect of the payment by one party of another party's indebtedness; but we are of opinion that that question is not presented by the facts with respect to this claim. The president of the claimant did not pay, or intend to pay, any part of the indebtedness of the Federal Bank to his bank. There is no question but that the Federal Bank received the money belonging to the Selma National Bank, and gave it credit therefor. It understood that the deposit was made by the Selma National Bank, and the money deposited came directly from the funds of the latter. The liability of the Federal Bank, therefore, to the Selma National Bank, was primary and direct. It did not concern and does not concern the Federal Bank, which thus received the funds of the Selma National Bank, that the latter had a claim on account of this transaction against its president for making the deposit without authority. The Selma National Bank called its president to account,

and in the adjustment of his liability to it for his negligent or unauthorized acts it was anticipated that it would sustain a total loss of about 40 per cent. of this deposit, making approximately \$3,000, and this amount was included in the note given by Carraway to his bank in settlement of its claim against him. The note, however, has not been paid. It appears by the evidence that it was expressly understood when it was given that he was not to become liable thereon in excess of the loss actually sustained by the Selma National Bank on its claim against the Federal Bank. If the note had been paid and the assets of the Federal Bank were sufficient to pay more than 60 per cent. of the claim of the Selma National Bank, that would not relieve the Federal Bank from its liability for the 40 per cent. balance; and the only question that could arise would be as to whether the claim could be enforced by the Selma National Bank, as trustee for Carraway, or whether Carraway himself would be deemed subrogated to the claim to that extent and be obliged to prosecute it in his own name, but that question does not arise upon this record, for the undisputed evidence shows that it would be the duty of the claimant to apply any amount it receives upon its claim against the receiver of the Federal Bank in excess of 60 per cent. in reduction of Carraway's note. Payment in the circumstances to the Selma National Bank will release the liability of the receiver from any claim by Carraway, and, in view of the fact that Carraway has made no claim against the Federal Bank, it is difficult to understand any theory upon which the receiver of the Federal Bank is concerned with the claim of the Selma National Bank against its president upon a secondary liability for this claim.

The learned counsel for the respondent further contends that the appellant is concluded by an order for distribution of the funds on hand by the receiver made upon an accounting by the receiver pursuant to the provisions of sections 6, 8, c. 60, pp. 115, 116, Laws 1902. The determination of the referee was filed on the 31st day of July, 1906, and a copy thereof served upon the attorney for the appellant on the 10th day of October, 1906, prior to which time he had no notice of the determination. It appears by affidavit of the attorney for the respondent that on the 18th day of June, 1906, an order was made by the Supreme Court, requiring the receiver to file an account of his proceedings; that pursuant thereto, he filed an account on the 6th day of August, 1906, in which he set forth, among other things, the claim of the appellant, and that it had been disputed by him and referred to the referee, and the determination of the referee thereon; that within 10 days thereafter notice was given to the appellant by mail of the filing of said account and of the service thereof upon the Attorney General, and that the same would be presented to the court "for passage and settlement, and for instructions relative to the disposition of the balance in the hands of the receiver," on the 6th day of September, 1906; that on the return of that motion the appellant failed to appear, and thereafter an order was made and entered on the 26th day of November, 1906, "passing, settling, ratifying, and confirming said accounts in all respects as filed, including the action had with respect to the Selma National Bank." That order has not been vacated nor has

any appeal been taken therefrom. This is the order which it is claimed is binding upon the appellant, and concludes it from reviewing the determination of the referee. It appears by affidavit of the attorney for the appellant that he appeared for the appellant generally in this proceeding on the 1st day of September, 1905, and served a notice of appearance on the attorneys for the receiver and on the Attorney General, and demanded that a copy of all papers and a notice of all proceedings be served upon him, but that he received no notice of the order requiring the receiver to account or of the filing of the receiver's account, or of an application for the allowance thereof, and had no knowledge thereof until the 13th day of December, 1906, when the affidavit of the attorney for the respondent, setting forth these facts, was submitted to the court on the hearing on appellant's exceptions to the referee's determination of the disputed claim.

Neither the proceedings or the accounting, nor the order of the court therein, nor the notices of appearance, are in the record. The respondent contends that the appearance was not an appearance in the action, which was brought for the dissolution of the corporation, and that it did not make the appellant a party thereto, but that it was merely an appearance in the proceeding with respect to the disputed claim. The theory of the learned counsel for the respondent is that the proceedings with respect to the receiver's accounting were in the action, and that, upon the accounting, the appearance for the appellant was properly ignored, and notice was only required to be given in accordance with section 8, c. 60, p. 116, Laws 1902, which provides for giving notice by mail to creditors. Section 6 of said act provides for a final accounting by a receiver upon his own motion or upon order of the court on application of the Attorney General or of a creditor or interested party. The accounting having been made pursuant to an order of the court, it may be assumed, although it does not definitely appear, that it was not a voluntary accounting; and yet, since the statute authorizes the court to require the receiver to file an intermediate account, it does not clearly appear that it was an order for a final accounting. Section 8 of the act requires the receiver, among other things, to file his account, and to serve a duplicate thereof upon the Attorney General, who is authorized to serve objections thereto, and requires the receiver to mail to each creditor within 10 days after filing the account notice of the time and place of presentation of the account to the court. The section further provides that, unless objections are made to the items of the account by a creditor or on behalf of the attorney general, no referee shall be appointed to pass thereon, but the same shall be examined and settled by the court, and that, in case objection is made, a referee may be appointed "to take the testimony and report the same to the court." At the time the order for the accounting was made the reference of the appellant's claim was pending; but before the account was filed the determination of the referee had been filed. The appellant, however, had no opportunity to review the determination of the referee, as its attorney had no notice of the determination of the referee until after the application for the approval of the receiver's accounts had been made or of the filing of the

receiver's account until after the order approving the same was made. The order of reference on the claim of the appellant, which was disputed by the receiver, was made pursuant to the provisions of section 5 of said act, which made it the duty of the receiver to apply to the court, upon notice to parties whose claims he rejected, "for the appointment of a referee to hear and determine as to the allowance thereof."

If it were intended by the Legislature that the court on a proceeding for an accounting by the receiver should review the determination of a referee with respect to a disputed claim, or pass upon claims disputed by the receiver and pending undetermined before a referee, or, in other words, that all references should be superseded by the accounting proceedings, then it is clear that the notice of appearance by the appellant required that notice of the application for the approval of the accounts of the receiver be given to its attorney, which was not done. If the order for the accounting did not supersede all references of disputed claims, the court on the accounting could not review these determinations of the referee. Then the order of the court approving the accounts of the receiver should not conclude the appellant. The receiver and his attorneys knew that the appellant was asserting the claim before the referee, that it had not been given notice of his determination, and had not been afforded an opportunity to review such determination. It was the duty of the receiver and of his attorneys in the circumstances to bring the matter to the attention of the court, to the end that a final order of distribution should not be made until the validity of the claim of the appellant was finally decided. It does not clearly appear that the order made was a final order of distribution, nor does it appear that distribution has been made thereunder. It does not appear that any order has been entered confirming the determination of the referee or that any judgment has been entered thereon. The appellant followed the practice prescribed by rule 30 of the general rules of practice, and filed exceptions to the report of the referee within eight days after service of notice of filing the same, and thereafter duly brought his exceptions to a hearing at Special Term, and has taken an appeal from the order overruling the same. The receiver does not object to the hearing of the merits on the appeal from the order overruling the exceptions upon the theory that no appeal lies from this order and that appellant's remedy is to appeal from an order confirming the report of the referee or from a judgment to be entered upon the determination of the referee.

As already observed, it does not appear that any such order or judgment has been entered or that the receiver contemplates entering the same. The objections are that the determination of the referee is final, and also that the appellant is concluded by the order approving the accounts of the receiver. If the Legislature intended that the determination of the referee should be final with respect to all rejected claims, that would be such a new and unusual departure that we would expect to find in the act language clearly expressing such intent. We find nothing in the statute to indicate that the Legislature intended to deprive claimants of the right to have the rejection of their claims by the referee reviewed by the court or of the receiver to

have claims allowed over his objection reviewed by the court. We are therefore of the opinion that the right to review the determination of the referee by either party continued as before the act of 1902 and that the practice followed by the appellant in filing exceptions to the report of the referee and bringing the same to a hearing at the Special Term was proper and in accordance with the decision of this court in *People v. American Loan & Trust Co.*, 87 App. Div. 139, 84 N. Y. Supp. 114, 69 N. E. 429; *Id.*, modified 177 N. Y. 231, 469, 69 N. E. 1105, which upon that point I do not understand to have been affected by the reversal in the Court of Appeals. This court has held that such a determination of a referee under the act of 1902 is final and conclusive, unless set aside by the court. *Matter of Eustace v. N. Y. Building Loan Co.*, 98 App. Div. 97, 90 N. Y. Supp. 784. See, also, *Austin v. Rawdon*, 42 N. Y. 155, and *Del. Valle v. Navarro*, 21 Abb. N. C. 136, and note. As the material facts are undisputed, there is no necessity of a further reference.

It follows that the order should be reversed, with \$10 costs and disbursements, and the exceptions sustained and claim allowed in full, with costs at Special Term and costs of the hearing before the referee to appellant. All concur.

(58 Misc. Rep. 645.)

INNOVATION TRUNK CO. v. PLATT.

(Supreme Court, Appellate Term. December 20, 1907.)

1. TROVER AND CONVERSION—ESSENTIAL ELEMENTS OF CONVERSION.

An essential element of conversion is that plaintiff has a property or ownership in the thing converted or the right of possession at the time of conversion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, *Trover and Conversion*, §§ 119-122.]

2. SAME—ACTIONS—EVIDENCE—SUFFICIENCY—FIDUCIARY RELATION—DEBTOR AND CREDITOR.

Where an officer of a corporation, having no fixed salary, is permitted to draw what money he wants for his needs, and it is charged to him, and on the return of money, which he drew, and loaned to another, applies such money to his personal purposes, including payment of taxes on his father's property, the relation between him and the corporation is that of debtor and creditor, and he is not liable for conversion.

Appeal from City Court of New York, Trial Term.

Action by the Innovation Trunk Company against Arthur C. Platt for conversion. From an order setting aside a verdict for defendant, he appeals. Reversed, and verdict reinstated.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

A. Parker Smith (Robert B. Honeyman, of counsel), for appellant.

Wentworth, Lowenstein & Stern (Louis Lowenstein, of counsel), for respondent.

McCALL, J. This action is for the conversion of the funds of the plaintiff by the defendant. The material facts are not in dispute. One Bonsall was the inventor of a wardrobe trunk. He sought the

aid of Platt, the defendant, to assist him in promoting his business. No agreement as to the wages or salary to be paid to the defendant by plaintiff was made, but the defendant drew from time to time such sums as he might need for his expenses. At times Bonsall made suggestions as to defendant's expenses, arranged for his apartment, introduced him to his tailor, and promised defendant a considerable sum of money when the business was in shape to warrant it. Subsequently, and in March, 1900, the business was incorporated under the name of the plaintiff company; Bonsall either owning or controlling substantially all the stock. The defendant was made the president and the treasurer of the company. There was no change in the manner of transacting the business. Defendant had entire charge and management, and his employment and duties continued exactly as they had under Bonsall individually, with nothing said as to defendant's compensation. It appeared upon the trial, without dispute, that the defendant drew money "for any purpose he needed money for," and each month his drawings were entered up against him, and a statement of the account given to Bonsall. The defendant drew the drafts and checks of the company, and signed them as president and treasurer.

In the summer of 1903 Bonsall was in Europe, and sent for the defendant to come there. Platt arranged with Brown Bros. in New York, and obtained an authorization upon their representative in London, by which arrangement, when Platt drew a draft, the London bankers cashed it for him. They then sent it to Brown Bros. in this city, who sent it to the bank with which plaintiff had its account. This bank paid it, charged it to the plaintiff's account, and the plaintiff then charged the amount of the draft to the defendant's account. While in London, a man named Mumford called upon the defendant. Mumford asked defendant for a loan of \$500. The plaintiff had had dealings with Mumford, and at that time was indebted to him in some amount. The defendant thereupon drew a draft for £100 and gave it to Mumford. This draft, after going through the channels indicated above, was paid by the plaintiff and the amount charged to the account of the defendant. Bonsall knew of this loan to Mumford, and told the defendant that it was satisfactory. Upon defendant's return from Europe Mumford paid to the defendant, by a check payable to defendant's order, the amount of this loan. The defendant made use of this money the same as "if I had drawn it from the funds of the corporation." Although the plaintiff claimed in this action that defendant had converted some \$1,500 of the plaintiff's money, upon the trial it limited itself to a claim that the facts above stated showed either a conversion by the defendant of the sum of \$500, or at least the sum of \$100, as it appeared in evidence that the defendant used some portion of the Mumford money to pay taxes upon some property owned by defendant's father, which property was to be given to defendant; his testimony being, "It may have been \$100." The jury rendered a verdict for the defendant, which the court set aside, holding, substantially, that a cause of action for conversion was made out against the defendant.

I do not subscribe to this contention. The essential element of conversion is that the plaintiff has a property or ownership in the thing

converted, or the right of possession at the time of conversion. Neither of these elements appear in the facts shown in this case. The only relation existing between the plaintiff and Platt was that of debtor and creditor. This is evidenced by the fact that the money in question was charged to him on the plaintiff's books. The money drawn by the defendant was not received by him in a fiduciary capacity. True, he could be compelled to account for the same; but he was not compelled to return the identical money received by him, even if unaccounted for. "The fiduciary relation exists by reason fiducia, or faith reposed, as where one man intrusts his property to another for a particular purpose." *Moffatt v. Fulton*, 132 N. Y. 515, 30 N. E. 992. In the case at bar the defendant had provided for drawing the sum of \$2,500 for use during his trip to Europe. He was at liberty to use the proceeds of his drafts in any way that he saw fit. He was not limited to any particular money for any particular purpose, and was only required to account to the plaintiff for the amount used by him, and not for the manner or purpose for which it was used. In *Farrelly v. Hubbard*, 84 Hun, 391, 32 N. Y. Supp. 440, it was held that an action for conversion could not be maintained against a person who receives money in a fiduciary capacity, that when money is received by the consent of another the legal obligation thus created is discharged by paying the debt, and that it is never necessary to repay the identical bills received. Upon appeal the court, without disputing the accuracy of the rule stated, reversed the judgment, upon the ground that the defendant in that case was the mere servant of the plaintiff and bound to immediately carry the money to the plaintiff. *Farrelly v. Hubbard*, 148 N. Y. 592, 43 N. E. 65. The omission to pay over money received as a factor, agent, or trustee in the course of the agency or trust will not lay the foundation for an action of trover. *Harris v. Schultz*, 40 Barb. 315; *Morange v. Waldron*, 6 Hun, 529. When the Mumford loan was repaid to the defendant, it was already charged to him in his account with the plaintiff.

The plaintiff urges that the defendant was limited to drawing money for his living expenses. This does not so appear. The defendant testified, and it was not disputed, that "I drew money for any purpose that I needed money for." It was also shown by two witnesses, without objection, that Bonsall had stated that the corporation had no particular arrangement with defendant regarding the salary to be paid him, that Platt "drew whatever he wanted," that he (Bonsall) "trusted him implicitly." While, perhaps, these statements of Bonsall are not binding upon the corporation, nevertheless they throw light upon the relations existing between the plaintiff, who was really and to all intents and purposes the creature of and owned and controlled by Bonsall and the defendant, and tend to show that the only relation existing between them in their business transactions was that of debtor and creditor.

The verdict was right, and should not have been set aside. Taking the evidence on the part of the plaintiff as true, it fails to show a cause of action for conversion.

Order reversed, and verdict reinstated, with costs. All concur.

TALTY et al. v. STRAUSS.

(Supreme Court, Appellate Term. December 20, 1907.)

APPEAL—APPEALABLE ORDER.

An appeal lies from an order of the Municipal Court denying a motion to open a default, on which plaintiffs have obtained and entered a judgment, and it is unnecessary that defendant should appeal from the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 766, 767.]

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by John Talty and others against Herman Strauss. Judgment for plaintiffs. From an order denying a motion to open a default, defendant appeals. Reversed.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Rose & Putzel (Jos. A. Burdeau, of counsel), for appellant.

Leidy & Goodstein (Herman B. Goodstein, of counsel), for respondents.

McCALL, J. The defendant herein appeals from an order denying his motion to open a default, upon which the plaintiffs have obtained and entered a judgment, and the contention of the plaintiffs (respondents) is that defendant (appellant) has mistaken his remedy and should have appealed from the judgment, and that from the order entered no appeal can be taken. I do not believe that that position is sound. The attitude this court assumed in the case of Lefenfeld v. Adler (Sup.) 99 N. Y. Supp. 799, does not control in the case at bar, and the point of differentiation is marked in the case of Guggolz v. Arch Realty & Construction Co., 53 Misc. Rep. 258, 103 N. Y. Supp. 82, the doctrine of which applies herein. Upon the merits of the case, I am of the opinion that a good and sufficient excuse under the rules, was offered in proper form by the defendant for an adjournment, and the same should have been recognized, and the application granted. Members of the bar, in response to their duties, cannot be expected to be in two places at the same time, and the advancement of these hair-splitting differences as to the time different courts convene in different parts of the city, as demonstrating that at a precise moment one court is not in session, and hence actual engagement cannot be shown, and a sufficient excuse under the rule is not therefore offered, would, if approved, simply establish an absurdity. All that was contemplated by the rule was shown in the affidavit submitted, and the order should be reversed. Judgment vacated, and order reversed, and new trial ordered, with costs to appellant to abide the event.

FORD, J., concurs. GILDERSLEEVE, P. J., concurs in result.

(56 Misc. Rep. 627.)

**NATIONAL SOCIETY OF UNITED STATES DAUGHTERS OF 1812 v.
AMERICAN SURETY CO. OF NEW YORK.**

(Supreme Court, Appellate Term. December 19, 1907.)

1. **INJUNCTION—LIABILITY ON BOND—DAMAGES—COUNSEL FEES.**
Counsel fees are not recoverable as an element of damages in an action on an injunction bond given and sued on in a federal court.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 597.]
2. **COURTS—RULES OF DECISION—DECISIONS OF UNITED STATES COURTS AS AUTHORITY IN STATE COURTS.**
In an action in a state court on an injunction bond given in a United States court, the rule of the federal courts that counsel fees are not admissible as an element of damages prevails.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 329.]
3. **APPEAL—PRESENTATION OF QUESTIONS IN LOWER COURT—THEORY OF CASE.**
The general rule is that a party who has acquiesced in the trial of an action on a certain theory will not be heard to assert for the first time on appeal that there was error in adopting that theory.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1053.]
4. **SAME—QUESTION NOT RAISED ON TRIAL.**
A question not raised on the trial will not be considered for the first time on appeal.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1018-1034.]
5. **TRIAL—OBJECTIONS TO EVIDENCE—SUFFICIENCY—GROUNDS OF OBJECTION.**
In an action in a state court on an injunction bond given in a United States court, the only damages shown were for counsel fees in procuring a dissolution of the injunction, and evidence as to this was taken against objection of defendant's counsel on the ground of immateriality and irrelevancy, without referring specifically to the rule of the federal courts as to the inadmissibility of counsel fees as an element of damage in such a suit. *Held*, that the question was not presented by the objection in such a manner as to bring it specifically to the court's attention.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 194-200.]
6. **CORPORATIONS—CORPORATE EXISTENCE—RIGHT TO DENY—ACTION BY CORPORATION.**
Persons sued by a corporation, where the action is *ex contractu*, as well as where it is *ex delicto*, are debarred from setting up the defense that the corporation was not legally organized; that being a question for the state.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 81-96.]

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by the National Society of United States Daughters of 1812 against the American Surety Company of New York. Judgment for plaintiff, and defendant appeals. Reversed, with leave to plaintiff to appeal to the Appellate Division.

Argued before GILDERSLEEVE, P. J., and GUY and BRUCE, JJ.

Asa Bird Gardiner, for appellant.

Philip Carpenter, for respondent.

GILDERSLEEVE, P. J. In an action in the United States Circuit Court, wherein one Titus and others were complainants and the plain-

tiff herein was defendant, a temporary injunction was given upon the application of the complainants. Upon the undertaking given on said injunction the defendant herein was the surety. The injunction was subsequently dissolved, and the bill or complaint in the case was dismissed. Thereupon this action was brought in the Municipal Court, on the undertaking, against defendant as surety. The only damages shown were for counsel fees in procuring a dissolution of the injunction, and the court below gave judgment for the plaintiff for the sum of \$200, interest, and costs. Defendant appeals.

Counsel fees are not recoverable as an element of damage in an action upon an injunction bond given in a United States court and sued upon in a United States court. *Oelrichs v. Spain*, 15 Wall. 211-231, 21 L. Ed. 43. It has also been held by the United States Supreme Court that, in an action brought in a state court upon an injunction bond given in a United States court, the rule of the federal court prevails, and that counsel fees are not admissible as an element of damage. *Tulluck v. Mulvane*, 184 U. S. 497, 22 Sup. Ct. 372, 46 L. Ed. 657; *Missouri, K. & T. R. R. Co. v. Elliot*, 184 U. S. 530, 22 Sup. Ct. 446, 46 L. Ed. 673. Plaintiff claims that defendant did not raise this point at the trial, and that the action was tried on the theory that the principle prevailing in the courts of this state, allowing counsel fees for setting aside the injunction as an element of damage in an action on the undertaking, applied to the case at bar. There is no substantial contention as to the law applicable to the conditions created by the transaction under consideration.

The respondent rests his claim for affirmance upon the ground that the trial proceeded upon an erroneous theory with the acquiescence of both parties, and that a new, although correct, theory cannot be urged upon appeal. The general rule is that a party who has acquiesced in the trial of an action upon a certain theory will not be heard to assert for the first time on appeal that there was error in adopting the theory he assisted in establishing as the law of the case, and that a question which was not raised on the trial will not be considered for the first time on appeal. *Reich v. Cochran*, 151 N. Y. 129, 45 N. E. 367, 37 L. R. A. 805, 56 Am. St. Rep. 607; *Vann v. Rouse*, 94 N. Y. 401; *Wellington v. Morev*, 90 N. Y. 656; *Caponigri v. Altieri*, 165 N. Y. 263, 59 N. E. 87. This general principle has been held to apply to appeals from the Municipal Court to the Supreme Court, and its soundness will not be challenged. *Steinhart v. Enteen*, 43 Misc. Rep. 388-390, 87 N. Y. Supp. 482.

The learned counsel for the appellant, however, urges that it is not necessary, in an action in a state court on a bond given in a United States court, that a right of a federal nature should be specifically raised, but that it is sufficient if the state court, by the pleadings, evidence, or otherwise, is informed of such fact. In support of this theory he cites the case of *M., K. & T. R. R. Co. v. Elliot*, supra, which is an appeal to the United States Supreme Court from the state court of Missouri. It was there held by Mr. Justice White that:

"If the state court, in deciding the case, has actually considered and determined a federal question, although arising on ambiguous averments, then, a federal controversy having been actually decided, the right of this court to

review obtains; and all that is essential is that the federal questions must be presented to the state court in such a manner as to bring them to the attention of that tribunal."

Can it be said that the erroneous admission of evidence by the Municipal Court on the question of damages is sufficiently presented to the Appellate Term of this court by the objections and exceptions taken at the trial? The pleadings state the facts which show the successive steps taken in the United States court. Plaintiff's counsel took the stand to show what damages plaintiff had sustained by reason of the injunction, and he is the only witness on that branch of the case. He sought to show what services he had rendered in the injunction matter, their value, what he had been paid, and what his client had agreed to pay him. All of this testimony was taken under the objection and exception of defendant's counsel. The grounds of the objection were immateriality and irrelevancy, without referring specifically to the federal rule on the inadmissibility of counsel fees as an element of damage in a suit on an injunction bond. While it is true that the evidence, to which objection was made, was in point of fact immaterial and irrelevant to the issues, since the services proven and the fees paid, or agreed to be paid, were not an element of damage in the case at bar, still it cannot be said that the federal question was presented to the Municipal Court by the objections in such a manner as to bring it specifically to the attention of that tribunal. While it must be said that the question which the court below was called upon to determine was not, upon the trial, in terms and language designated as a federal question, still under the pleadings and proof it was the inherent and vital question upon which the decision necessarily turned, and the judgment, as rendered, could not have been given without deciding it. The only issue presented was the claim for damage under a federal bond. The limit of liability under the bond was \$250, which was the amount demanded in the complaint, and also the amount claimed by counsel to be his agreed fee for getting the injunction vacated, and, as we have seen, the only evidence of damage by reason of the injunction was this counsel fee. If plaintiff could have shown any other element of damage, it is not indicated in any way either in the pleadings or proof.

In *Maxwell v. Newbold*, 59 U. S. 511-516, 15 L. Ed. 506, cited with approval in *Oxley Co. v. Butler Co.*, 166 U. S. 649, 655, 656, 17 Sup. Ct. 709, 41 L. Ed. 1149, no reference was made to the federal question at the trial in the state court; but the Supreme Court of the United States held that this did not preclude the plaintiffs in error from raising the point in the appellate state court, "if it was involved in the case as presented to that court." In the case at bar the federal question, as we have seen, is clearly involved in the case as presented to the Appellate Term. As the case now stands, the plaintiff has a judgment for damages to which he is not entitled by law. Such judgment, in the interests of justice, cannot stand. Inasmuch, however, as there may be at least a possibility of plaintiff proving some other element of damage, a new trial should be granted.

So far as defendant's claim that plaintiff is not legally incorporated is concerned, assuming such to be the fact, it may be observed that the

general rule is that persons sued by a corporation in an action ex contractu, as well as persons sued by a corporation in an action ex delicto, are equally debarred from setting up the defense that the corporation was not legally organized, which is a question for the state. Cook on Corporations, p. 1422. However, it is not necessary to discuss this branch of the case, as the judgment must be reversed for the reasons above stated.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

As the questions presented are somewhat novel and of an important character, the respondent may have leave to appeal to the Appellate Division. All concur.

HOPP v. McWHIRTER et al.

(Supreme Court, Appellate Term. December 20, 1907.)

SALES—RECOVERY OF PRICE—DEFENSES—ILLEGAL USE OF PARTNERSHIP NAME—STATUTORY PROVISIONS.

Recovery may be had for goods sold and delivered, notwithstanding the vendor may have been transacting business in violation of Pen. Code, § 363, declaring any person using the designation "and Company" or "& Co.," where no actual partner is represented thereby, guilty of a misdemeanor.

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Percy P. Hopp, doing business under the name of the Bronx Window Shade & Awning Company, against William H. McWhirter and another. Judgment for defendants, and plaintiff appeals. Reversed, and a new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

David H. Taylor, for appellant.

Oliver E. Davis, for respondents.

PER CURIAM. The plaintiff sued as Percy P. Hopp, doing business under the name of the Bronx Window Shade & Awning Company. The pleadings were oral; plaintiff claiming for goods sold and delivered, and the defendants pleading a general denial. The plaintiff called a witness, who testified that he was the manager and salesman for the Bronx Window Shade & Awning Company and that he sold and delivered to the defendant McWhirter window shades to the amount and value of \$80.40, which were placed in one of defendant's houses and for which he promised, but had failed, to pay. When plaintiff rested, the defendant moved to dismiss the complaint upon the ground, among others, that the plaintiff had not shown authority to do business under "that name." This motion was granted. This was error. There was no evidence that the plaintiff was transacting business in violation of section 363 of the Penal Code, and, even had that appeared, it would not have prevented the plaintiff from recovering under the testimony in this case. *Vandergriff v. Bertron*, 82 N. Y.

Supp. 154, 83 App. Div. 548; *Loeb v. Fireman's Ins. Co.*, 78 App. Div. 117, 79 N. Y. Supp. 510.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

(56 Misc. Rep. 664.)

ANDERSON v. HEBBARD.

(Supreme Court, Appellate Term. December 20, 1907.)

LANDLORD AND TENANT—LEASE—OPTION TO CANCEL—NOTICE.

A lease of an apartment for 18½ months, terminating September 1, 1907, provided that the landlord should have the right to cancel the lease at any time during the term, on 30 days' notice, prior to the date of the cancellation, of his intent so to do. On March 5, 1907, an agent of the owner wrote to the tenant that the rent of the apartment would be at the rate of \$60 per month after May 1st next, and asked the tenant to notify him whether he wished to keep the apartment at this rent. *Held*, not the 30 days' notice required by the lease for its cancellation, but sent under a mistaken impression that the lease expired by its express terms on May 1st, and intended as an invitation to the tenant to stay, providing he would meet the increase of rental.

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by Chauncey Anderson against Gilbert C. Hebbard, Jr. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Anderson, Pendleton & Anderson, for appellant.
Walradt, Blaney & Hord, for respondent.

McCALL, J. The relation existing between the parties to this litigation was that of landlord and tenant, and is defined in a written instrument of lease of an apartment in the building, 687 Lexington avenue, in this city. The term of holding therein defined was a period of 18½ months, beginning on February 15, 1906, and terminating on September 1, 1907, at a fixed rental of \$50 per month. The lease, however, contained this clause:

"It is hereby expressly understood and agreed that the said party of the first part (the landlord) retains the right and privilege of canceling this lease at any time during the term, provided, however, he gives written notice of his intention to the party of the second part thirty days prior to the date of cancellation decided upon."

There is no dispute about the facts in the case, and unless the landlord has exercised his option thus above shown to have been specially reserved to him of canceling this lease, then the term of same would not have expired until September, 1907, and, as the month's rental sued for long antedated the fixed period of expiration, the defendant was answerable for the amount sued for and obligated to pay same. On March 5th one Henry Keale personally wrote the following letter to the defendant:

"Dear Sir: The owner of the building, No. 687 Lexington avenue, requests me to say that the rent of the apartment now occupied by you in that building will be at the rate of \$60 per month from and after May 1st next. Kind-

ly let me know whether or not you desire to keep the apartment at this rent and oblige,

"Yours very truly,

Henry Keale."

And this letter, read in the light of the right of cancellation reserved in the lease, presents the only question involved in this litigation, because, as heretofore stated, all the facts being conceded, the question turns on whether from this writing is to be spelled the exercise by the landlord of the right reserved unto him to terminate the tenancy before the time fixed in lease for expiration. In our judgment the agent who wrote that letter was clothed with full authority to represent the landlord, and, whatever the purport of his act, it is binding upon the principal, and with that statement we dismiss that feature of the case.

But what motive prompted the sending of this letter, and what purpose was sought to be worked by it? Examined from any viewpoint it is impossible to interpret it in any sense as exercising the right of cancellation reserved. It was not a 30-day notice, such as was called for by the terms of the lease. In not a syllable of the writing is there a reference to a cancellation of or intent to cancel an existing lease, and while it does refer to an intention to put a higher price upon the occupancy of the apartment after a given date, to wit, May 1st, some 40 or 50 days in the future, it expressly invites the views of the tenant as to whether he will continue upon the increased basis, showing clearly, not an intent to exercise an absolute right established by an existing contract, but, when that contract should expire, a statement of terms under which a new contract could be entered into between the parties, if they so desired. Of course, the landlord was mistaken as to his power to do this, because the existing contract did not expire on May 1st, but on September 1st of the same year, and he could not, had he attempted, enforce the payment of such increased rental; and this, it seems to me, is the test to apply in determining the question presented by this litigation. We are not left in any doubt about, nor have we cause to conjecture, that, this letter of March 5th was sent through mistake as to the date of fixed expiration. The correspondence clearly demonstrates it, and the defendant himself was fully imbued with the belief, as shown by his testimony, and was fully apprised of same, and in what we believe was ample time.

The correspondence following the letter of March 5th clearly indicates the construction and interpretation put upon it by the parties. Neither party treated the letter as an exercise of the option reserved in the lease. It is unfortunate that the defendant has taken upon himself contractual obligations that may prove onerous; but in the light of all the circumstances, and the proof adduced, it is in our judgment impossible to reach any other conclusion than that the letter of March 5th was sent by the landlord under the mistaken impression that the lease expired by its express terms on May 1st, and what was intended was, not an invitation to the tenant to vacate the premises, but rather to stay, provided he would meet the increase of rental; that the landlord had not thereby exercised the right of cancellation, nor was any such idea conveyed thereby; that the lease did not end until

September 1st; and that the defendant was answerable to the demand for payment, and must respond.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

ISRAELS et al. v. MacDONALD et al.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

1. EVIDENCE—OPINIONS—SUBJECTS OF EXPERT TESTIMONY.

Where, in an action by architects for fees for making plans for a building at a specified per cent. of the cost thereof, the actual cost could be proved, the testimony of experts as to the cost of the building, based on calculation, was inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2330.]

2. SAME—VALUE OF BUILDING—ARCHITECTS' ESTIMATE.

In an action by architects for fees for making plans for a building at a specified per cent. of its cost, a statement of one of the architects, before the plans were drawn, of the amount the building would cost, was only an estimate, and inadmissible, where the actual cost could be proved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2330.]

3. SAME—PLANS AND SPECIFICATIONS—SELF-SERVING DECLARATIONS.

In an action by architects for fees for making plans for a building at a specified per cent. of its cost, the statement as to the cost in the plans filed with the building department was inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1096.]

4. APPEAL—PRESENTATION OF QUESTIONS IN LOWER COURT—ELEMENTS OF CAUSE OF ACTION.

Where, in an action by architects for fees for making plans for a building at a specified per cent. of its cost, plaintiffs opposed a motion to nonsuit and claimed the right to go to the jury on evidence of the cost of the building, and they did not claim that the evidence established a right to recover on certain items, the question of the right to recover on such items could not be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1070-1078.]

Appeal from Trial Term, Kings County.

Action by Charles H. Israels and another, doing business as Israels & Harder, against Ranald H. MacDonald and another, doing business as Ranald H. MacDonald & Co. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

The action is to recover a balance for the fees of the plaintiffs as architects. The complaint alleges and the plaintiffs proved a contract that they were to make the plans and specifications of a building about to be erected by the defendants, and be paid 3 per cent. therefor on the cost of the building by the defendants. The building was completed, and the defendants paid the plaintiffs 3 per cent. on what the defendants claimed was the cost, viz., \$275,891.45, and also an additional sum for other items, but the plaintiffs claimed that the cost was more, viz., \$400,000, and sued for the balance due them thereon, and for some small items of extra work, which the defendants claim to have overpaid.

Argued before JENKS, HOOKER, RICH, MILLER, and GAY-NOR, JJ.

Theodore T. Baylor, for appellants.

Frank W. Arnold (Frederick C. Gladden, on the brief), for respondents.

GAYNOR, J. The learned trial judge did not err in excluding the evidence of experts as to what the cost of such a building would be. The actual cost could be proved, and therefore the case was not one for the opinion, calculation or estimate of experts. No case is cited to the contrary. Nor was the statement of one of the plaintiffs before the plans and specifications were drawn, of the amount the building would or was to cost, evidence of the actual cost; it was only an estimate or opinion. The same is true of the statement as to cost in the plans and specifications filed with the building department. There being no evidence of the actual cost, the case called for a nonsuit.

But the plaintiffs now claim that at all events they were entitled to recover some small items amounting to about \$233, whereas the action is for \$3,298.97. The claim is very obscure, to say the least. But it suffices that it was not made below. On the contrary, in opposing the motion for a nonsuit, counsel for the defendants claimed the right to go to the jury on the evidence of the cost of the building only. If, apart from that, he claimed that the evidence established a right to recover some other item, he should have pointed it out.

The judgment should be affirmed.

Judgment affirmed, with costs. All concur.

CRISSMAN V. ERIE R. CO.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

1. MASTER AND SERVANT—INJURY TO SERVANT—EVIDENCE.

In an action against a railroad company for death of an engineer, evidence held to sustain verdict for plaintiff.

2. TRIAL—MOTION TO DIRECT VERDICT.

A motion to direct a verdict on specified enumerated grounds excludes all grounds not enumerated.

Appeal from Trial Term, Orange County.

Action by Caroline Crissman, executrix of Henry Crissman, against the Erie Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before WOODWARD, JENKS, RICH, MILLER, and GAYNOR, JJ.

John B. Stanchfield, for appellant.

Thomas Watts, for respondent.

GAYNOR, J. There is no reason to interfere with this judgment. The deceased was a locomotive engineer. His engine left the track near the Bergen tunnel in New Jersey, toppled over on and killed him. He was 59 years old and left a widow and a son 30 years old. The verdict was for \$10,500. The defendant had been repairing and re-

laying a section of the track. There is evidence to show that the ties and rails were put down on loose material, and that the heavy engine caused the track to move, and to sink on one side. The defendant's main contention was that the engine left the track just before it reached the place where the repairs had been done. The judge submitted this to the jury, and also took away from them any question of the sufficiency of the material, leaving to them only the question of whether the work had been properly done and the track made safe. The verdict is not against the weight of evidence.

The complaint alleges the New Jersey statute similar to ours which allows actions like this, but although this was put in issue by the answer there was no proof of it, the judge took no note of it in his charge, but instructed as though the action were under the New York statute, and there was no reference to the matter by any one during the trial. The defendant now asks for a reversal on the ground that the plaintiff did not make out a case for lack of such proof, and that therefore its motion at the close to direct a verdict was erroneously denied. But when we look at the record we find that the motion was put on specific enumerated grounds, thereby excluding all grounds not enumerated, and the one in question was not.

The judgment should be affirmed.

Judgment and order affirmed, with costs. All concur.

RAMSAY v. LANTRY, Fire Com'r, etc.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

MANDAMUS—MUNICIPAL FIRE DEPARTMENT—PENSIONS—FIXING AT WRONG AMOUNT—CORRECTION—LACHES.

A person who, upon retirement from the fire department of the city of New York, has his pension fixed at a sum less than he is entitled to in law, is not barred by laches because his application to compel the commissioner to fix it at the proper amount is not brought promptly after the amount was fixed, since the rule that a person dismissed from an office, if he wishes to be reinstated, must apply promptly, does not apply.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 283.]

Appeal from Special Term, Kings County.

Application for a writ of mandamus by John Ramsay against Francis J. Lantry, as commissioner of the fire department of the city of New York, etc. From a final order granting a peremptory writ, respondent appeals. Affirmed.

Argued before WOODWARD, JENKS, RICH, MILLER, and GAYNOR, JJ.

James D. Bell (James W. Covert, on the brief), for appellant.
Charles J. Ryan, for respondent.

GAYNOR, J. When the respondent was retired from the fire department of the city of New York his pension in the fire department pension fund was fixed at \$533.33 by the fire commissioner. It was the statute duty of such commissioner to fix such pension at one-half the

salary the respondent was receiving at the time of his retirement, or at "such less sum in proportion to the number of officers and members so retired as the condition of the fund will warrant." Claiming that his pension should have been fixed at \$800 (for his salary was \$1,600 at the time of his retirement) the respondent brought an action to recover the difference for the first year between \$800 and the sum allowed him. He was retired on March 14, 1903, and commenced the said action on December 2, 1904. He failed in his action because his remedy was by mandamus to correct the error of the fire commissioner. *Ramsey v. Hayes*, 112 App. Div. 442, 98 N. Y. Supp. 394; 187 N. Y. 367, 80 N. E. 193. Thereupon he applied for a writ of mandamus to require his pension to be fixed at \$800, alleging facts showing that the state of the pension fund allowed him that amount, and the order granting a peremptory writ is here appealed from. The contention is that the application should have been denied for laches. It seems extraordinary that such an objection should be taken when it is not disputed that the condition of the pension fund was such that the respondent was entitled to have his pension fixed at \$800. Such a course in private affairs could scarcely be deemed honorable. The rule of laches declared by the courts in respect of applications to be reinstated in an office or place (*People v. Justices*, 78 Hun, 334, 29 N. Y. Supp. 157; *People v. Keating*, 49 App. Div. 123, 63 N. Y. Supp. 71; *People v. Sturgis*, 82 App. Div. 580, 81 N. Y. Supp. 816) has no application to this case. In such cases it is fair and meet that the person dismissed apply promptly for reinstatement, and not wait until another has become seasoned to his place, or the condition of the department has become adjusted to his absence. But here the respondent asked only for what in law and honesty he was entitled to, and the granting of which could injure no one.

The order should be affirmed.

Order affirmed, with costs. All concur.

KARCH v. NASSAU ELECTRIC R. CO.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

JURY—RIGHT TO TRIAL BY JURY—DEMAND—WAIVER OF RIGHT.

Municipal Court Act, Laws 1902, p. 1557, c. 580, § 230, provides that upon an issue of fact joined, if a jury trial be not demanded, the court must hear the evidence, etc. Section 231 provides that, at any time when an issue of fact is joined, either party may demand a jury trial, and, unless so demanded at the joining of issue, it is waived. *Held*, that a jury trial is waived only when neither party makes demand therefor; and hence, where plaintiff demanded a jury, and defendant's challenge to the venire and the jurors drawn was sustained, plaintiff could not waive his demand, nor could the court try the case alone against defendant's protest, since plaintiff's demand had assured a right to defendant, as well as to himself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 176-196.]

Appeal from Municipal Court, Borough of Brooklyn, Second District.

Action by Martin Karch against the Nassau Electric Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and MILLER, JJ.

A. M. Williams, for appellant.

Frederick N. Van Zandt, for respondent.

JENKS, J. The action is brought in the Municipal Court for loss of services of a wife consequent upon injuries suffered by her when a passenger in a car of the defendant. On the return day of the summons the plaintiff demanded a jury trial, and a venire was issued. When the case came on for trial, the defendant challenged the venire and the jurors drawn. The challenge was sustained, under exception by the plaintiff, who thereupon said that he would try the cause without a jury. The defendant declined to proceed without a proper jury. The plaintiff objected that the defendant could not demand a jury at that time. The defendant replied that such was its demand. The court ruled that the cause must go to trial without a jury. The defendant objected, and the court, ruling that it then demanded a jury and tendered the fees, denied the motions of the defendant, overruled its objections, and under exception the cause was tried without a jury. The court alone was not empowered to try the cause if a jury trial was demanded. Municipal Court Act, Laws 1902, p. 1557, c. 580, § 230.

The point of the respondent is that, inasmuch as section 231 provides "at any time when an issue of fact is joined, either party may demand a trial by jury, and unless so demanded at the joining of issue, a jury trial is waived," the defendant had waived its right by omission to demand the jury at the joinder of issue. But either party may demand a jury and thus secure it, and it is only when neither party makes such demand that the jury is waived. In this case the plaintiff had duly demanded the jury, and hence a trial by jury was then assured to both parties. The defendant had the right to rest upon the action of the plaintiff, and to assume that the trial would be by jury, and there was no reason why it should have then on its part taken a step like unto that already taken by the plaintiff to obtain a like condition for both parties. The plaintiff could not waive the demand against the protest of the defendant, because his demand had assured a right to the defendant, as well as to himself; and the court had no power to dispense with the jury against the protest of the defendant. *Sherwood v. N. Y. Telephone Co.*, 46 Misc. Rep. 102, 91 N. Y. Supp. 387.

The judgment must be reversed, and a new trial must be ordered before a court and a jury; costs to abide the event. All concur, except HIRSCHBERG, P. J., not voting.

PEOPLE ex rel. PECHTOLD v. BOGART, Commissioner of Licenses.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

1. CERTIORARI—NECESSITY FOR REVIEW—POSSIBILITY OF RELIEF.

On certiorari to review the revocation of an employment bureau license, where it appears that the writ was dated some two or three weeks prior to the expiration of the license by its own limitations under the law, and the hearing is not had until after such date of expiration, substantial relief cannot be granted, and the court may refuse to review.

2. LICENSES—OCCUPATIONS—REVOCATION—NOTICE—STATUTORY PROVISIONS.

Laws 1906, p. 837, c. 327, § 8, relating to regulation of employment agencies, provides that reasonable notice, of not less than one day, of charges against a licensee, shall be given in writing by serving upon him a concise statement of the facts constituting the complaint. Notice was served February 27th, and the hearing was held March 1st. The charge was somewhat lacking in conciseness, but there was no objection at the hearing and no suggestion that the licensee did not understand what it was about, and the record did not disclose that she requested counsel, or an adjournment, or that she was deprived of the rights or privileges claimed on certiorari. *Held*, that the notice was sufficient to sustain a revocation.

Certiorari by the people, on the relation of Amalia Pechtold, against John Bogart, as commissioner of licenses of the city of New York. Final order for defendant.

Argued before WOODWARD, JENKS, HOOKER, RICH, and GAYNOR, JJ.

Harry E. Shirk, for relator.

James D. Bell (Edward Lazansky, on the brief), for defendant.

WOODWARD, J. The relator held a license to conduct an employment bureau or agency issued to her on the 15th day of June, 1906, which, under the terms of the statute (chapter 327, p. 831, Laws 1906), expired by its own limitations on the first Tuesday of May next ensuing; the petition for the writ herein being dated on the 16th day of April, 1907. It appears, therefore, that this court, upon a writ of certiorari, is without power to give any substantial relief, even should we reach the conclusion that the relator was not properly deprived of her license. A license which expired by express provisions of the statute on the first Tuesday of May, 1907, could not be given any vitality by an order of this court after that date.

We are of opinion, however, that the matters urged here have no substantial basis in fact. The statute requires that the licensed person shall be served with a reasonable notice, not less than one day, of the charges. The notice was served on the 27th day of February, and the hearing was held on the 1st day of March. We think under the provisions of this statute, in the absence of special reasons, this was a reasonable notice. While the charge was lacking, perhaps, in some of the elements of conciseness, there was no objection made to it at the time of the hearing, and there is no suggestion that the relator did not understand what it was about. The record does not disclose that she made any request for counsel, or for an adjournment, or that she was deprived of any of the rights or privileges which she now claims be-

longed to her. The evidence is sufficient to warrant the exercise of the discretion vested to revoke the license.

Final order for the defendant, with costs. All concur.

FRIEDMAN v. FERTEL

(Supreme Court, Appellate Term. December 20, 1907.)

MASTER AND SERVANT—ACTION FOR SERVICES.

In an action against an employer to recover for overtime work, evidence held insufficient to sustain judgment for plaintiff.

Appeal from City Court of New York.

Action by Joseph Friedman against Harry D. Fertel. Judgment for plaintiff. Defendant appeals. Reversed.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Joseph J. Harris (Carlisle J. Gleason and John G. McTigue, of counsel), for appellant.

House, Grossman & Vorhaus (Louis J. Vorhaus and Joseph Fischer, of counsel), for respondent.

PER CURIAM. The plaintiff entered into the employ of the defendant in March, 1906, as a fur designer and foreman. He brought this action, and recovered for 452 hours of overtime work on evenings and Sundays between March 10, 1906, and January 1, 1907. The defendant appeals from the judgment entered upon a verdict of the jury in favor of the plaintiff, and from an order denying the defendant's motion for a new trial.

We think the verdict is against the weight of evidence. The plaintiff's case rests entirely upon his uncorroborated testimony that he made a contract to work overtime, nights and Sundays, at the rate of 62½ cents per hour, and that he then worked from March until December 31, 1906, 452 extra hours, for which he is entitled to \$282.50. He is contradicted by the defendant and three disinterested witnesses. Moreover, the records of the Holmes Electric Protective Company, introduced in evidence, show that for a large portion of the overtime for which plaintiff was allowed to recover defendant's place of business was closed. Again, other employes during the period in question were paid for overtime work, to the knowledge of the plaintiff, while the plaintiff never asserted any claim for overtime until January 1, 1907. We may add that it would seem that the haste forced upon the defendant's attorney in the closing moments of the trial operated to the disadvantage of the defendant. A careful examination of the entire record satisfies us that the interests of justice demand a new trial.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

PEOPLE ex rel. APRIL v. BUTLER, Tenement House Com'r.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

MANDAMUS—MUNICIPAL CORPORATIONS—REMOVAL OF OFFICERS AND EMPLOYEES—COMPELLING REINSTATEMENT.

Greater New York Charter, Laws 1901, p. 686, c. 466, § 1543, provides that no employé in the classified civil service shall be removed until he has been allowed an opportunity of making an explanation, and, in every case of removal, the true grounds thereof shall be forthwith entered upon the record of the department. Charges were preferred against relator, a tenement house inspector, who was suspended pending the hearing. Before the time fixed for explanation, he tendered his resignation, which respondent, the tenement house commissioner, did not accept. After his explanation, additional charges were made against relator, and a time fixed for a second hearing, at which relator did not appear, writing that he had an attack of influenza; and he did not appear before respondent afterwards. Respondent dismissed relator, but through inadvertence the ground of dismissal was placed upon the last charges made. Upon the mistake being called to his attention, respondent corrected the record to show that the dismissal was upon the charges as to which relator had made explanation. *Held*, that relator was validly discharged, and that respondent should not be compelled to reinstate him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 83, Mandamus, §§ 167, 168.]

Appeal from Special Term.

Mandamus by the people, on the relation of Nathan April, against Edmond J. Butler, to compel respondent, as tenement house commissioner, to reinstate relator as inspector. From an order denying the motion, and from an order denying a motion for leave to renew, relator appeals. Orders affirmed.

Argued before PATTERSON, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Samuel M. Levy, for appellant.

Theodore Connolly, for respondent.

INGRAHAM, J. The relator was an inspector in the tenement house department of the city of New York. Charges of misconduct and incompetency were preferred against him, a copy of which was served upon him, and he was given an opportunity to explain them at a time and place fixed. He was then suspended from duty without pay pending the disposition of such charges against him. While these charges were pending, the relator tendered his resignation, which the commissioner did not accept. After the relator's explanation had been submitted to the commissioner, additional charges of misconduct and incompetency were made against him, a copy of which was also served upon him and a time fixed to submit his explanation to the commissioner. On the day that he was to appear before the commissioner, the relator did not appear, but sent a letter, stating that he was unable to attend owing to an attack of influenza. No physician's certificate or affidavit was submitted. The relator did not subsequently appear before the commissioner after he recovered from his attack of influenza, nor does it appear that this communication was received by the commissioner on the day the relator was required to submit his ex-

planation. Subsequently the defendant dismissed the relator; but through inadvertence the ground of dismissal was placed upon the last charges that were made, and in relation to which the relator had submitted no explanation. As soon as attention was called to this mistake, the record was corrected by the defendant, so that it appeared that the dismissal was upon the charges as to which the relator had made an explanation, and, in reply to this application for a mandamus, the commissioner submitted an affidavit in which he states that the relator was actually dismissed upon the charges as to which he had made an explanation, as he believed that the relator was guilty of such charges.

It is entirely clear that the charges of extortion fully justified the defendant in dismissing the relator; that the defendant acting upon these charges actually found him guilty and acted upon them, and the only claim made is that the record showed that the removal was upon the charges as to which the relator had had no opportunity of explanation. The relator based his right to be reinstated upon section 1543 of the charter (chapter 466, p. 636, Laws 1901), which provides that no employé in the classified civil service subject to competitive examination shall be removed until he has been allowed an opportunity of making an explanation, and, in every case of a removal, the true grounds therefor shall be forthwith entered upon the records of the department, and a copy filed with the municipal civil service commission. The prohibition against a removal is that the relator should not be removed until he has been allowed an opportunity of making an explanation. It is not claimed that he was not allowed an opportunity of making an explanation in regard to the charge of extortion, and by the affidavit of the defendant it appears that he was removed upon those charges in relation to which his explanation had been heard. It seems to me, therefore, that there can be no question as to the validity of the discharge. The statute does not provide that a failure of the commissioner to perform the duty imposed by this last clause of the section above quoted in failing to file and transmit to the municipal civil service commission the true grounds thereof should entitle the removed officer to be reinstated, nor is there any provision which fixes the time within which the officer making the removal must enter upon the records of the department and file with the municipal civil service commission the grounds of removal. He could undoubtedly be required to perform that duty by mandamus, but an omission to state the true grounds of removal would not entitle the removed officer to reinstatement. In this case it appeared, when the motion was made, the commissioner had attempted to comply with this provision, but by inadvertence had stated the wrong charges that he had acted upon in removing the relator, and that mistake had been corrected, so that, when the application came before the court, the statute had been complied with. Charges had been made; copies served upon the relator. He had been allowed an opportunity of making an explanation. He had explained. The explanation was not satisfactory. The commissioner found him guilty of the charges and removed him, and had entered upon the records of the department the true grounds of the removal, and a copy

thereof had been filed with the municipal civil service commission. The statute had therefore been complied with, and certainly under those circumstances the court would not have been justified in reinstating the relator.

The orders appealed from should therefore be affirmed, with \$10 costs and disbursements. All concur.

WIECHERS v. McORMICK et al.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

1. ADVERSE POSSESSION—INSUFFICIENT SHOWING.

Code Civ. Proc. § 369, provides that land is deemed to be held adversely where there has been a continued occupation and possession thereof for 20 years under an exclusive claim of title founded upon a deed, etc. Section 370 provides that, to constitute adverse possession, land is deemed to have been possessed and occupied where it has been cultivated or improved, or where it has been substantially inclosed or has been used for fuel supply or fencing timber, etc. *Held*, that plaintiff shows neither actual nor constructive possession of wild, uncultivated lands, claimed under a void tax deed, where the land was never occupied nor inclosed, excepting that a wire was recently strung on two sides thereof, where no building was ever erected thereon, and plaintiff's predecessor lived $2\frac{1}{2}$ miles away from the land, though at various times from 1882 to 1906 the predecessor cut wood thereon for use on his farm and for sale, and a road was cut through the premises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 86.]

2. QUIETING TITLE—RIGHT TO MAINTAIN ACTION.

Under Code Civ. Proc. § 1638, authorizing one who has been for one year in possession of land claiming title thereto to sue to quiet title thereto, one who had no title to land and no right to occupation by adverse possession, and not in actual possession, was not entitled to judgment in such an action, however defective defendant's title might be.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 36-38, 44.]

3. SAME—TRACING TITLE TO SOVEREIGN POWER—NECESSITY FOR.

Though ordinarily to establish title to unoccupied lands it is necessary to trace it back to the sovereign power, where in an action to quiet title the parties stipulated that another conveyed the land to defendants' predecessor, it was not necessary that defendants so trace their title in order to establish it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 37.]

Appeal from Special Term, Suffolk County.

Action to quiet title by Emily Wiechers against Robert McCormick and others. From a judgment for plaintiff, defendants appeal. Reversed, and new trial granted.

Argued before WOODWARD, JENKS, RICH, MILLER, and GAYNOR, JJ.

Charles S. Taber, for appellants.

Henry E. Wilke (Rowland Miles, on the brief), for respondent.

WOODWARD, J. This action was brought for the purpose of quieting conflicting claims to the title to about 60 acres of land situate

in the town of Brookhaven, Suffolk county, N. Y. During all the period involved in this litigation the property has been wild land, covered with a growth of oak and chestnut in the northerly part, and with pine and scrub oak in the southerly part. In May, 1882, the county treasurer of Suffolk county, for the consideration of \$13.41, executed to one Charles W. Hawkins a deed of property described as "bounded north and east by lands of J. H. Puleston, south by Long Island Railroad, and west by Islip and Brookhaven line." This deed recited that it was given in pursuance of a tax sale in May, 1882, for unpaid taxes for the year 1878. The trial court held that the assessment and sale upon which the tax deed was based were illegal and void; and that Charles W. Hawkins acquired no title under them. The plaintiff, who derives her rights under and through Hawkins, contends, however, that, notwithstanding the fact that the deed was void and conveyed no title, yet that Hawkins went into the possession of the property in question, and for more than 20 years occupied the same under an adverse claim of title, and that any rights the defendants had in the premises have become barred by adverse possession and the statute of limitation. The appellants claim, not only to be the owners of the legal title as heirs and devisees of one John H. McCormick, but also claim they are entitled to the possession of the land in question, and that their rights have not been barred or defeated by adverse possession by the plaintiff or her grantors. The trial court found the plaintiff the owner in fee of the premises in dispute, and the defendants' interest barred, by reason of adverse possession of the premises in dispute for more than 20 years. The respondent's right to an affirmance of that judgment turns upon the question whether the acts relied on to constitute adverse possession make out such a case within the provisions of the Code of Civil Procedure. Although other numerous exceptions have been argued on this appeal, it will be unnecessary to refer to any of them if it should be determined that no case of adverse possession has been established by the evidence in the case. This brings us at once to a statement of the essential facts relied on by the plaintiff to establish adverse possession against the defendants.

It is conceded that the lands in dispute were wild, uncultivated lands, that they were never fenced or inclosed, saving that very recently a single wire was strung on two sides of the property. No buildings were ever erected on the property. Charles W. Hawkins, the grantee in the tax deed, lived on a farm some $2\frac{1}{2}$ miles distant from this tract. The evidence, however, tends to show that at various times from 1882 down to 1906 Hawkins cut firewood from the tract; that this wood was not used on the property in question, but drawn $2\frac{1}{2}$ miles away to Hawkins' own farm, of which the property in question never formed a part. The evidence also shows that some bean poles were cut and that some cordwood was sold to others. There is some dispute as to the amount of wood cut and taken from the tract, but the most favorable view does not disclose that any very considerable quantity was cut, and in some years the evidence indicates none whatever was taken. Most of the cutting was done during the years between 1882 and 1891. The only other thing tending to show any improvement of the property is the fact that a road was cut through the

premises. These facts bring us to the consideration of the clear-cut proposition of law as to whether a case of adverse possession under the law has been established. We think the plaintiff has signally failed in this regard.

Section 369 of the Code of Civil Procedure provides:

"Where the occupant, or those under whom he claims, entered into the possession of the premises, under claim of title, exclusive of any other right, founding the claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court; and there has been a continued occupation and possession of the premises, included in the instrument, decree, or judgment, or of some part thereof, for twenty years, under the same claim; the premises so included are deemed to have been held adversely: except that where they consist of a tract, divided into lots, the possession of one lot is not deemed a possession of any other lot."

Section 370 defines what acts are necessary to constitute adverse possession as follows:

"For the purpose of constituting an adverse possession, by a person claiming a title, founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases: (1) Where it has been usually cultivated or improved. (2) Where it has been protected by a substantial inclosure. (3) Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, either for the purposes of husbandry, or for the ordinary use of the occupant. Where a known farm or a single lot has been partly improved, the portion of the farm or lot that has been left not cleared, or not inclosed, according to the usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time, as the part improved and cultivated."

There must therefore be a continuous occupation and possession of the premises included in the instrument or of some part thereof for 20 years.

The evidence in this case shows neither actual nor constructive adverse possession. It shows no occupation whatever. In certain cases the statute does not require that the premises should be actually inclosed to make out case, as, to wit:

"Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, either for the purposes of husbandry, or for the ordinary use of the occupant."

There must, however, be an "occupant"—not necessarily of the entire tract, but of some part of the land claimed to be held adversely. The possession and occupation referred to in the sections of the Code is actual occupation of the premises or of some part of them, and not the occasional going upon the premises for the purpose of cutting wood, and drawing it off. These acts do not constitute occupation and possession of any part of the premises. They partake rather of the nature of trespasses on real property. To constitute adverse possession, the Legislature contemplates an actual and continued occupation of at least some part of the premises under a claim of title to it all, and where there has been no actual occupation of any part, and no inclosing, there can be no constructive adverse possession. This view has been repeatedly enunciated by the Court of Appeals. A leading case is that of *Thompson v. Burhans*, 79 N. Y. 93, where the plaintiff claimed a tract of 6,300 acres under a void tax deed. He showed

that he had erected upon the property in dispute a log shanty and barn, and cleared a quarter of an acre around there and had cut 300 or 400 logs from the uncleared land. Earl, J., in discussing the claim of adverse possession, said:

"That there was any actual possession of the land recovered cannot be well claimed. It was not inclosed. No part of it had ever been cultivated or improved. Whatever was done upon it was to take value from it, not to put value into it. It does not even appear that any one ever lived in the shanty, and no one representing the plaintiff was upon the land at the time of the alleged entry of the defendants or for some months before. Payment of taxes, surveying, and assertion of right do not constitute possession. They merely show a claim of title, and, whenever it is important to show that, they are material. Going upon land from time to time and cutting logs thereon does not give possession. Such acts are merely trespasses upon the land against the true owner, whoever he may be. Any other intruder may commit similar trespasses without liability to any other trespasser. Such acts do not constitute a disseisin of the true owner. One may gain actual possession of land by fencing it, or by cultivating and improving it, or by building upon it; and then he will have possession of as much as he has fenced, or cultivated and improved, or built upon with some land around and necessary for the buildings. * * * Nor did the plaintiff have any constructive possession of the land. Constructive possession is based upon a written title, which may be valid or invalid. The person having the valid title is always in law in the constructive possession of the land, unless he has become disseised. But a person claiming land under a defective conveyance must have actual possession of part of the land, and that gives constructive possession of other land contained in the conveyance. In other words, he must have a written conveyance of land, and he must enter into actual possession of a part thereof, claiming the whole, and then he may, under certain circumstances, have constructive possession of the whole. Constructive possession arises in no other way than this. But the definition I have given is not yet complete. The part not actually possessed must be for use with or subservient to that actually possessed, and have some necessary connection therewith. One may purchase and take a conveyance of land for a farm and have actual possession of but a small part thereof, and the balance, uninclosed, may be kept for future improvement, and for firewood and fencing and building timber, and he will have constructive possession of such uninclosed land. But such constructive possession will extend only to such land as is used in connection with the improved land actually possessed, and to only so much as is reasonable and proper for that purpose, according to the custom of the country."

In *Bliss v. Johnson*, 94 N. Y. 234, 242, Chief Judge Ruger said:

"The settled principles of law require courts to consider the true owner as constructively in possession of the land to which he holds the title, unless they are in the actual hostile occupation of another under a claim of title; and this rule is still more imperative in the case of wild and uncultivated tracts, or lands which are not legally susceptible of actual occupation and cultivation. *Doe ex dem. Arden v. Thompson*, 5 Cow. 371; *Thompson v. Burhans*, 79 N. Y. 99. This possession is deemed to continue until there is an actual disseisin and expulsion of the true owner from the land."

In *Price v. Brown*, 101 N. Y. 669, 671, 5 N. E. 434, the court said:

"A person cannot acquire title to an uninclosed, unoccupied, unimproved parcel of land by taking a deed thereof from one not the owner, and then merely going upon the land and there asserting his ownership; nor can he acquire the title by taking such a deed and then making an occasional foray upon the land for grass or sand, and thus committing trespass against the real owner. *Miller v. L. I. R. R. Co.*, 71 N. Y. 880."

In *Mission of the I. V. v. Cronin*, 143 N. Y. 524, 38 N. E. 964, the property in dispute consisted of 30 acres of land on Rockaway Beach. It was uncultivated, unimproved, and unoccupied. Earl, J., there said:

"The plaintiff and its predecessors had exercised some acts of apparent ownership upon the land. They had claimed title to the land, surveyed it, marked the boundaries thereof by monuments, from time to time cut trees upon it, and for a few years paid the taxes thereon. All these acts, as we have frequently held, fall short of showing adverse possession as defined in the Code. Section 372; *Wheeler v. Spinola*, 54 N. Y. 377; *Thompson v. Burhans*, 61 N. Y. 52; *Miller v. Long Island R. R. Co.*, 71 N. Y. 380; *Thompson v. Burhans*, 79 N. Y. 93; *Price v. Brown*, 101 N. Y. 669, 5 N. E. 434. * * * The plaintiff cannot claim constructive, possession of the land under section 370 of the Code, because no part of the tract was improved, and the trees cut therefrom were not cut for use upon the tract, but for use upon other land at least two miles distant."

We have no hesitation, therefore, in saying no case of actual or constructive adverse possession was made by the plaintiff, and the title of the defendants to the property in question remains unimpaired by any of the acts of the plaintiff or of her predecessors in title.

Having no title, and no right to occupation by adverse possession, and not being in actual possession, the plaintiff is entitled to no judgment in this action, however defective the defendants' title may prove. The plaintiff was entitled to maintain an action of this character only where for a year prior to the commencement of the action she had been "in possession" of the real property in dispute. Section 1638, Code Civ. Proc. The plaintiff held no record title or legal seisin of the premises in dispute so as to constitute constructive possession. Neither had she actual occupation of the land. Her right to a standing in court under the provisions of the section quoted failed.

It is asserted by the plaintiff that the defendants have established no title because they have failed to trace back their title to the sovereign power. This is ordinarily required to establish title to unoccupied lands. *Greenleaf v. B., F. & C. I. R. Co.*, 141 N. Y. 395, 36 N. E. 393. In this case, however, it was expressly stipulated that one Martha A. Smith in 1858 "conveyed the property described in the complaint" to one of the defendants' predecessors in title, and through whom the defendants claim. We construe this stipulation to fairly mean, not simply that Martha Smith executed a deed describing the property, but that by the instrument she actually transferred the title to the property described. This concession having been made by stipulation, there remained no necessity of tracing the defendants' title back to the sovereign source.

The judgment should be reversed, and a new trial granted, costs to abide the final award of costs. All concur.

THISTLE v. JONES.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

1. PLEADING—DEMURRER—JUDGMENT.

Where no leave is given to the withdrawal of a demurrer to a special defense after the same is overruled, the demurrer is in the record, and a judgment for defendant on the pleadings is proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 570.]

2. CORPORATIONS—LIABILITY OF DIRECTORS—NATURE OF DEBTS.

The liability of a corporation for rent accruing from August 1, 1902, to June 11th following, under a lease executed in 1899, and fixing a monthly rental, is a liability within Membership Corporation Law, Laws 1895, p. 335, c. 559, § 11, making the directors of a membership corporation liable for any debt of the corporation contracted while they are directors and payable within one year or less from the date when contracted.

3. SAME—PLEADING—SEPARATE DEFENSES—SUFFICIENCY.

In an action against directors of a membership corporation for rent accruing under a lease, an answer alleging that the indebtedness sued for is for installments of rent due from the corporation under the lease, and is not a debt payable within one year or less from the date it was contracted, must be construed as pleaded as a complete defense, and is insufficient on demurrer, the liability being one imposed by Membership Corporation Law, Laws 1895, p. 335, c. 559, § 11.

4. PLEADING—JUDGMENT ON PLEADINGS.

Where an interlocutory judgment erroneously overruling a demurrer was entered, a judgment for defendant on the pleadings on the ground that leave to withdraw the demurrer was not granted is also erroneous.

Appeal from Kings County Court.

Action by Boyd Thistle against Ellie A. Jones. From a judgment for defendant on the pleadings, plaintiff appeals. Reversed.

See 92 N. Y. Supp. 113.

Argued before JENKS, HOOKER, RICH, MILLER, and GAY-NOR, JJ.

Richards Mott Cahoon, for appellant.

W. B. Symmes, Jr., for respondent.

JENKS, J. This is an action against directors of a membership corporation upon an alleged debt of the corporation contracted while they were directors, and payable within one year or less from the date it was contracted. Membership Corporation Law, Laws 1895, p. 335, c. 559, § 11. Issue was joined, whereupon the plaintiff demurred to the separate defense as insufficient in law upon the face thereof. An interlocutory judgment overruling the demurrer was entered. At the trial the defendant moved for judgment on the pleadings, upon the ground, among others, that neither the opinion handed down upon the decision of the demurrer, nor the decision, nor the interlocutory judgment, gave the plaintiff leave to withdraw his demurrer, and that it was still in the records. The court granted the motion, and the plaintiff appeals from the judgment thereupon entered, bringing up for review the interlocutory judgment.

I think that the court was right in its disposition of the case. Na-

tional Contracting Co. v. Hudson River W. P. Co., 110 App. Div. 133, 97 N. Y. Supp. 92. But the interlocutory judgment is now under review. The plaintiff sues for the use and occupation of a building by the Woman's Aid Nursery of Brooklyn from August 1, 1902, to June 11, 1903, at the rate of \$45 monthly, the agreed rental. The defendant, in addition to general denials, pleads, in effect, as a separate and distinct defense, that the Woman's Aid Nursery made a lease with the plaintiff on or about August 31, 1899, which covered the period in question, that the indebtedness, if any, alleged in the complaint, is for installments of rent due from the said corporation under said lease, and that it is not a debt payable within one year or less from the date it was contracted. The opinion of the learned court handed down upon the decision of the demurrer indicates that it took this view. The learned court said:

"And rent which by the terms of such lease or agreement was to be paid or to become due three years thereafter was not such a liability within the meaning of the membership corporations law as to make the directors liable therefor. *Hardman et al. v. Sage*, 124 N. Y. 25, 26 N. E. 354. This liability for the rent due in August, 1902, and thereafter, was incurred in August of 1899 by the written lease, and not by the use and occupation of the corporation."

I think that the learned court is in error. *Sanford v. Rhoads*, 113 App. Div. 782, 784, 99 N. Y. Supp. 407; *Providence Steam Co. v. Connell*, 86 Hun, 319, 33 N. Y. Supp. 482. In *Sanford v. Rhoads*, supra, the action was upon two written leases made in 1892 and 1894, for 20 and 10 years, respectively, and assigned to the corporation in 1896. This court held, per Miller, J.:

"No debt was contracted when the leases were assigned to the defendants' corporation. A contingent liability was incurred which only ripened into a debt as the premises were used, or, the rent being payable quarterly in advance, as the rent of each quarter fell due."

Garrison v. Howe, 17 N. Y. 458, *Gold v. Clyne*, 134 N. Y. 262, 31 N. E. 980, 17 L. R. A. 767, and *Whitney Arms Co. v. Barlow*, 68 N. Y. 34, were cited. In *Providence Steam Co. v. Connell*, supra, the court said:

"In *Vernon v. Palmer*, 16 Jones & S. 231, it is said that the true doctrine is that a debt is contracted when, in consideration of value received by the corporation, a payment is to be made, no matter whether at once or at a future period."

See, also, *Carr v. Risher*, 50 Hun, 148, 2 N. Y. Supp. 792. *Hardman v. Sage*, 124 N. Y. 25, 26 N. E. 354, cited by the learned court, is not to the contrary.

That case held that the year within which an action must be begun began to run from the day that the debt became due, and that when a note is given in extension, which is sued within a year of its maturity, but more than a year after the debt became due, the stockholders cannot be charged. The principle is that the note is but a continued evidence of the first indebtedness, and that its operation is to extend the time of payment until it becomes due, but the original demand is not extinguished and the liability of a stockholder cannot be thus extended or renewed. *Parrott v. Colby*, 6 Hun, 55, affirmed 71 N.

Y. 597, and Jagger Iron Co. v. Walker, 76 N. Y. 521, cited in Hardman v. Sage, supra.

The new matter must be regarded as pleaded as a complete defense. Mott v. De Nisco, 106 App. Div. 154, 94 N. Y. Supp. 380. The interlocutory judgment must be reversed, and the demurrer sustained, with leave to the defendant to plead over. The final judgment falls within the interlocutory judgment. Carter v. De Camp, 40 Hun, 258. I do not express any opinion contra to the proposition of law of the defendant that the Woman's Aid Nursery could adopt this lease.

Interlocutory judgment of the County Court of Kings county reversed, with costs, and demurrer sustained, with costs, with leave to the defendant to plead over. All concur.

STRAUSS v. STRAUSS.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

1. JUDGMENT—CONCLUSIVENESS.

Where a court of general jurisdiction, having jurisdiction over the subject-matter, acquires jurisdiction over the person of defendant, and a final judgment is entered, it is conclusive, not only in the sovereignty of the forum, but wherever the question is presented.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1445-1457.]

2. APPEARANCE—EFFECT.

Code Civ. Proc. § 424, formulating the rule that a voluntary appearance in an action is equivalent to personal service of process within the jurisdiction of the court, is declaratory of the common law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appearance, § 91.]

3. JUDGMENT—FOREIGN JUDGMENT—CONCLUSIVENESS—EFFECT.

Where, in a suit in Illinois for divorce, defendant, though not served with process, voluntarily appeared and filed an answer and cross-bill seeking a divorce, and the answer denied the allegations of the complaint, to the effect that complainant had been an actual resident of Illinois for the period required by the statute as a prerequisite to the maintenance of a suit for divorce, and the Illinois court was one of general jurisdiction, having jurisdiction of the subject-matter, the final judgment granting a divorce was conclusive in New York.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1445-1457.]

Appeal from Special Term.

Action by Alice K. Strauss against Leo Strauss. Appeal by defendant from an order denying a motion to vacate an order of arrest. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Charles Goldsier, for appellant.

I. N. Jacobson, for respondent.

INGRAHAM, J. The facts in this case, which are not disputed, are that the plaintiff and defendant were married in the state of New Jersey on the 20th of May, 1888, and lived together until the fall of 1903, when they separated; that in August, 1905, the defendant com-

menced an action against the plaintiff for divorce in the state of Illinois on the ground of abandonment, the defendant alleging in his bill of divorce that he had been an actual resident of the state of Illinois for more than a year prior to the commencement of the proceeding. The plaintiff claims that she was not served with process personally within the state of Illinois, that she had never been domiciled in that state, or that the parties never had a matrimonial domicile there. The plaintiff in this action, however, appeared in the action in the state of Illinois, and interposed an answer verified by her, denying the material allegations of the complaint, and filed a cross-bill asking for a divorce from the defendant. She then applied for alimony, and obtained an order from the Illinois court in which the action was pending requiring the defendant in this action, the plaintiff in that, to pay \$15 a week alimony. This alimony being in arrears and pending the final disposition of the action in Illinois, the plaintiff in this action seems to have made a proposition that the defendant in this action should pay her \$1,000 in full settlement of all alimony. The defendant accepted this offer, and paid the \$1,000 in full settlement of all alimony which plaintiff received. Thereafter, on June 14, 1907, a decree was entered in the superior court of Cook county in the state of Illinois reciting that the cause "coming on now to be heard, upon the bill of complaint filed herein, and the answer filed thereto by the defendant, and the replication filed by the complainant, and the court, having heard all the evidence adduced herein by the complainant, and having heard the arguments of counsel, and being fully advised in the premises, finds that the said defendant, Alice Strauss, has willfully deserted herself from her husband, Leo Strauss, said complainant, without any reasonable cause, for the space of two (2) years," and therefore ordered, adjudged, and decreed that the complainant be divorced from the defendant, released from the obligations of his marriage, and restored to all and singular the rights and privileges of an unmarried man.

It does not seem to be disputed but that at the time of the commencement of the action, and for over one year prior thereto, the complainant in the Illinois action had been a resident of the state of Illinois, and commenced his action for a divorce in that state in good faith, and that the defendant in that action appeared therein, interposed an answer, denying the allegation of residence, and filed a cross-bill for a divorce. It is a principle of universal application that where a court of general jurisdiction, having jurisdiction over the subject-matter of a controversy, acquires jurisdiction over the person of defendant and a judgment is entered finally determining the controversy, such a judgment becomes an adjudication that is conclusive, not only within the sovereignty in which the court which rendered the judgment is located, but wherever the question thus determined is presented. The binding force of such an adjudication does not depend upon any provision of the Constitution of the United States, but upon the general principle of the common law, and this principle has always been recognized and enforced in this state. It is also a general principle that a voluntary appearance in an action is equivalent to per-

sonal service of the process within the jurisdiction of the court in which the action is pending. This rule is formulated in the Code of Civil Procedure (section 424), but is also a rule of common law. In *Reed v. Chilson*, 142 N. Y. 152, 36 N. E. 884, it was said:

"When a party does not intend to subject himself to the jurisdiction of the court, he must appear specially for the purpose of raising the question of jurisdiction by motion, or he may allow the plaintiff to go on and take judgment by default without affecting his rights, since no judgment entered without service of process in some form could bind the defendant, and the question of jurisdiction would protect him at any stage of the proceedings for its enforcement, provided it has not been waived by his own act. But, if the defendant elects to come before the court and there try the questions, he cannot afterwards deny the jurisdiction, or be heard to claim that it was not a voluntary appearance. The court had jurisdiction of the subject of the action. It was the judgment of the courts of a sister state which the plaintiff had the right to enforce here if jurisdiction of the person could be obtained, though the defendant resided in another state."

The court in Illinois having acquired jurisdiction over the parties to this action and having jurisdiction to pronounce a decree of divorce, the case came on for hearing, and, upon the evidence, the court determined the issues presented in favor of the defendant here, and granted to him a decree of divorce, which, under the rule before stated, becomes *res adjudicata* as to the relations of the parties to each other. The very issue presented by the answer in the Illinois action required the court to determine as to the residence of the plaintiff there, and, the question at issue having been determined by a court of competent jurisdiction having jurisdiction over both the parties, it becomes a binding adjudication, and settles the relations of the parties to each other.

It is necessary to refer to but two or three later cases where this principle has been expressly recognized and enforced. In *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132, the question presented was as to whether a divorce granted in the state of Illinois was binding upon the parties to the action in which the judgment of divorce was entered. *Church, C. J.*, there said:

"If the Illinois judgment was binding upon the parties to it, and if the defendant and her former husband were divorced by that judgment, as between themselves their marriage was not in force when the plaintiff and defendant were married. The complaint alleges that the husband went to Chicago and filed his bill in a court of equity, and that the defendant appeared and put in an answer, denying the equities of the bill, and that afterward, by collusion, a decree of divorce was entered as though no answer had been interposed. The court had jurisdiction of the subject-matter of the action—that is, it had jurisdiction to decree divorces according to the laws of that state—and every state has the right to determine for itself the ground upon which it will dissolve the marriage relation of those within its jurisdiction. The court also had jurisdiction of the parties by the voluntary appearance of the defendant. These are the facts stated. * * * Having jurisdiction of the subject-matter and of the parties, the other questions relating to the pleadings and the form and manner of procedure were matters of regularity merely, for which the judgment cannot be questioned collaterally. * * * The question whether he was a resident there, so as to enable him to file his bill, was for that court to determine, and, although it may have decided erroneously, the decision cannot affect the validity of the judgment. The status of all persons within a state is exclusively for that state to determine for itself. * * * Sufficient facts are alleged to give the Illinois court power to decide the question of domicile, and the judgment is not void if we concede

that the decision was erroneous, and if it is also conceded that the question of residence is vital to give jurisdiction. A wrong decision does not impair the power to decide, or the validity of the decision when questioned collaterally."

And this principle has been recognized in every case in which the question has been presented to the present time. See *Lynde v. Lynde*, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. Rep. 332. This same principle is extended in *Starbuck v. Starbuck*, 173 N. Y. 503, 66 N. E. 193, 93 Am. St. Rep. 631, to a case where a plaintiff obtained a decree of divorce as against the defendant who had not been served by process within the jurisdiction of the court granting the decree or personally appeared in the action; and, although the decree did not bind the defendant in that action, it was held that the plaintiff, having invoked the jurisdiction of a foreign court and submitted herself thereto, could not be heard to question the validity of its decree. This principle has also been expressly recognized by the Supreme Court of the United States in many cases, notably in *Laing v. Rigney*, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. Ed. 525, where the court said:

"As this record discloses that the defendant was served with process under the original bill, and appeared by counsel, and made answer, and was personally served with a copy of the supplemental bill and with an order to plead, and, after permitting himself to be defaulted, did appear by counsel and procured the vacation of the original decree and the enrolment of the decree amended in accordance with his own motion, it may fairly be said that he both had an opportunity to be heard and was heard. His appearance by counsel under the supplementary proceedings was not to object to the jurisdiction of the court, but to effect a change in the recitals of the decree on non-jurisdictional grounds."

Counsel for the plaintiff seems to think that certain late decisions of the Supreme Court of the United States have changed or modified this principle, and cites *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794, and *Andrews v. Andrews*, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366. The only question before the Supreme Court of the United States in those cases was as to the obligation of the state court under the full faith and credit provisions of the federal Constitution in relation to judgments of sister states. It did not determine what judgments of sister states the courts of any state would recognize. In *Andrews v. Andrews*, *supra*, what was decided was:

"A state may forbid the enforcement within its borders of a decree of divorce procured by its own citizens who, whilst retaining their domicile in the prohibiting state, have gone into another state to procure a divorce in fraud of the law of the domicile"

—a decision certainly which cannot affect the power of a state to recognize a divorce granted by the courts of a sister state where the court had jurisdiction over the parties to the action in which the judgment was entered.

In *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, the question presented was in relation to a judgment entered against a nonresident upon constructive service of process, and without acquiring jurisdiction over the person of defendant. The judgment in that case relied on was based upon the service of process by publication, and the defendant had not appeared in the action, and

the discussion related solely to a judgment obtained under such circumstances. In summing up a discussion as to the force of the provisions of the federal Constitution, it is there said:

"It has, moreover, been decided that, where a bona fide domicile has been acquired in a state by either of the parties to a marriage, and a suit is brought by the domiciled party in such state for a divorce, the courts of that state, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce entitled to be enforced in every state by the full faith and credit clause. *Cheever v. Wilson*, 9 Wall. (U. S.) 108, 19 L. Ed. 604. * * * On the other hand, the denial of the power to enforce in another state a decree of divorce rendered against a person who was not subject to the jurisdiction of the state in which the decree was rendered obviates all the contradictions and inconveniences which are above indicated. It leaves uncurtailed the legitimate power of all the states over a subject peculiarly within their authority, and thus not only enables them to maintain their public policy, but also to protect the individual rights of their citizens. It does not deprive a state of the power to render a decree of divorce susceptible of being enforced within its borders as to the person within the jurisdiction, and does not debar other states from giving such effect to a judgment of that character as they may elect to do under mere principles of state comity. It causes the full faith and credit clause of the Constitution to operate upon decrees in the respective states just as that clause operates upon other rights; that is, it compels all the states to recognize and enforce a judgment of divorce rendered in other states where both parties were subject to the jurisdiction of the state in which the decree was rendered, and it enables the states rendering such decrees to take into view for the purpose of the exercise of their authority the existence of a matrimonial domicile from which the presence of a party not physically present within the borders of a state may be constructively found to exist."

It seems to me, therefore, that these decisions of the Supreme Court of the United States have no relation to the question as to the effect which will be given to a decree of divorce of the courts of a sister state, and the principles that are well settled in this state and have been universally enforced are that such decrees are binding upon the parties where the court granting the decree or judgment had jurisdiction to grant a divorce and obtained jurisdiction over the parties to the action either by personal service within its jurisdiction or voluntary appearance. It follows, therefore, that upon the conceded facts the decree in the court of Illinois granting to the defendant in this action a divorce from the plaintiff terminated the matrimonial relations between the parties to this action, and that, therefore, upon the undisputed facts, there was no marriage relation existing, and the action cannot be maintained.

For these reasons, no order of arrest should have been granted in the action, and the order appealed from must be reversed, with \$10 costs and disbursements, and the motion to vacate the order of arrest granted, with \$10 costs. All concur.

EHRICH v. ROOT.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

DISCOVERY—EXAMINATION OF PARTY BEFORE TRIAL—NECESSITY.

Code Civ. Proc. § 872, subd. 4, declares that a person desiring to take a deposition may present an affidavit stating the name and residence of the person to be examined, and that his testimony is material and necessary for the party making such application. *Held*, that an application for the

examination of the defendant in an action for labor and services, and the use of plaintiff's office and appurtenances, alleging that the service consisted of advice as to certain mining properties, and with respect to the formation of a company to take over the properties, and the disposal of the stock of such company, and that plaintiff was informed and believed that defendant was enabled to sell the property for a large price, and that plaintiff desired to obtain from defendant testimony as to his profits on such sale as bearing on the question of plaintiff's damage, was fatally defective for failure to show that the desired testimony related to a material issue which the applicant was required to prove on the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Discovery, § 54.]

Houghton, J., dissenting.

Appeal from Special Term.

Action by Samuel W. Ehrich against Henry A. Root. From an order denying a motion to have an order for the examination of defendant before trial, he appeals. Reversed. Order vacated.

Argued before PATTERSON, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

J. Aspinwall Hodge, for appellant.

Herbert R. Limburg, for respondent.

INGRAHAM, J. This action is brought to recover from the defendant upon an allegation that the plaintiff rendered work, labor, and services for defendant, and gave defendant the use and occupation of plaintiff's office and office appurtenances and of plaintiff's office force, all of which was of the reasonable value of \$25,000, which defendant agreed to pay. There is no statement in the complaint of the nature of plaintiff's services, of the use that the defendant made of the plaintiff's office, office appurtenances, and office force, and the answer is a general denial. After issue joined the plaintiff made an application to examine the defendant before trial, and in the affidavit upon which an order for such examination was granted alleges that the "services were advice with respect to certain mining properties owned or controlled by the defendant, and with respect to the formation of a company to take over these properties and the disposal of the stock of this company"; that in consequence of the plaintiff's advice a corporation was organized, of which the plaintiff acted as one of the first directors and was elected treasurer, and that plaintiff subsequently advised the defendant with regard to the sale and disposition of the stock of the company, and arranged with a person named to purchase the stock of the company which he did. The affidavit further states that the plaintiff was informed that the defendant was enabled to sell the property for a large price, that this was done without plaintiff's knowledge, and the testimony that plaintiff desires to obtain from the defendant is the profits derived by the defendant in his future disposition of the stock of this company. The affidavit then states:

"A necessary element of my proof upon the trial will be to show the profits derived by the defendant, for this evidence will be a material element to enable the jury to fix the value of the services which I have rendered."

By subdivision 4 of section 872 of the Code of Civil Procedure, a person desiring to take a deposition may present to a judge of the

court in which the action is pending an affidavit stating the name and residence of the person to be examined, and that the testimony of such person is material and necessary for the party making such application or the prosecution and defense of such action. To justify the order, it must appear, therefore, that the testimony sought to be obtained is material and necessary for the party making the application or the prosecution of the action. I think this affidavit fails to show that the testimony of the defendant is material or necessary to plaintiff's prosecution of the action. The plaintiff does not allege that he had anything to do with the ultimate disposition of the property from which it is alleged the defendant realized large profits. The value of the services rendered in the advice given to the plaintiff and the use of his office and office force could have no relation to the profits that the defendant ultimately realized by a disposition of the property at a future time, of which the plaintiff had no knowledge and with which he had nothing to do.

While I am in favor of allowing examination of a party before trial in all cases where, upon the facts stated, it can fairly be inferred that the object is to obtain the deposition of an adverse party as to the facts which are by the pleadings in dispute and the proof of which would be competent upon the trial to justify such an examination, I think it must appear that the testimony desired really relates to a material issue that must be proved by the party making the application upon the trial of the action. That fact does not appear in this action, and there are facts which justify the inference that this application is not made in good faith to obtain testimony to be used upon this trial, but to use the information in other actions or proceedings. Under such circumstances, we think the court below should have refused to compel the defendant to submit to an examination, and should have vacated the order obtained for that purpose. We do not wish to be understood as expressing an opinion that should in any way influence the trial court as to the materiality of evidence of the profits of the defendant upon the trial, but simply to say that, on the facts before the court, it does not satisfactorily appear that the evidence of the defendant is material and necessary for the plaintiff, and that the order should therefore have been vacated.

The order appealed from is therefore reversed, with \$10 costs and disbursements, and the order for examination of the defendant before trial vacated, with \$10 costs.

McLAUGHLIN and CLARKE, JJ., concur. PATTERSON, P. J., concurs in result.

HOUGHTON, J. (dissenting). I dissent from the proposition that plaintiff's order for examination should be set aside because it does not seek to obtain evidence material to the trial of the action against defendant. The services claimed to have been performed by plaintiff for defendant were in the formation of a copper company to take over certain mining properties owned by defendant and in the disposal of the stock of such company. The plaintiff by his affidavit alleges that the defendant transferred the stock of the company which plaintiff had

helped to form, and the mining properties which he had helped to market and which were supposed to be deeded to it, to another company for a very large sum of money. The amount plaintiff does not know, and cannot ascertain from any source aside from the defendant.

If plaintiff performed services in relation to and gave advice respecting a property of magnitude, he would have a right on the trial of this action to recover the value of his services, to prove that fact, as bearing upon the reasonableness of his charges. If his services and advice related to a large transaction, they would manifestly be worth more than if they related to a small one. The advice of a lawyer as to the transfer of a hundred million railway corporation would be of greater value than respecting a hundred dollar horse trade. So plaintiff's services as a promoter would be worth more if they related to a \$3,000,000 mining property than if they related to one worth \$300. Plaintiff has no knowledge of the sum for which defendant sold the properties which he helped put upon the market, and he has no means of obtaining that knowledge except by an examination of the defendant.

It is not a proper interpretation of plaintiff's affidavit to say that he only desires to examine the defendant as to the profits which he himself made. On the contrary, what he does desire is to examine the defendant as to the amount of the sale for the purpose of showing the magnitude of the transaction. This evidence is most pertinent to plaintiff on the trial of the action. If the trial court should exclude evidence showing the magnitude and character of the transaction, this court would instantly reverse the judgment because of such erroneous ruling. If the examination of adverse parties before trial is to be permitted respecting material matters peculiarly within the knowledge of the opposite party, the present order was right, and should be affirmed so far as it relates, at least, to the disposition of the mining properties and of the stock of the Somers Copper Company, and the price obtained therefor, and the general terms of the agreement of transfer.

PEOPLE v. EATON.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

1. CRIMINAL LAW—EVIDENCE—ACCOMPLICES—CORROBORATION.

Under Code Cr. Proc. § 399, providing that a conviction cannot be had on the testimony of an accomplice, unless corroborated by other evidence connecting accused with the crime, where accused himself testifies that he was connected with the crime, no further corroboration is required.

2. SAME.

On a trial for obtaining money by fraudulent representations, evidence held to sufficiently corroborate the testimony of an accomplice essential to a conviction under Code Cr. Proc. § 399, providing that a conviction cannot be had on the testimony of an accomplice, unless corroborated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1128.]

3. FALSE PRETENSES—FRAUDULENT REPRESENTATIONS.

An employé of a railroad company was required to make an independent check of the men employed by a construction company, which relied on the reports made by the employé in paying the men. The employé and

the timekeeper of the construction company reported that a third person was entitled to receive compensation for work done, and they procured the presentation to the construction company of a check therefor, which it paid. They received the proceeds. The report was false. *Held*, that the employé was guilty of larceny under Pen. Code, § 528, punishing one who, with intent to defraud, obtains from another by aid of fraudulent representations any money, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, §§ 5-12.]

4. SAME—INDICTMENT.

An indictment under Pen. Code, § 528, providing that one who, with intent to defraud the owner of his property, obtains from his possession by aid of fraudulent representations any money, shall be guilty of larceny, need not allege the means by which defendants carried out their fraudulent conspiracy to obtain the money of another, or that the latter or its employes or agents relied on the false representations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, §§ 34, 35.]

5. SAME—OBTAINING MONEY OF CORPORATION.

A representation to an agent of a corporation to obtain money from the corporation is a representation to the corporation within Pen. Code, § 528, punishing one who, with intent to deprive the owner of his property, obtains by aid of fraudulent representations any money, etc.

Appeal from Court of General Sessions, New York County.

Codwell J. Eaton was convicted of grand larceny in the second degree, and he appeals. Affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Henry Hardwicke, for appellant.

Robert C. Taylor, for the people.

INGRAHAM, J. Two questions are presented on this appeal, one relating to the sufficiency of the indictment and the other to the sufficiency of the corroboration of the evidence of Swartz, an accomplice. There are two counts in the indictment. The first alleges that the defendants on the 9th day of February, 1907, "with intent to deprive and defraud a certain corporation called Degnon Contracting Company of the proper moneys, goods, chattels, and personal property hereinafter mentioned, and of the use and benefit thereof; and to appropriate the same to their own use, did then and there feloniously, fraudulently, and falsely pretend and represent to the said corporation that one W. Jukus had been for some time prior thereto, and was then and there, a servant and employé of the said corporation, and shortly theretofore had worked for the said corporation as such servant and employé for 13 days, and that the said corporation was then and there indebted to the said W. Jukus, and there was then and there due and owing to the said corporation to him as such servant and employé for and on account of the said work the sum of \$48.75," and that the said defendants did then and there feloniously and fraudulently obtain from the possession of the said corporation the said sum with intent to deprive and defraud the said corporation of the same, and of the use and benefit thereof and to appropriate the same to their own use, "whereas, in truth and in fact, the said W. Jukus had not been prior thereto,

and was not then and there, a servant or employé of the said corporation, and theretofore had not worked as such servant or employé for the said corporation for 13 days, or for any time whatsoever," and there was not due and owing the said sum of \$48.75, and that the pretenses and representations so made by the defendants to the said corporation were in all respects utterly false and untrue as at the time of making the same the defendants then and there well knew, and that by the means aforesaid the said money of the said corporation the defendants feloniously did steal. The second was a general count for larceny.

It appeared that Eaton, the appellant, was employed by the New York & Long Island Railroad Company to make an independent check of the men employed in shaft 3 of a tunnel being constructed by the Degnon Company for the railroad company, who relied upon the appellant's reports in payment of the bills of the Degnon Company. The appellant made a return to the railroad company every morning, which stated the number and names of the men who were employed in shaft 3. Every morning the railroad company received a report from the Degnon Company made up by Swartz, the timekeeper of that company as to the men employed in shaft 3 the day before, and these returns from the Degnon Company were compared with the appellant's returns as to the number of men employed. It seems that each employé had a number, and the returns were made by these numbers, and to each number there was affixed a letter which indicated the nature of the employment, so that if these two reports, that from the Degnon Company and from the appellant, agreed, the men were paid for the time thus certified; that, when a man was employed by the Degnon Company, he received a brass check upon which was a number by which he was identified while he continued to work; that on the pay day he presented that check, and he then received the money due him contained in an envelope that corresponds to the number on the check that he presented. On the 9th day of February, 1907, one Abramson presented a check with the number 3,178, and was paid \$48.75. The timekeeper for the Degnon Company was Swartz, and the timekeeper for the railroad company was the appellant. Abramson testified that on the 9th of February he presented check No. 3,178 to the Degnon Company at the foot of East Twenty-Second street, and received an envelope containing money; that about three weeks before that he met the appellant, who told the witness that his father had bought checks from people working in the tunnel, and he wanted the witness to go down and present one of the checks and collect the money for him; that the appellant told Abramson to walk to 112 East Forty-First street with him; that the appellant's father handed him a brass check when the witness went to the paymaster of the Degnon Company, presented the check, and received an envelope there under a different name, brought the envelope back, and handed it to the appellant's father; that the appellant then handed the witness \$5, and asked him if he would come again two weeks afterwards and cash another check. Two weeks afterwards the witness went down with his cousin, where they were each given a check and told to go and collect the money on that check, which he did and turned it over to the

appellant. This was all previous to the 9th of February, 1906. The witness went through with this performance four times prior to the 9th of February, when he presented check No. 3,178, and received from the Degnon Company \$48.75. Swartz was present at the same time that the witness received the checks. Swartz was then called as a witness, and testified that he was in the pay office on pay day; that somebody brought this check No. 3,178 and presented it, and that he (Swartz) checked it off as "O. K.," and told the paymaster that it was all right, and that then the paymaster paid it; that about December 1st, prior to this time, the appellant came to Swartz, and said he had a scheme by which they could make some money, that it was simply putting in checks and putting the names of men in the book with the same number as upon the checks; that Swartz should give to the appellant checks and he would have the money drawn out on pay day; that Swartz agreed to this scheme, and he selected names and numbers which he put into his report as the men who had done the work upon the job, and then gave the numbers to the appellant; that this continued for several weeks up to the pay day February 9, 1907; that No. 3,178 was one of the numbers that he put on the pay roll as representing a man who was given the name "Jukus" on the pay roll, but who had done no work, and he entered the number in his timebook and upon the slip that he furnished to the Degnon Company; and that the check representing this number was then given to the appellant, who collected the money from the Degnon Company; that he received from the appellant a portion of the money that was thus collected from the Degnon Contracting Company. There was other evidence showing the method by which this plan had been worked out and connecting the defendant with it. The people having rested, the appellant was called as a witness on his own behalf. He testified that he had a conversation with Swartz, the timekeeper of the Degnon Company, about purchasing checks; that Swartz said there was a lot of these men who wanted to sell their time, and there was an opportunity to buy them for a mere song; that he introduced the appellant to certain men who wished to sell their time, and that the appellant determined that it was all right, and that he subsequently received checks from Swartz as checks that had been purchased from men who said that they were entitled to be paid; that on that day he gave the checks to his father, or one of the boys, to be cashed; that 28 or 29 checks received from Swartz had been cashed up to the 9th of February; that Swartz never told him that these checks did not represent actual work, but had been taken out of the desk of the Degnon Company; that he had no idea that they were not perfectly bona fide checks; that he knew Abramson; that he presented Check No. 3,178 on February 9th with his knowledge and consent; that in his report turned in on February 7, 1907, check No. 3,178 appeared there; that he got check No. 3,178 with other information supplied him by Swartz; that Swartz supplied him with a list of the men at work every morning, which he would accept and report as though made in the regular course of his investigation. Thus, upon his own testimony, the appellant, who was employed by the railroad company to make an independent investigation of the men at work, took from Swartz the

names of men who did work represented by checks that Swartz furnished him, and put them on his report to his employer, and that it was in this way that the fraud was perpetrated. Certainly the defendant's own testimony directly connected him with the crime of which he was charged. The provision of the Code (section 399, Code Cr. Proc.) is satisfied, if the testimony of the accomplice is corroborated by such other evidence as tends to connect the defendant with the commission of the crime. When the defendant himself testified that he was connected with the crime, no further corroboration is required. There was much other evidence that directly connected appellant with this crime. A witness named Leow, who was called by the defendant, testified that on the morning of the 9th of February the appellant advised him not to cash the checks; that it would not be wise for him to cash any, as he might be caught; and that Swartz told him that they were padding the pay rolls with extra checks. The evidence is undisputed that these pay rolls were made up from returns of Swartz; that they were sent to the railroad company, who checked them off by the time slips furnished by the appellant, and that no man received pay, unless he were on both of the time slips furnished by the two men; that these slips were relied upon by the paymaster of the Degnon Company when the money was paid, and the person to whom the money was paid was determined by the presentation of the brass checks with the number upon it.

The other question presented is as to the sufficiency of the indictment. The false representation was that one Jukus had been employed by the Degnon Company, and that the Degnon Company was indebted to Jukus in the amount that was received. The defendant, in his testimony, admits that he presented the check calling for a payment to Jukus of \$48.75; that he received the money; that the check upon which the money was paid was given to him by Swartz, and the evidence is conclusive that the paymaster of the Degnon Company relied upon the report of the time sheets made by Swartz and the appellant that this man represented by that check was entitled to receive from the Degnon Company \$48.75, and upon the possession of the check by the man applying for payment. All of the elements of the crime were thus established.

The allegation of the indictment that the representations were made to the corporation, and not to a particularly named agent of the corporation, is clearly sufficient. The indictment is under section 528 of the Penal Code, which provides that:

"A person who, with the intent to deprive or defraud the true owner of his property, * * * takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representations or pretense, or of any false token or writing * * * any money, personal property, things in action, evidence of debt or contract, or articles of value of any kind * * * steals such property, and is guilty of larceny."

Now, the evidence is undisputed that this \$48.75 was the money of the Degnon Company, and that the appellant, with others, by color or aid of fraudulent or false representations, or pretense, obtained that money from the possession of the Degnon Company. It was not

necessary to allege in the indictment the means by which the parties carried out their fraudulent conspiracy to obtain the money from the Degnon Company, or that the Degnon Company, or its employes or agents, relied upon the false representations. Every element of a false and fraudulent representation or pretense under which the Degnon Company's money was obtained is alleged and proved. The point that the appellant could not have made a false representation to a corporation, because it is an artificial person, is without the slightest merit. All corporations have to act through agents, and a representation to an agent of a corporation to obtain money from the corporation is a representation to the corporation.

It is quite clear that this crime was proved by undisputed evidence; the only possible question being whether or not the defendant acted with intent to deprive or defraud the true owner of his property, and there was certainly evidence that justified the verdict of the jury.

The judgment should be affirmed. All concur.

MILLER v. NORCROSS et al.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

APPEAL—CASE ON APPEAL—DOCUMENTARY EVIDENCE.

On the trial plaintiff offered a certificate of the county clerk, which stated that a lis pendens had been filed in March, 1902. Defendant's objection to the certificate as evidence having been sustained, the court stated that, when the original notice of pendency of action was produced, it would be marked "Exhibit 20." The notice of lis pendens had been actually filed and was constructively before the court, but plaintiff's counsel inadvertently failed to have the original paper brought from the files of the court and introduced in evidence. *Held*, that the lis pendens should have been considered as offered in evidence on the settlement of the proposed case on appeal, or the judgment and decision should have been set aside and the trial opened to enable plaintiff to introduce the lis pendens, and the judgment be re-entered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2495-2499.]

Appeal from Special Term.

Action by Clifford L. Miller against Orlando W. Norcross, impleaded with others. From an order denying plaintiff's motion to produce on the settlement of the proposed case on appeal the lis pendens filed in the office of the county clerk in the action, and directing such lis pendens to be marked as an exhibit, and striking out a finding of fact that no notice of lis pendens had been filed, and substituting in place thereof a finding that a notice of pendency of action had been filed, plaintiff appeals. Reversed and remitted.

See 87 N. Y. Supp. 56.

Argued before PATTERSON, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Cyrus C. Miller, for appellant.

Frank H. Gerrodette, for respondents.

INGRAHAM, J. I think upon the facts appearing here the court should have granted the plaintiff some relief. Upon the trial the plaintiff offered in evidence a certificate of the county clerk as to the filing of a *lis pendens*. This certificate stated that a *lis pendens* had been filed in March, 1902. Counsel for the defendant objected to this certificate as evidence of the filing of the *lis pendens*. That objection was sustained, and the court then said that, when the original notice of pendency of action is produced, it will be marked "Exhibit 20." There is no dispute but that the notice of *lis pendens* had been actually filed, and that the plaintiff intended to offer it in evidence. It was a part of the record of the court, and the certificate of the county clerk that it had been filed was presented to the court. Purely by inadvertence the counsel for the plaintiff did not have the original paper brought from the files of the court; but it was perfectly well understood that the paper was to be offered in evidence and the court expressly stated that, when produced, it should be marked "Exhibit 20." Considering the fact that the paper was on file and constructively before the court, I think that was a sufficient offer in evidence of the notice. If the defendant insists upon the point that the original notice was not actually produced and marked, and insists upon retaining in the decision a finding which is incorrect as shown by the official records of the court, we think the trial judge should set aside the judgment and decision and open the trial, so as to enable the plaintiff to produce this *lis pendens* from the files of the court, and have it marked in evidence when judgment can be again entered. But the rights of the plaintiff should not be affected by a pure mistake when from what happened at the trial it seems that the *lis pendens* was really in evidence and before the court.

With this statement of our views, we think the order appealed from should be reversed, with \$10 costs and disbursements, to abide the final result of the appeal from the judgment, if one is taken, and the case remitted to Special Term for further proceedings in conformity with the views here expressed. All concur.

FINNIGAN v. NEW YORK CONTRACTING CO.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—LIABILITY OF MASTER—EMPLOYER'S LIABILITY ACT.

Employer's Liability Act, Laws 1902, p. 1748, c. 600, making an employer liable for injuries to an employé by reason of any defect in the condition of the ways, works, or machinery used in the business of the employer, or by reason of the negligence of any person in the service of the employer, intrusted with and exercising superintendence, etc., increases the liability of employers by making them liable for the negligence of employes intrusted with the duty of superintendence of other employes, irrespective of the care taken to provide competent persons to superintend the work, and, if one charged with the duty of superintendence is negligent and an injury results to an employé, the employer is liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 371-373.]

2. SAME—ACTIONS—NOTICE OF INJURY—SUFFICIENCY.

A notice of injury to an employé causing his death, averring that the injuries were caused solely by reason of the negligence of the employer, in that he, as employer, failed to furnish the employé with a safe place to work and suitable tools, etc., is insufficient under Employer's Liability Act, Laws 1902, p. 1748, c. 600, § 2, providing that no action under the act shall be maintained unless notice of the time, place, and "cause" of the injury is given to the employer within a specified time, the "cause" of injury relating to particulars of the accident by which the employé sustained the injury, to enable the employer to make the necessary investigation as to what caused the accident, etc., and, though no notice is to be deemed insufficient solely by reason of inaccuracy in stating the cause of the injury, a notice is insufficient which does not give the cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 806.]

3. SAME.

Where, to recover for the death of an employé, the Employer's Liability Act, Laws 1902, p. 1748, c. 600, must be relied on, and the notice of the injury is not sufficient under the act, no cause of action under the act is established, and the action must be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 806.]

Houghton, J., dissenting in part.

Appeal from Trial Term.

Action by Mary Finnigan, administratrix of James Finnigan, deceased, against the New York Contracting Company. From a judgment for plaintiff and from an order denying a motion for a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

J. C. Toole, for appellant.

John C. Robinson, for respondent.

INGRAHAM, J. The complaint alleges that the plaintiff's intestate, while in the employ of defendant, received injuries which caused his death; that prior to the commencement of the action the plaintiff had caused to be served upon the defendant a notice in conformity with the employer's liability act (chapter 600, p. 1748, Laws 1902), setting forth the time, place, and circumstances under which the deceased was killed; that on or about February 28, 1906, the plaintiff's intestate, then in defendant's employ, received injuries which caused his death on said date, and that said death was caused without negligence on the part of the plaintiff's intestate and solely by the defendant's negligence, and then follows a statement of the nature of the defendant's negligence. At the opening of the trial counsel for the plaintiff offered in evidence the original notice under the employer's liability act. That notice was objected to by counsel for the defendant on the ground that it was insufficient under said act, which objection was overruled, and the defendant excepted. The court charged the jury that an employé by entering upon or continuing in the service of an employer shall be presumed to have assented to the necessary risks of the occupation or employment, and no others; that the necessary risks of the occupation or employment shall in all cases arising be considered as including

those risks, and those only, inherent in the nature of the business which remain after the employer has exercised due care in providing for the safety of his employes. Thus, upon the question of the assumption of risk by the deceased, the rule provided by the employer's liability act was stated to the jury as the basis upon which they were to consider that question. The notice, which was admitted over the objection and exception of the defendant, after stating the time and place at which the decedent received the injuries, was as follows:

"And that said injuries and death were caused without any negligence on the part of the deceased, but solely by reason of your negligence, in that you, as his master, failed to furnish him with a suitable and safe place to work, and failed to safeguard said place in which deceased was directed to work, and failed to furnish him with suitable tools, appliances, apparatus, ways, works, and machinery in connection with the work which deceased was obliged to do, and in that you failed to properly inspect, guard, and protect the place where he was at work, and in that you failed to furnish him with competent foreman and co-employes, and in that you failed to formulate, promulgate, and enforce proper rules and regulations for the safety of the deceased and his co-employes in the performance of their duties."

The notice here given failed to state what it was that caused the injury to the deceased which caused his death. From this notice the defendant could gain no information as to whether the deceased was injured by a blast, the breaking of a derrick, by falling into a pit, or failure to provide safe machinery. Nothing was stated, except that his death was caused by the negligence of the defendant. .

The employer's liability act (chapter 600, p. 1748, Laws 1902) gives to an employe a cause of action when he sustains personal injury, first, by reason of any defect in the condition of the ways, works, or machinery in connection with or used in the business of the employer which arose from or had not been discovered or remedied, owing to the negligence of the employers or any person in the service of the employer intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition; second, by reason of the negligence of any person in the service of the employer intrusted with and exercising superintendence whose sole or principal duty is that of superintendence, or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer. By this provision of the statute an employer is made liable for the negligence of an employe intrusted with the duty of superintendence of other employes engaged in the work, and consequently changed the liability of an employer for injuries caused by the negligence of a fellow workman of the person injured. The care that an employer takes to provide competent persons to superintend the work, the care that he takes to provide the very best machinery and appliances for doing the work, and the care that he himself exercises in the superintendence of the work are of no avail. If a person who is charged with the duty of superintending the work is negligent, no matter in what respect, and injury results, the employer is liable. The effect of this statute, therefore, is to greatly increase the liability of employers for injuries sustained by their employes when engaged in the master's work, and the Court of Appeals was held that this gives an additional cause of action. *Gmaehle v. Rosenberg*, 178 N. Y. 147, 70 N. E. 411; *Harris v. Baltimore Machine*

& Elevator Works, 188 N. Y. 141, 80 N. E. 1028. There are certain conditions, however, upon which such an additional cause of action depends. Section 2 of the act provides that no recovery for compensation for injury or death under this act shall be maintained unless notice of the time, place, and cause of the injury is given to the employer within 120 days, and an action is commenced within one year after the occurrence of the accident causing the injury or death. "But no notice under the provisions of this statute shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of the injury if it be shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby."

The notice required by the act of the "time, place, and cause of the injury," and the question is whether the provision requiring notice of the cause of the injury to be given to the employer is satisfied by this notice, which is nothing more than a general statement that the injury was caused by the defendant's negligence. It does not seem that such could have been the intention of the Legislature, for the cause of action which is given by the statute is one where the employé was injured by the negligence of the employer, or by a person intrusted by him with the duty of superintendence. Merely giving a notice that the plaintiff or the deceased was injured by the negligence of the defendant, or by his failure to perform certain duties imposed upon him by law, would be only notifying him that the injured person claims that the employer was liable for his neglect to an employé injured. By requiring the employé to give the employer a notice of the "time, place and cause of the injury," it was obviously intended to put the employer in possession of the facts of the particular accident which caused the employé the injury for which he seeks to hold the employer liable. The "cause" of the injury obviously relates to the particulars of the accident by which the employé sustained the injury, in order to enable the employer to make the necessary investigation as to just what it was that caused the accident for which he is to be held liable and the person charged with the duty of superintendence who was responsible for it. When the liability was confined to the negligence of the employer himself or his neglect to perform some duty that the law imposed upon him for the protection of his employés, such notice was not essential; but when liability was extended to every case in which any person charged by him with the duties of superintendence was negligent, so that the employer would be liable for an injury with which he personally had no connection and which he had taken every personal precaution to prevent, he was entitled to notice of just what the accident was, so that he could at once investigate the actions of those intrusted with the duties of superintendence, and be prepared to meet the charge that such persons had failed in the duties which they were charged to perform. But not only is the notice in this case not a notice of the cause of the accident, but the notice that it does give to the defendant was that the injury was caused by the negligence of the defendant, and not by the negligence of a person in its employ who was charged with the duty of superintendence. All the grounds of the action as stated

in the notice relate solely to the negligence of the defendant, and not to the negligence of its superintendent or a person charged by it with duties of superintendence, and there was nothing to bring home to the defendant knowledge of the cause of this accident. No one reading this notice would have any information that the injuries to the plaintiff's intestate had been caused by the explosion of dynamite left in a hole in the rock undischarged by a person charged with the duty of superintending the blasting, and the employer, after receiving this notice, would have had just exactly as much information as he had before as to the "cause" of the injury, and no more. It was not essential that there should be a positive statement in the notice that the administrator of the deceased intended to bring an action against it for its negligence; but it was essential that the employer should know what particular accident it was that caused the injury, for he could then make the necessary investigation to ascertain what, if any, person charged with the duty of superintendence had been responsible for it. If this provision requiring notice of the cause of the injury means anything or is to be of any advantage to the employer, it seems to me that the notice must give a statement of what it was that caused the injury to the person injured, and a statement that the injury was caused by the negligence of the defendant does not at all comply with the statute. We have had occasion to lately examine this question in the case of *Barry v. Derby Desk Company* (decided November 15th, and not yet reported) (Sup.) 106 N. Y. Supp. 575, and we there held that the purpose of the notice was to acquaint the employer with the particular negligent act for which it was intended to hold him liable, and thus enable him to make the necessary inquiries to present his defense, if any, and that a notice which stated the cause of the injury as "your negligence in failing to furnish me with a safe, suitable, and proper place to perform the work which I was engaged to do by you, in failing to furnish me with safe and proper appliances with which to do the work which I was engaged to do by you, and in failing to furnish me with competent fellow servants," was not a compliance with the statute, and did not justify the maintenance of an action under it. It was there said that "what the plaintiff has given notice of is not the cause of his injury, but the cause of that cause," and that this was not a substantial compliance with the statute. The fact that no notice was to be deemed invalid or insufficient solely by reason of any inaccuracy in stating the cause of the injury does not render a notice sufficient which does not purport to give the cause of the injury, but simply gives the nature of the cause of action to be tried. See, also, *Ortolano v. Degnon Contracting Co.*, 120 App. Div. 59, 104 N. Y. Supp. 1064. As, therefore, the cause of action alleged in the complaint was not proved and for the error in admitting the notice under the employer's liability act, we are compelled to reverse the judgment.

It is claimed, however, by the plaintiff that, although the notice was insufficient, still the action could be maintained as an action at common law, and, upon the proofs submitted, the defendant was liable irrespective of the employer's liability act. Assuming that the judgment could be sustained if an action at common law was proved, we think the

proof was not sufficient to sustain such a cause of action. In its essential elements the action is much like *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905. In that case the plaintiff's intestate was drilling a hole in a rock for blasting purposes under the direction of defendant's foreman. It appeared that a charge in another hole had not exploded, and, while the plaintiff's intestate was at work, the charge in the other hole exploded, causing his death. It was held that, assuming the foreman to have been negligent, this negligence was that of a fellow servant, for which the master was not liable; that the risk of the dangers incident to the business of blasting is assumed by those engaged in the work; and that the act of the superintendent in placing the deceased at work where he did was a detail of the work, for which the master was not liable. This case was followed in *Capasso v. Woolfolk*, 163 N. Y. 472, 57 N. E. 760, in which it was said:

"The master, in such a case, is not supposed to watch for supervening conditions in the progress of the work on which his workmen are engaged. If his measure of duty had been performed by sending them off to the work under right conditions, with an experienced foreman and competent workmen, nothing further was incumbent upon him. If the accident happened during the performance of their work, due to some negligent act of commission or of omission in their midst, then the negligence was that of a fellow servant, and that was a risk which the plaintiff assumed in entering upon the employment."

There is nothing in *McGuire v. Bell Telephone Co. of Buffalo*, 167 N. Y. 208, 60 N. E. 433, 52 L. R. A. 437, which affects this question. The cases referred to were not cited in the prevailing opinion, although Chief Judge Parker in his dissenting opinion calls attention to them, but there was nothing that indicated an intention of the Court of Appeals to disaffirm or qualify the principle established. The plaintiff to recover must rely upon the provisions of the employer's liability act, and, having failed to serve the notice required by that act, there was no cause of action proved, and the complaint should have been dismissed.

The judgment and order are therefore reversed, and a new trial ordered, with costs to appellant to abide the event.

PATTERSON, P. J., and McLAUGHLIN and CLARKE, JJ., concur.

HOUGHTON, J. (dissenting). I dissent on the ground that the plaintiff proved a cause of action at common law arising from the failure of the employer properly to inspect; and that the theory of the submission of the case to the jury was under the common law, and not under the employer's liability act, to which submission the defendant made no objection.

(122 App. Div. 576.)

FLYNN et al. v. WHITE et al.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

1. CORPORATIONS—FOREIGN CORPORATIONS—ACTIONS—JURISDICTION.

Under the express provisions of Code Civ. Proc. § 1779, an action may be maintained by a foreign corporation in like manner and subject to the same regulations as an action brought by a domestic corporation, except as otherwise specially prescribed by law; the only restriction in

the statute relating to an action against a foreign corporation by a nonresident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2563-2567.]

2. ATTACHMENT—PROPERTY SUBJECT—DEBT OF NONRESIDENT TO FOREIGN CORPORATION DEFENDANT—SITUS OF DEBT.

N., a resident of New Jersey, maintained a general business office in New York City, and there, through plaintiffs, residents of New York, purchased certain Canadian land from a foreign corporation, which thereby became indebted to plaintiffs for commissions. *Held*, that the situs of the debt owing by N. to the corporation was in New York, and that such debt was subject to attachment in a suit brought by plaintiff against the corporation in New York.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 200.]

Appeal from Special Term.

Action by John P. Flynn and others against William F. White and another. From an order denying a motion to set aside a levy under an attachment, defendants appeal. Affirmed.

Argued before PATTERSON, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Sullivan & Cromwell (Francis D. Pollak, of counsel and Emory H. Sykes, on the brief), for appellants.

Rosendale & Dodd (George Rosendale, of counsel), for respondents.

CLARKE, J. Plaintiffs, who are residents of the city of New York, brought this action against William F. White, a resident of New York, and the White Silver Company, Limited, a foreign corporation organized under the laws of the province of Ontario, dominion of Canada, to recover \$37,500 as commissions alleged to have been earned by them in bringing about the sale of certain lands in Canada to Thomas A. Nevins for \$375,000. Nevins is a resident of the state of New Jersey, although he now has, and for a long time past has had, an office for the transaction of business as a banker in the city of New York. The contract sued upon and the contract alleged to have been brought about by the plaintiffs' efforts were made in the city of New York, and payment for the lands sold was provided to be made in the city of New York, and \$330,000 of said purchase price was actually delivered in the city of New York. The greater part of the money so paid was from funds deposited in said city. A warrant of attachment against the property of the White Silver Company, Limited, was issued and was served upon Nevins, and he has withheld by reason of said service from the last payment due by him, \$45,000. It is to vacate the levy upon that debt that the motion was made. The validity of the attachment depends upon the fact that the White Silver Company, Limited, is a foreign corporation. The motion to vacate the levy thereunder is based upon the contention that the debt levied upon, the res, has no situs within the state of New York; that a debt due by a nonresident to a nonresident is not attachable in this state.

The appellant places great reliance upon the decision of this court in *Bridges v. Wade*, 113 App. Div. 350, 99 N. Y. Supp. 126. That case is an authority for two propositions: First, that a motion to set aside

a levy under a warrant of attachment will lie under proper circumstances. Second, that in an action brought by a foreign plaintiff against a foreign defendant to recover the agreed price of goods sold in a foreign state said foreign plaintiff is not entitled, under a warrant of attachment, to levy upon an indebtedness due the foreign defendant from a foreign corporation. Arguendo, the rule laid down by the Supreme Court of the United States, which is not in harmony with that of the Court of Appeals, was examined, and it was held that even under that rule the levy was bad. The rule referred to was based upon the proposition that an attachment will lie only when the creditor of the garnishee could himself sue. In *Bridges v. Wade* the garnishee was a nonresident corporation, and the defendant, the creditor of said foreign corporation, was a nonresident. Section 1780 of the Code of Civil Procedure provided that an action against a foreign corporation might be maintained by a nonresident in certain specified cases only, under none of which, under the circumstances there disclosed, could the defendant Wade have sued the foreign corporation. If the contract out of which the debt grew in that case had been made within this state or the cause of action had arisen within this state, a different question would have been presented. In the case at bar the contract out of which the debt from Nevins to the White Silver Company, Limited, grew was made within this state, and the money was to be paid within this state, a large portion due thereunder had actually been paid in this state from money here on deposit, and therefore, if there had been a breach of the contract to pay, the cause of action would have arisen within this state. The case at bar is further differentiated from *Bridges v. Wade*, supra, by the fact that the creditor, instead of the debtor, is the foreign corporation, and therefore, if an action were to be brought upon the debt, the foreign corporation would be the plaintiff, and not the defendant. The restriction in the statute is against a nonresident bringing an action against a foreign corporation; but there is no restriction in the statute against a foreign corporation bringing an action in this state against a nonresident. On the contrary, section 1779 of the Code of Civil Procedure provides that an action may be maintained by a foreign corporation in like manner, and subject to the same regulations, as where an action is brought by a domestic corporation, except as otherwise especially prescribed by law. Therefore, as Nevins has an office for the transaction of business in the city of New York, the White Silver Company, Limited, would have no difficulty in serving him with process in this state, and there would be no legal objection to maintaining its action upon the debt. In most of the cases where the attachment or the levy has been set aside there was an attempt made to serve process upon nonresidents incidentally or temporarily within the state, and to levy or attach debts contracted in foreign jurisdictions. It is true that under the rule as laid down by the Supreme Court of the United States in the cases noted in *Bridges v. Wade*, supra, that court has held such service good, that the debt was migratory in character, and followed the person. The rule, however, as laid down by the Court of Appeals, as indicated in *National Broadway Bank v. Sampson*, 179 N. Y. 213, 71 N. E. 766,

66 L. R. A. 606, 103 Am. St. Rep. 851, is otherwise, and we are bound to follow the Court of Appeals.

There are expressions in that opinion which, if taken by themselves, would support the contention of the appellant. The court did say:

"It seems clear that a debt, to be subject to attachment, must have a situs somewhere, and can be impounded only in the jurisdiction where such situs exists, which is clearly where either the creditor or debtor resides. The laws relating to attachments do not authorize a proceeding in this state to seize a credit owing to a resident of another state where neither the creditor nor the debtor is a resident here."

But we have been many times admonished by the Court of Appeals that we are to be bound by the decision of that court, and that an expression in its opinion is not to be divorced from its context and warped into an authority in another case presenting a different state of facts. In the Sampson Case, the attachment had been issued in a suit brought against a Massachusetts corporation. The firm of which Sampson had been a member was a limited partnership organized under the laws of Massachusetts, having its principal place of business in Boston. Prior to its dissolution it had a branch office in New York, but the firm had been dissolved, and some days before the attachment in question the firm had neither an office nor any property in this state. The dealings between the firm and the corporation were had in Massachusetts. There the firm kept its books of account and records of its transactions. The corporation consigned its goods to the firm at Boston exclusively, and payments for the goods sold by the firm to the account of the company were made to the firm in Boston. Statements of account were rendered by the firm at the same place. C. E. Sampson was a resident of the state of Massachusetts, and, being temporarily within this state, he was served with a notice of the warrant of attachment. It was these circumstances that the court was considering when it said:

"If, under the circumstances of this case, it could be properly said that the situs of the debt owing by Charles E. Sampson was in this state, and that it could be attached here, it would follow that it had no actual situs anywhere, but was transient, following the person of the debtor, and could be attached in any state or country where the debtor might be temporarily found."

So in the other cases cited, *Plimpton v. Bigelow*, 93 N. Y. 592. Plaintiffs were residents of Massachusetts. The defendant was a resident of Pennsylvania. The suit was on promissory notes made and delivered by defendant in Massachusetts. The levy was on shares of a Pennsylvania corporation owned by the defendant, the certificates of which the defendant had in Pennsylvania, and the levy was made by service upon an officer of the corporation in which the defendant owned the shares, who was in this state, and it was held that the shares of stock of a foreign corporation were not here because the corporation had property or was conducting business here. In *Carr v. Corcoran*, 44 App. Div. 97, 60 N. Y. Supp. 763, plaintiff was a resident of Ohio, and the defendant was a resident of Pennsylvania. Attachment was served upon Rhodes, a resident of Pennsylvania, while temporarily sojourning at the Fifth Avenue hotel in this city upon a debt alleged

to be due by him to the defendant. That is, all the parties were non-residents, and the levy was set aside.

I have not found any cases where the Court of Appeals has held an attachment or levy thereunder bad where the person upon whom the levy was attempted to be made, and who owed the debt, duty, or obligation, while he had his technical domicile in an adjoining state, yet was a New York business man in every sense of the word, was in daily attendance at his regular office for the transaction of business in this city, kept his money on deposit in the banks of this city, made the contract out of which the obligation grew in this city, which, by its terms, was payable in this city, and the greater part of the amount payable thereunder had actually been paid in this city, when the plaintiffs were residents of this city and their claim against the defendant grew out of the obtaining for the defendants the very contract which the garnishee had partially performed, and the obligation for the last payment thereunder was the debt attempted to be levied on. There is presented here no question of a temporary sojourn by a nonresident, and an attempt to levy upon a debt upon a contract created and to be performed elsewhere. It seems to me in view of the large numbers of business men who sleep in adjoining states, and therefore have a technical domicile there, but who, as matter of fact, spend all their business hours in the actual transaction of business enterprises in this city, that citizens of this state ought not to be deprived of the aid of the court in collecting their just debts by holding that the mere fact of such nonresidence will prevent a levy under an attachment. Under the circumstances disclosed upon this record, it seems to me that we should hold that the thing levied upon is within the state and subject to our jurisdiction until the court of last resort has squarely passed upon such a state of facts.

It follows, therefore, that the order appealed from should be affirmed, with \$10 costs and disbursements. All concur.

(122 App. Div. 576.)

BROWN et al. v. BROWN et al.

(Supreme Court, Appellate Division, First Department. December 13, 1907.)

1. WILLS—LIFE ESTATES—INCOME.

Testator authorized his executors to invest for a term of years a specified sum as special capital in a firm of which he was a member, provided the firm should pay interest thereon and a fixed sum annually for the good will of the business and gave the residue of his estate, including the interest and capital in the firm, to his wife for life, to receive the income, with gift over on her death. The investment was made under an agreement with the surviving partners providing for payment out of profits of the interest and the annual sum as a consideration for the sale of the good will of the firm, and a percentage of the remainder of the net profits. *Held*, that such portion of the profits was not principal, as being part of the purchase price of the good will, but was income on the sum invested, and the wife was entitled to such percentage of the profits as income, as against the remaindermen.

2. EXECUTORS—SALE OF PROPERTY—PROVISIONS OF WILL—RIGHT OF REMAINDERMEN TO OBJECT.

Where the will of a partner fixed the price which his surviving partners should pay for the good will of the firm, the remaindermen could not,

in the absence of bad faith, fraud, or collusion, complain that the executors sold on the terms prescribed.

3. SAME—PERSONAL INTEREST OF EXECUTRIX.

Testator authorized the investment of a specified sum in a firm of which he was a partner, and gave the residue of his estate, including the interest in the firm, to his wife for life, with gift over to his children. He appointed his wife executrix and his brother executor. They made the investment authorized, pursuant to an agreement with the surviving partners. *Held* that, though the wife was interested, she had a right to act as executrix until removed, and the agreement, made prior to any proceedings for her removal, was valid.

Appeal from Special Term.

Action by Adelaide E. Brown and another, executrix and executor of Edward M. Brown, deceased, against Adelaide E. Brown and others for the construction of the will of the deceased. From a judgment overruling exceptions to the report of the referee and confirming a judgment in accordance with the report, defendant Emily Louise Brown appeals. Affirmed.

Argued before PATTERSON, P. J., and LAUGHLIN, HOUGHTON, SCOTT, and LAMBERT, JJ.

Theodore H. Silkman, for appellant.

John G. Agar, for respondents.

LAUGHLIN, J. The action was brought to have the will of Edward M. Brown, deceased, judicially construed. Two questions only are presented by the appellant for review. The able opinion of the learned referee disposes of all others raised on the trial satisfactorily to the parties. The first is whether the profits on capital left invested in the business of a fruit auction copartnership firm, of which decedent was a member, by express permission contained in the will, belongs to principal or income; and the other is whether the appointment of Adelaide E. Brown, the widow of the decedent, as trustee of an express trust, she being a beneficiary, was valid.

The firm name of the copartnership was Brown & Seccomb. The decedent appointed his brother and wife his executor and executrix, and authorized them to leave or invest \$75,000, "as a special capital and interest in the firm" to remain "invested as a special partnership interest in said firm" for the term of five years after his death, "provided such firm and such business shall be continued by my partners for that length of time, and that said firm shall agree to pay to my said executors or estate interest and income thereupon at the rate of six per cent per annum on said capital, and in addition thereto, the sum of ten thousand dollars (\$10,000) annually, for the period of five years, for the good will of said business, the payments of said interest, and additional sum, to be made semiannually." The testator died on the 1st day of December, 1903. The will was duly probated, and after the executors qualified, and on the 12th day of January, 1904, they, individually and not in form as executors, entered into an agreement, in writing, with the surviving partner concerning the copartnership business, and executed concurrently therewith a declaration showing that the investment was for the benefit of the estate, and with a view to carrying into effect the authority contained in the will. The agreement

provided for a new limited copartnership, under the old firm name, to commence on the 2d day of January, 1904, and to continue until the 31st day of December, 1909, a period of six years less two days. It provided that the capital of the firm should consist of the good will of the old firm, of \$75,000, one-half of which was to be contributed in cash individually by each of the executors as a special partner, \$30,000 to be contributed, as a general partner, by one of the surviving partners, together with his interest in the good will and assets of the old firm, and \$23,000 by the other, together with his share in said good will and assets. The special partners were first to receive out of the profits semiannually interest at the rate of 6 per centum on their capital, and, in addition thereto, the sum of \$10,000 per annum, payable semiannually. It was then provided that the surviving partners should likewise receive interest on their capital, and that each of the special partners should receive 20 per cent. of the remainder of the net profits. The provision with respect to the payment of \$10,000 per annum was modified by a succeeding clause, which limited the payments to five years, and expressly provided that it was to be paid "as a consideration for the value and sale of the good will, stock, and fixtures belonging to the firm of Brown & Seccomb at the date hereof, which said firm has existed and been conducted by Edward M. Brown, Esq., deceased, and said Thomas Rawlinson and George L. Buckman, for several years last past, and that the said Thomas Rawlinson and George L. Buckman hereby agree to purchase the good will, stock and fixtures of the said late said firm by paying the sum of ten thousand (10,000) dollars a year from the income and profits of the copartnership hereby formed for the period of five years, and it is understood and agreed that at the end of said period, to wit, on the first day of January, 1909, the said good will, stock and fixtures, as they now and shall then exist, shall become the property of the said Thomas Rawlinson and George L. Buckman, and that all the interest of Adelaide E. Brown and William Harold Brown in the said firm, except their special capital contributed as aforesaid, and any increase and interest due thereupon, shall cease." After directing the payment of debts and funeral expenses, and authorizing the executors to retain or invest the \$75,000 in the copartnership, the testator devised and bequeathed as follows:

"All the rest, residue and remainder of my Estate both Real and Personal, of which I may die seized or possessed, inclusive of my said interest and capital in said firm to my wife, Adelaide E. Brown, during the period of her natural life, to receive the interest, income, rents, issues and profits thereof remaining after the payment of all taxes, assessments, insurance and necessary repairs for and upon said property, and to apply the said net income, etc., to the support of herself and the proper support of my daughter, Emily Louise Brown."

His widow, a daughter, and a son survived him. He gave a legacy of \$20,000 to his daughter out of the remainder after the life estate to his wife, and devised the rest of the remainder to his son and daughter in equal shares. The widow has been allowed as income the 40 per cent. of the profits derived from the copartnership business. The daughter contends that the 40 per cent. of the profits of the copartnership is principal, and forms part of the remainder. The principal the-

ory upon which the learned counsel for the appellant makes this contention is that it is manifest that this percentage of the profits was allowed as part of the purchase price of the good will of the old firm, and not for the use of the \$75,000 invested by the special partners, because interest at the legal rate is expressly allowed for the use of the money. In effect, the claim is that the \$75,000 should be treated as a loan to the surviving partners, and that the estate should have no interest in the profits of the business. In the event that the executors saw fit to continue the investment of \$75,000 in the copartnership business, the testator authorized them to sell his interest in the good will to the surviving partner, and he prescribed that the terms of sale should be an agreement to pay therefor \$10,000 per annum, payable semi-annually during the time the business was continued, which he fixed as a period of five years. It is evident that the executors undertook to execute this authority along the lines planned by the testator. They were vested with discretion as to whether to thus invest the money; and, in exercising it favorably to the wishes of the surviving partners, they may have exacted better terms than those contemplated by the testator, and yet it is not clear that they have. They demanded and received for leaving or investing the money in and thus retaining an interest in the business a percentage of the net profits in addition to interest at the legal rate on their share of the capital. It is to be observed in this connection that interest was not payable in any event by the surviving partners, but only from the profits of the business, and that the investment was subject to the risks of the business, and not a mere loan of money. Nor did the testator contemplate a mere loan of money. He evidently intended that his estate should receive a share of the profits in proportion to its investment of capital; and he manifestly intended that his widow should have the income of all his property, including the profits from this investment for he expressly so provided. Moreover, the \$75,000 invested was, of course, principal, and presumably formed part of his estate's share in the copartnership dissolved by his death; but the widow was entitled to the income thereof, and, in running the risk that this might not be 6 per cent., it was not unreasonable that the executors should make it a condition of the investment that the estate should share for her benefit in any net profits.

Stress is laid upon the finding that the good will was worth more than the price fixed therefor by the testator. There is nothing to give rise to the inference of bad faith or an attempt on the part of the executors to procure for one of them—the life tenant—an advantage at the expense of the remaindermen. The testator fixed the price that his surviving partners should pay for the good will; and, in the absence of bad faith, fraud, or collusion, the remaindermen cannot complain that the executors sold on the terms he prescribed. The argument that on this construction the business might be very profitable at the outset, and yet, after the life tenant realizes many times the interest on the principal invested, it might fail, resulting in a loss to the remaindermen, is answered by the authority of the testator to invest in the partnership business, which necessarily subjected the investment to the hazards of a business venture. The risk of loss of principal sheds no

light on the question presented for decision, which is: Did the executors exact the agreement, and did the surviving partners agree to pay the 40 per cent. of the profits as part consideration for the good will? The agreement negatives any such inference, and the evidence does not impeach it. It shows the ordinary agreement for interest on capital invested as distinguished from loaned and for a show of profits in proportion to the amount of capital contributed.

The learned counsel for the appellant contends that the life tenant, who in the first instance receives all of the income, is incompetent to act as trustee. If this were so, its effect upon the decision under review is not stated. Assuming the trustee to be incompetent as claimed, that would not invalidate the trust. There has been no motion to remove the trustee, or to have a substituted trustee appointed. If the theory be that it renders the agreement with the surviving partners void, we are unable to agree with that view. In any event, the other executor was competent to make the agreement, and the mere fact that the life tenant joined in it would not invalidate it. Moreover, the testator expressly authorized her to act in the premises. With knowledge that she might have an interest adverse to that of the remaindermen, he vested discretion in her to act with her coexecutor; and, until enjoined or removed, she is competent to act. It may well be that he fixed the prices to be charged the surviving partner for the good will, in order that she might have no interest adverse to the interests of the remaindermen. She is not trustee and beneficiary of the same interest. She, with her coexecutor, held the legal title to the \$75,000, the same as to the rest of the estate, in trust to invest and preserve for the remaindermen. Income while in the hands of her coexecutor would be held in trust for her, but upon reaching her hands from any source the trust with respect thereto ceased, and it became her individual property, subject only to the obligation to apply it in part toward the support of her daughter.

It follows that the judgment should be affirmed, with costs. All concur.

LALLY v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

1. QUIETING TITLE—PROCEEDINGS—STATE PATENT AS CLOUD.

Though, where evidence dehors letters patent for land is required to show the invalidity thereof, the patent can be avoided only by a direct proceeding by the state to review the action of the Commissioners of the Land Office, or by action in equity to vacate the patent, yet an individual may bring an action in equity to remove from her title a cloud consisting of a patent from the state.

2. SAME.

Code Civ. Proc. § 1957, empowering the Attorney General to bring actions to vacate or annul letters patent granted by the state, is not prohibitive of an action by an individual to remove, as a cloud on her title, a patent from the state.

3. SAME.

A patent to lands obtained from the state may create a cloud on the title to the land.

4. SAME—PROCEEDINGS—NECESSARY PARTIES—PATENTEE.

In an action to remove from the title to land a cloud consisting of a patent issued by the state, the patentee is a necessary party defendant.

5. SAME—ACTION IN PERSONAM.

An action to remove a cloud from the title to land is an action in personam.

Appeal from Special Term, Westchester County.

Action by Lavinia Lally against the New York Central & Hudson River Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed, and new trial granted.

Argued before HIRSCHBERG, P. J., and JENKS, HOOKER, WOODWARD, and GAYNOR, JJ.

Lavinia Lally, for appellant.

Alexander S. Lyman (Thomas Emery, on the brief), for respondent.

JENKS, J. The plaintiff appeals from a judgment dismissing her complaint at the opening of the trial at Special Term. Both parties concede that the action is in equity to remove a cloud upon the plaintiff's title. The question turns upon the extent and the validity of certain letters patent from the people of the state. The learned court dismissed the complaint, upon the ground that the court did not have jurisdiction, that such a grant could only be attacked by a suit brought directly by the sovereign, either by the people themselves through the Attorney General to set aside the entire grant, or, where it affects a private individual, as in this case, by the people on the relation of the owner to set aside the grant. My discussion is limited to the question whether an action of this nature lies.

It is well settled that, where evidence dehors the patent is required to show the invalidity thereof, the patent can be avoided "only in a direct proceeding to review the action of the commissioners, or by action in equity to vacate the patent." *Blakslee Mfg. Co. v. Blakslee's Sons Iron Works*, 129 N. Y. 155, 29 N. E. 2, and authorities cited. But I think that this rule does not prohibit an action by an individual to remove a cloud on his title. The distinction is clearly shown by *Stephen J. Field, C. J.*, in *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279, and especially at pages 363, 364, and 365. The learned judge first says:

"The proceeding by bill in equity, which an individual is allowed to take, to set aside a patent, or control its operation, is in the nature of a bill to quiet title—to determine an estate held adversely to him—to remove what would otherwise be a cloud upon his own title, or is in the nature of a bill to enforce a transfer of the interest from the patentee, on the ground that the latter has, by mistake or fraud, acquired a title in his own name, which he should in equity hold for the benefit of the complainant. The individual complainant must, therefore, possess a title superior to that of his adversary, and, of course, to that of the government through whom his adversary claims, or he must possess equities which will control the title in his adversary's name."

After discussion of *Gaines v. Nicholson*, 9 How. (U. S.) 364, 13 L. Ed. 172, the learned judge proceeds:

"Here the trustees asserted a title, which upon their allegation was superior to that of the government at the time the patent issued, and, though the suit

is stated in the opinion of the court to be to set aside and annul the patent. It was, in fact, as appears from the pleadings and judgment, only to stay proceedings at law and remove the cloud upon the title. In that particular case the effect of the suit, had the decree been sustained, would have been the same upon the rights of the patentees as if it had been brought to annul the patent absolutely. But in many cases the effect would be very different. A decree annulling a patent destroys it absolutely. A decree setting aside or restricting its operation to the premises in controversy still leaves it unimpaired in other respects. To annul a patent absolutely, proceedings can only be taken by the government, or some individual in its name, and that by *scire facias*, or by bill, or information. Individuals can maintain no proceedings to that effect; the question being one exclusively between the sovereignty issuing the patent and the patentee."

See, too, *Peabody Gold Min. Co. v. Gold Hill Min. Co.* (C. C.) 106 Fed. 241; *Duluth & Iron Range R. R. Co. v. Roy*, 173 U. S. 587, 19 Sup. Ct. 549, 43 L. Ed. 820; *Van Wyck v. Knevals*, 106 U. S. 370, 1 Sup. Ct. 336, 27 L. Ed. 201.

I think that section 1957 of the Code of Civil Procedure refers to actions to vacate and to annul, and is not prohibitive of this action. Such an instrument as is described in the complaint may be said to create a cloud upon title. *Van Wyck v. Knevals*, *supra*. This defendant is certainly a necessary party. *Sanders v. Saxton*, 182 N. Y. 477, 75 N. E. 529, 1 L. R. R. A. (N. S.) 727, 108 Am. St. Rep. 826.

The question of any defect of parties defendant is not raised on this appeal. Whether there is such a defect in this action which is in personam (*Hart v. Sansom*, 110 U. S. 151-154, 3 Sup. Ct. 586, 28 L. Ed. 101; *Pomeroy's Eq. Jurisprudence*, 5 [1 Pom. Eq. Rem.] § 12), needs not now to be considered.

I recommend that the judgment be reversed and a new trial be granted, costs to abide the final award of costs. All concur, except *HIRSCHBERG*, P. J., not voting.

(56 Misc. Rep. 612.)

DANA v. THAW et al.

(Supreme Court, Appellate Term. December 20, 1907.)

JUDGMENT—VACATING DEFAULT.

Vacating a judgment after default and inquest should not be as a matter of course, but only on papers showing not only a reasonable excuse for defendants' neglect, but facts constituting a defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 250, 251.]

Appeal from City Court of New York, Special Term.

Action by Charles L. Dana against Mary C. Thaw and another. From an order granting defendants' motion to vacate a judgment entered on an inquest after default, plaintiff appeals. Reversed, and motion denied.

Argued before *GILDERSLEEVE*, P. J., and *McCALL*, and *FORD*, JJ.

Adam Frank, for appellant.

Hartridge & Peabody, for respondents.

FORD, J. Plaintiff appeals from an order vacating a judgment against defendants, rendered upon default and after inquest taken. The moving papers show facts upon which the court might easily have excused the default. They also contain an affidavit of merits and a verified answer. But they do not shed a ray of light upon what defense the defendants have. This omission is the more significant in view of the sworn statement of defendants' counsel that he believes they have a good and substantial defense upon the merits "from his own personal knowledge of the facts in the case." Those are the facts which he should have laid before the court, to enable it to pass upon their value as defensive material.

On the inquest plaintiff's case in detail was spread upon the record in the testimony given by the plaintiff and his principal witness. The court should have insisted upon getting at least an intelligent idea as to how defendants proposed to meet that testimony before vacating the judgment. Upon an appeal to the Appellate Division of this department from an order vacating a judgment taken after default and inquest, as was the judgment here, Mr. Justice Clarke, writing for the court, says:

"Parties seeking to be relieved from their defaults must show a reasonable excuse for their neglect and must establish a meritorious case before they are entitled to the favor of the court." *Clews et al. v. Peper*, 112 App. Div. 430, 98 N. Y. Supp. 404.

So in *Butterick Publishing Co. v. King*, 15 App. Div. 403, 44 N. Y. Supp. 60, Mr. Justice Ingraham says:

"They [the defendants] say that they then discovered a defense; but, to entitle them to set aside the judgment under such circumstances, it is only fair that they should frankly disclose to the court the facts upon which the defense is founded, so that it can be seen whether or not there is a substantial defense upon the merits. In this case, both in the affidavits upon which the motion was made and in the proposed answer, the defendants carefully avoid stating the facts which would enable the court to determine whether or not they have a valid defense upon the merits."

The same rule was emphatically laid down in an opinion by the late Presiding Justice Van Brunt as follows:

"We think that the learned counsel for the appellant is entirely mistaken in supposing that the doctrine has ever been established that when an affidavit of merits is presented, and there are no suspicious circumstances connected with the application, a default will necessarily be opened. Although decisions to that effect may be found, yet still the practice of the court has been against so loose a procedure as this; and the applicant must not only show a reasonable ground for opening the default, but the burden is upon him to establish his good faith otherwise than simply by an affidavit of merits." *Deane v. Loucks*, 58 Hun, 555, 12 N. Y. Supp. 903.

In the case of *Davis v. Solomon*, 25 Misc. Rep. 695, 56 N. Y. Supp. 80, this court unanimously reversed an order vacating a judgment taken by default for failure to answer ready upon the call of the calendar. Mr. Justice Gildersleeve in his prevailing opinion says:

"It is true that the granting of an order opening a default is within the discretion of the court below, and cannot be reviewed by this court, unless there has been a gross abuse of such discretion. See *Lawrence v. Farley*, 73 N. Y. 187; *De Llamosas v. De Llamosas*, 62 N. Y. 619. It is, however, the duty of this court to examine the papers upon which the application was

based, for the purpose of seeing whether the legal foundation has been laid for the order opening the default. If the affidavits are not found to be sufficient to bring the case within the law authorizing the application, it is clearly the province of this court to reverse the decision of the court below. See *Burnell v. Coles*, 23 Misc. Rep. 616, 52 N. Y. Supp. 200."

That the practice of opening defaults as a matter of course has grown up is no excuse for its continuance, but rather accentuates the necessity for its condemnation.

The order should be reversed, with costs, and the motion to open the default denied, with \$10 costs, with leave to renew on proper papers. All concur.

FENSTER v. BASS.

(Supreme Court, Appellate Term. December 20, 1907.)

1. MASTER AND SERVANT—DISCHARGE OF SERVANT.

Testimony of plaintiff that he told defendant's foreman that he felt bad and wanted to go home, and that the foreman said to him, "You don't need to come to-morrow; they are going to move," whereupon plaintiff left, and did not return to work, shows, not a discharge, but that plaintiff left voluntarily.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 49.]

2. SAME—WAGES—ABANDONMENT OF EMPLOYMENT.

One employed at a certain amount per week, with a provision that from his wages \$2 per week should be retained as a guaranty that he would not leave during the busy season, by leaving without the master's consent, in the middle of a week, and during the busy season, forfeits both the amount retained and his wages for the part of the week he worked.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 94-96.]

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by Joseph Fenster against Joseph Bass. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Argued before GILDERSLEEVE, P. J., and McCALL, and FORD, JJ.

Louis Boehm, for appellant.

Isidor Wels, for respondent.

FORD, J. Plaintiff (respondent) sued for breach of contract of employment, alleging that he was to receive \$24 a week from September to Thanksgiving Day, 1906, and from that to May 15, 1907, \$22 a week. He testified that at the end of November his employer, the defendant (appellant), arbitrarily reduced his wages to \$15 a week, which were paid to him until the termination of the employment on Friday, January 19, 1907, except that under the new arrangement defendant deducted \$2 weekly for seven weeks from his salary, and did not pay him for the 4½ days which he worked in the final week.

As to the circumstances of his leaving defendant's employment, he testified that on a Friday, at noon, he went to the foreman and told him that he (plaintiff) felt bad and wanted to go home, and that the

foreman said to him: "You don't need to come to-morrow; they are going to move." It appears that thereupon plaintiff left and did not return to work. Assuming that the foreman had the authority to discharge plaintiff, what is there in this conversation from which a discharge can be spelled out? Does it not rather show that plaintiff left voluntarily? The defendant testified that, in his business, the busy season ends December 1st, at which date the dull season commences and continues to January 15th, when the busy season starts up again. He says he hired plaintiff until December 1st only at \$24 a week. At that date he had a talk with plaintiff, and agreed to keep him on during the slack season at \$15 a week, but would pay him \$22 a week after the busy season began on January 15th; furthermore, that the defendant was to keep back \$2 a week of plaintiff's wages as a guaranty that he would not leave during the busy season. To this new arrangement, as he testified, plaintiff agreed, and worked under it until January 19, 1907, when he voluntarily left the employment without the knowledge or consent of the defendant.

The trial justice expressly found against the plaintiff on his version of the terms of the contract of employment, but gave judgment in his favor for \$14, the amount of the moneys withheld by the defendant, and also for \$14.50, wages for the 4½ days worked in the last week—a total of \$28.50. Since the testimony shows that plaintiff was not discharged, but left without defendant's consent, he forfeited both the amount withheld and his wages for the 4½ days. 26 Cyc. 1042; *Seaburn v. Zachmann*, 99 App. Div. 218, 90 N. Y. Supp. 1005; *Eden v. Silberberg*, 89 App. Div. 259, 85 N. Y. Supp. 781. There is enough in the testimony to show that defendant was damaged by plaintiff's leaving when he did, just at the beginning of the busy season, after having earned \$15 a week during the preceding slack season, during which, as defendant testified, plaintiff's services were not actually worth more than \$3 or \$4 a week.

The judgment should be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

TANKINS v. BERGER.

(Supreme Court, Appellate Term. December 20, 1907.)

1. TROVER AND CONVERSION—EVIDENCE—SUFFICIENCY.

In an action for conversion, evidence as to plaintiff's ownership and possession *held* insufficient to support a judgment in his favor.

2. APPEAL—REVIEW—QUESTIONS OF FACT.

To sustain a judgment for plaintiff on conflicting evidence, the record of the trial must show with a reasonable degree of certainty that he is entitled to the judgment rendered.

Appeal from Municipal Court, Borough of Manhattan, Thirteenth District.

Action by Charles Tankins against Bernard Berger for conversion. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Bernard Breitbart, for appellant.
H. & J. J. Lesser, for respondent.

FORD, J. Plaintiff (respondent) recovered a judgment against the defendant (appellant) for conversion of a stock of groceries. Plaintiff's principal witness, a Mrs. Zechnowitz, testified that she knew Sam Lubosky for a year and a half; that he had a grocery store at 318-320 East Eighth street; that she was in the grocery business herself; that she had sold him grocery goods; that on March 14, 1907, he owed her \$250; and that on that day, in payment of the bill and for \$100 in cash paid by her to him, he gave her a bill of sale of the stock of goods and fixtures in the store. She says that on the same day she gave a bill of sale of the same goods and fixtures to the plaintiff in consideration of \$250, which plaintiff was to pay later. It is well to note here that, while the minutes have the name of the vendor as "S. Lubosky," the bill of sale itself has his name typewritten in the body of the instrument as "Dobruskin." The signature bears some resemblance to the typewritten name, but clearly ends in "skin," not "sky." Mrs. Zechnowitz testified, further, that she took possession of the store; but it appears from her whole testimony that, while she was always there after the bill of sale, she did not sell goods nor assume its management. She swears that Sam Lubosky was a young man with black hair, and that she had seen another man in the store named Jacob Lubosky, whom she had known for six or seven months, and who was "reddish—a young man." The plaintiff corroborates Mrs. Zechnowitz as to the bill of sale from her to him. He testifies on direct examination, manifestly led by his counsel, that he was in possession of the store and its contents; but on cross-examination he contradicts himself, and says that he never got possession of the store, but "was supposed to come in a month later." He insists, however, that he went to the store every day to see what was bought and sold, but did not sell goods. He did not keep the store open, but "they did." Asked whom he meant by "they," he answered that he meant Lubosky. He saw only one Lubosky in the store.

Defendant testifies that his business was buying stores; that he knew Jacob Lubosky owned the store at 318-320 East Eighth street; that he (Lubosky) lived there with his family, and had purchased goods from the defendant; that he never saw Sam Lubosky there, and did not know him; that the name "Jacob Lubosky" was on the windows of the store; and that Jacob Lubosky was "a black fellow." He produced a bill of sale, signed "Jacob Lubosky," dated March 30, 1907, purporting to grant and convey to the defendant the very same goods and fixtures described in the bill of sale purporting to be signed by Sam Dobruskin, dated March 14, 1907, under which the plaintiff claims title. Defendant testifies that he paid \$475 in cash to Jacob Lubosky for the contents of the store. Defendant's testimony was corroborated by several witnesses, three of whom describe Jacob Lubosky as a "black" or "dark" man, and one of whom testifies that the store had been ad-

vertised for sale in the Jewish papers by Jacob Lubosky. Defendant's removal of the goods under his bill of sale from J. "Lubosky," or "Dobruskin," as it appears in that instrument itself, constitutes the alleged conversion for which the suit is brought.

A judgment in conversion, based upon such a record, cannot be sustained. The proof offered by the plaintiff as to the ownership and possession of the property alleged to have been converted is hazy and contradictory. The maker of the bill of sale to plaintiff's vendor is not sufficiently identified. The weight of evidence is apparently with the defendant, although his defense is far from satisfactory. The entire record is a mass of contradictions, ambiguities, and inconsistencies. The burden is upon the plaintiff to send to this court a record of the trial from which it can be determined at least with a reasonable degree of certainty that he is entitled to the judgment in his favor. *O'Connell v. Thompson-Starrett Co.*, 72 App. Div. 47, 76 N. Y. Supp. 296.

The judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

CARPENTER v. PIRNER.

(Supreme Court, Appellate Term. December 20, 1907.)

1. COURTS—MUNICIPAL COURT—TIME FOR RENDERING JUDGMENT—JURISDICTION.

In the absence of any valid consent of the parties extending the time of court in which to render judgment, a judgment rendered July 17, 1907, in a case tried May 10, 1907, is void under Municipal Court Act, Laws 1902, p. 1557, c. 580, § 230, which provides that the court must render judgment within 14 days from the time the case is submitted to it.

2. SAME.

Under Municipal Court Act, Laws 1902, p. 1557, c. 580, § 230, which provides that, unless the parties consent otherwise, the court must render judgment within 14 days from the time the case is submitted to it, a judgment should have been rendered on May 31, 1907. On that day the justice, wishing more time, was asked by defendant's attorney how much time he would require, and replied that another week would be sufficient. The attorney said, "You may have a week, and all summer if you want it." No written stipulation by defendant extending the justice's time appears in the record. An entry appears in the attorney's record to the effect that the justice's time was extended a week. Judgment was rendered on July 19, 1907. *Held*, that the court had lost its jurisdiction, since at most the time was extended but one week; the words, "and all summer if you want it," indicating that, if the justice desired more than one week, he should again apply for additional time.

3. SAME—PRESUMPTIONS AS TO JURISDICTION.

The Municipal Court being a court of limited jurisdiction, its jurisdiction will not be presumed; but all the facts essential thereto must appear in the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 142.]

4. STIPULATIONS—ORAL STIPULATIONS IN OPEN COURT.

An oral stipulation, made in open court and entered in the minutes, will be enforced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Stipulations, § 14.]

5. SAME—RULES OF PRACTICE.

By the express provisions of rule 11 of the general rules of practice, oral agreements between parties or their attorneys cannot be enforced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Stipulations, §§ 5-18.]

6. COURTS—MUNICIPAL COURT—RULES—EXTENSION OF TIME FOR RENDERING JUDGMENT.

Rule 17 of the Municipal Court, which provides that "a stipulation to extend the time of the court within which to render judgment or make a decision may be entered into between parties or their attorneys on the record in the minutes of the trial or in a written stipulation signed to that effect," contemplates the making of a record or the filing of a written stipulation in order to enable the court to retain jurisdiction to render judgment after the expiration of the statutory time.

7. SAME.

Such a rule is as binding upon the court as upon the parties or their attorneys.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 294.]

Ford, J., dissenting.

Appeal from Municipal Court, Borough of the Bronx, First District. Action by Achilles Carpenter against Frank W. Pirner. From a judgment for plaintiff, defendant appeals. Reversed, and complaint dismissed.

See 102 N. Y. Supp. 461.

Argued before GILDERSLEEVE, P. J., and McCALL, and FORD, JJ.

Charles W. Culver, for appellant.

Wheeler, Cortis & Haight (H. M. Hewitt, of counsel), for respondent.

GILDERSLEEVE, P. J. This is an appeal by the defendant from a judgment rendered in favor of the plaintiff, and one of the points raised by the defendant is that the court below lost jurisdiction of the case by failure to render judgment within the statutory time. Section 230, Municipal Court Act (Laws 1902, p. 1557, c. 580). It is undisputed that the case was tried on May 10, 1907, and judgment was not rendered until July 19, 1907. In the absence of any valid consent of the parties extending the time of the court in which to render judgment, such a delay would render the judgment void. *Lamura v. Haggerty*, 30 Misc. Rep. 745, 62 N. Y. Supp. 1084; *Van Valis v. Charcona*, 40 Misc. Rep. 226, 81 N. Y. Supp. 630; *A. M. Eisenberg & Co. v. Janzlik* (Sup.) 92 N. Y. Supp. 247.

The respondent seeks to uphold the judgment upon the following facts: At the conclusion of the trial the justice reserved his decision and asked for briefs to be submitted by May 17th, which was done. The time (14 days) in which to render judgment would therefore have expired on May 31, 1907. On that day the justice called up the defendant's attorney by telephone and asked for an extension of time in which to decide the case. The defendant's attorney asked how much time the justice desired, and was told a week would be sufficient, whereupon the defendant's attorney said: "You may have a week, and all summer if you want it." The plaintiff's attorney con-

sented in writing to extend the justice's time until August 1, 1907. The attorney who thus verbally on May 31st consented to the justice having more time died on June 9, 1907, and the defendant's present attorney urges that the court obtained no jurisdiction by the consent thus given by the deceased attorney. We are reluctantly forced to the same conclusion. It is conceded in the record that the defendant's attorney never gave any written stipulation extending the time of the justice in which to render his decision, and none appears in the record. The son of the deceased attorney was a partner with his father when the case was tried, and is now the attorney of record. He swears that his father informed him that the justice's time had been extended one week, and that in the record kept by them there appears, in the handwriting of his father, an entry to the effect that one week longer had been given the justice. The actual time thus orally given seems to depend upon the recollection of the justice as to a conversation had over the telephone, and if such time was for more than one week it was indefinite and uncertain. The addition of the words, "and all summer if you want it," to the granting of a week's time, would indicate that, if more than one week was desired by the justice, he should evidence that wish by again applying for more time. At most, therefore, the time was extended but one week, which would expire on June 8th, and the judgment was not rendered until July 19th.

There is another and more serious reason for the reversal of the judgment. The Municipal Court is a court of limited jurisdiction. Its jurisdiction will not be presumed; but all the facts essential thereto must appear in the record. *Tannenbaum v. Natchtigall*, 29 Misc. Rep. 759, 60 N. Y. Supp. 474. It must in every instance show authority for its acts. *People ex rel. Jaffe v. Fitzpatrick*, 35 Misc. Rep. 456, 71 N. Y. Supp. 191. An oral stipulation, made in open court and entered in the minutes, will be enforced. *Slaven v. Germain*, 64 Hun, 506, 19 N. Y. Supp. 492; *Staples v. Parker*, 41 Barb. 648. Oral agreements between parties or their attorneys cannot be enforced. See rule 11, General Rules of Practice. Rule 17 of the Municipal Court, which provides as follows: "A stipulation to extend the time of the court within which to render judgment or make a decision may be entered into between parties or their attorneys on the record in the minutes of the trial or in a written stipulation signed to that effect"—contemplates the making of a record or the filing of a written stipulation in order to enable the court to retain jurisdiction to render judgment after the expiration of the statutory time. The rule is a wise one, and is based upon the fact that a justice loses jurisdiction after the expiration of the statutory time, unless continued jurisdiction is conferred upon him by consent given in due form of law, and this rule is as binding upon the court as upon the parties or their attorneys. To hold that a justice may, by an oral agreement between himself and one of the parties, extend the time in which he is required by law to render a judgment, would lead to grave abuse and open the door to fraud and perjury, and cannot be countenanced. That this result is peculiarly unfortunate for the plaintiff in this case must not stand in the way. He should have seen to it that the jurisdiction

in the court below was retained by written stipulation, signed by the parties or their attorneys, and filed with the court or shown by some suitable entry upon the docket.

Judgment reversed, and complaint dismissed, with costs.

McCALL, J., concurs. FORD, J., dissents.

TIETZEL v. TIETZEL.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

JURY—RIGHT TO JURY TRIAL—DIVORCE—STATUTORY PROVISIONS—WAIVER.

Though an action for divorce is a suit in equity, Code Civ. Proc. § 1757, provides that if the answer puts in issue an allegation of adultery the court must, on the application of either party, make an order directing the trial of that issue by a jury. *Held*, that the right to a jury trial is not waived by consent of defendant to the filing of a note of issue for the Special Term; for, in the absence of demand for jury trial on that issue, the case could not be properly noticed for the Jury Trial Term, nor placed on the circuit calendar, and denial of a motion to direct the issue to be tried by a jury is error, especially in the absence of indication of any purpose to improperly delay the trial.

Appeal from Special Term, Kings County.

Action by Henry H. H. Tietzel against Viola T. Tietzel for a divorce. From an order denying a motion to direct the trial of the issue of adultery to a jury, defendant appeals. Reversed, and motion granted.

Argued before WOODWARD, JENKS, RICH, MILLER, and GAYNOR, JJ.

Thomas C. Whitlock, for appellant.

Charles M. Stafford, for respondent.

WOODWARD, J. This is an action for divorce. The charge of adultery is contained in the third paragraph of the complaint. The answer denies each and every allegation contained in that paragraph. The question of the defendant's adultery, therefore, was the only issue presented by the pleadings. The defendant noticed the case for trial in the Kings County Special Term beginning on the first Monday of June, 1907. The plaintiff's attorney inadvertently neglected to file a note of issue for that term in due time, whereupon the defendant's attorney signed the consent upon which the court ordered the clerk to accept plaintiff's note of issue and place the case upon the calendar. Thereafter, and apparently before the case was ever called at Special Term for trial, the defendant in October, 1907, applied to the court for an order directing that the issue of adultery be tried by a jury. This motion was denied, on the ground that the defendant, by noticing the case for trial at Special Term and thereby consenting that it be tried in that branch of the court, had waived her right to a jury trial under section 1757 of the Code of Civil Procedure.

We think this view was erroneous. A suit for divorce under our statute is a suit in equity. *Lowenthal v. Lowenthal*, 157 N. Y. 236, 243, 51 N. E. 995. In many divorce suits, where affirmative defenses

are set up in the answer, issues other than that of adultery may be presented as to which the right of trial by jury does not exist. The defense of condonation is an example. Notwithstanding the fact, however, that an action for divorce is an equity suit, the statute entitles either party to have the issue of adultery tried by a jury. "If the answer puts in issue the allegation of adultery, the court must, upon the application of either party, or it may, of its own motion, make an order directing the trial, by a jury, of that issue; for which purpose the questions to be tried must be prepared and settled, as prescribed in section 970 of this act." Code Civ. Proc. § 1757. The proper procedure, as we understand it, in an action of this character, is to place the case upon the Special Term calendar, and then, if either party so desires, to make an application for a jury trial under section 1757, whereupon it becomes the duty of the court to cause the question of fact arising upon the allegation of denial of adultery to be distinctly and plainly stated for trial before a jury under section 970 of the Code.

The right to a jury trial of this issue should not be deemed to have been waived by noticing the case for trial at Special Term or consenting that a note of issue be filed in that branch of the court. The Special Term is the proper place for the trial of equity suits generally. Unless and until a demand had been made for a jury trial of the issue of adultery, the case could not be properly noticed for a Jury Trial Term or placed upon the circuit calendar. In other words, a divorce suit has no place at circuit, in the absence of an order framing issues. There is nothing in the law, nor in the practice which has hitherto prevailed, which compels either party to elect, in advance of putting the case on the Special Term calendar, whether he will insist upon his right to a jury trial or not. We have not been referred to any decision holding that a party to a divorce action has waived his right to a jury trial by noticing the case for Special Term. The only Court of Appeals decision which we have found wherein the doctrine of waiver was applied against a party because he had noticed his case for trial at Special Term arose under a section of the Code which did not give an absolute or unqualified right to a trial by jury (*Mackellar v. Rogers*, 109 N. Y. 468, 17 N. E. 350); and there the demand for a trial by jury which arose upon the counterclaim was not made until the cause was actually reached for trial. The circumstances there presented were so different from those in the present suit that we do not regard it as controlling authority. There is nothing to indicate that the application in the present case was postponed for the purpose of improperly delaying the plaintiff in the prosecution of the action; and we find ourselves unable to concur in the view that the proceedings of the defendant constituted a waiver of his statutory right to a trial by jury.

The order appealed from should be reversed, with costs, and the motion granted. All concur.

VANONI v. ALTER.

(Supreme Court, Appellate Term. December 20, 1907.)

VENDOR AND PURCHASER—DEPOSIT OF PRICE—RECOVERY—EVIDENCE.

A purchaser, who deposited with a third person a part of the price pursuant to an agreement with the vendor stipulating that the deposit should be returned on his being unable to obtain possession of the property in possession of a lessee, etc., cannot recover the deposit without proving his inability to obtain possession.

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by Leon Vanoni against Mark Alter. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Jones Cochrane, for appellant.

Leonard A. Snitkin, for respondent.

FORD, J. Defendant (appellant) is the depositary of a sum of money for the alleged conversion of which the plaintiff (respondent) as depositor brought this action. Plaintiff agreed to purchase the contents and good will of a furnished room house, which at the time seems to have been occupied by the lessor of the vendors. They seem to have been subtenants and owners of the furnishings. As consideration for the transfer of the property to her, plaintiff paid \$500 down and agreed to place \$600 additional to be paid to the vendors on certain conditions. The deposit was held, also, subject, among others, to the conditions set out in this paragraph of the agreement made between plaintiff and her vendors:

"It is further understood and agreed that, should the lessee now in possession of the premises and to whom the parties of the first part now pay the rent, refuse to accept the party of the second part [the plaintiff] as the tenant in the place and stead of the parties of the first part [the vendors], then the sum of \$500 to be returned to said party of the second part, and the sale of said property canceled."

Plaintiff actually deposited only \$400 with the defendant, and has recovered a judgment for that sum as damages, besides \$32 costs and allowances. The appeal is from that judgment.

Defendant sets up in his answer that under the terms of the contract "the plaintiff is now entitled to the money." Nonjoinder of parties defendant is also properly pleaded by him, namely, the vendors of plaintiff who are the other parties to the contract of sale. Plaintiff's claim is that she was unable to get possession of the house; but what efforts she made to that end are unsatisfactorily proved. The testimony more than suggests that the vendors, instead of plaintiff, may be entitled to the money. Defendant has the right to have the question of the ownership of the fund on deposit determined in such manner as to bind all parties and relieve him from future liability to third parties who may have an interest in the deposit. The case

of Bushnell v. Chautauqua County National Bank, 74 N. Y. 290, is controlling.

The judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

McCALL, J., concurs in result.

GILDERSLEEVE, P. J. I concur in the result. It is not clear from the testimony in the case that the plaintiff was refused possession of the premises in question through the fault of the vendors of the lease. The right of the plaintiff to recover in an action for conversion under the circumstances seems doubtful. At any rate there was a failure of proof.

FEINSTEIN et al. v. GOTTFRIED.

(Supreme Court, Appellate Term. December 20, 1907.)

LANDLORD AND TENANT—RENT—LIABILITY—INJURY BY FIRE.

Where a tenant continued to hold possession of the leased premises notwithstanding the occurrence of a fire thereon, such fire was no defense to his liability for rent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 777, 778.]

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Ida Feinstein and another against Elias Gottfried. From a Municipal Court judgment for defendant, plaintiffs appeal. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Samuel Plumer, for appellants.

Leo Schafran, for respondent.

PER CURIAM. This judgment must be reversed. The record shows that there was a fire upon the premises and some destruction necessarily ensued. Without further comment upon that feature than to say that the defendant seemingly was given to exaggeration of conditions produced, it was without doubt proven that the tenant maintained possession and never left the premises. He cannot keep possession and refuse to pay rent. He must give up one or the other. Having in this case kept the possession, he must respond in compensation therefor, and there is nothing in the lease that makes this conclusion inconsistent with its terms.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

DOOLEY v. UNION RY. CO. OF NEW YORK CITY.

(Supreme Court, Special Term, New York County. December 16, 1907.)

COSTS—APPEAL—DISMISSAL—PROPRIETY OF ALLOWANCE.

Where an appeal was not dismissed upon notice previously given, but only after it was called in its regular order on the calendar, costs before and after notice of argument were properly taxed against appellant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Courts, § 956.]

Action by William Dooley against the Union Railway Company of New York City. Plaintiff's appeal from a judgment of the Appellate Division (94 N. Y. Supp. 635), reversing a judgment for him and an order denying a new trial, was dismissed by the Court of Appeals (82 N. E. 1125), and he moves to retax costs. Motion denied.

Fromme Bros., for the motion.

James L. Quackenbush, opposed.

GIEGERICH, J. The appellant seeks by this motion for a retaxation of costs for a disallowance of the items before and after notice of argument, which items were taxed by the clerk. The appeal from the judgment was dismissed by the Court of Appeals on the ground that it was not appealable, and the appellant insists that the respondent is not entitled to the said items "because there was actually no argument of the appeal." The remittitur, however, states that the cause came on for argument, and that after due deliberation the appeal in question was dismissed, with costs, and the affidavit, used upon the taxation, shows that the dismissal took place upon the argument. Since the appeal was not dismissed upon notice previously given, but only after it was called in its regular order on the calendar, the clerk properly taxed the items objected to. *Winchester v. Jackson*, 7 U. S. 514, 2 L. Ed. 516, 9 Abb. Pr. Rep. (N. S.) note at bottom of page 455. See *Kanouse v. Martin*, 4 N. Y. Super. Ct. Rep. 739; *In re Wray Drug Co.*, 93 App. Div. 456, 87 N. Y. Supp. 676.

Motion denied.

McMANN v. BLOOMER.

(Supreme Court, Appellate Term. December 20, 1907.)

LANDLORD AND TENANT—DURATION OF TERM—HOLDING OVER BY TENANT.

Where the tenant of an apartment, on the expiration of the lease on May 1st, left some of his furniture there for about a week by permission of the janitor, but no authority to grant such permission was shown, there was a holding over, rendering the tenant liable for rent for May.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 82, Landlord and Tenant, § 393.]

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by Amanda McMann against Harvey N. Bloomer. From a judgment in favor of defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL, and FORD, JJ.

Wesselman & Kraus, for appellant.

Arthur W. Birkins, for respondent.

PER CURIAM. If there had been a disputed question of fact here, and it had been determined in favor of the tenant, we should not be inclined to disturb the judgment; but there is no dispute about the facts. The defendant himself swears:

"Q. Where were the things, in the apartment you occupied? A. Yes, sir; a few pieces of furniture. Q. How long were they there after the 1st? A. About four or five days; about 12 pieces of furniture," etc.

It is true that he swears that he had the permission to leave them from the janitor; but to make such permission available to the defendant the authority to grant same should have been shown, and the record is silent thereon. We cannot see, therefore, but that under the law, which without dispute must be accepted as settled, there was a holding over beyond May 1st, and that the defendant was answerable for that month's rental, but, under the circumstances, for that month only. The judgment must therefore be reversed, and a new trial ordered.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

WOLVERTON et al. v. ROGERS.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

1. TRIAL—TAKING CASE FROM JURY—DISMISSAL—SEVERAL PLAINTIFFS—GENERAL MOTION.

A general motion to dismiss an action by four plaintiffs should have been denied, where a cause of action was shown as to two.

2. PARTIES—MISJOINDER—WAIVER.

Under the express terms of Code Civ. Proc. §§ 488, 498, 499, by not objecting by answer that there was a misjoinder of plaintiffs, such misjoinder not appearing on the face of the complaint, defendant waived the objection, and was not entitled to move to dismiss the action on that ground on trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 145.]

Appeal from Municipal Court, Borough of Brooklyn, Second District.

Action by Byron Wolverton and others against James Rogers. From a judgment for defendant, plaintiffs appeal. Reversed.

Argued before HIRSCHBERG, P. J., and WOODWARD, GAYNOR, RICH, and MILLER, JJ.

Benj. Frindel, for appellants.

Louis Ehrenberg, for respondent.

GAYNOR, J. The action is for a broker's commission on the sale of real estate. The evidence is that the defendant employed two of the plaintiffs to sell the property, that they brought him a purchaser on his terms, and that he refused to make the contract. Two other brokers are joined as plaintiffs because they assisted the plaintiffs in getting the purchase, though not employed by the defendant. At the close of the plaintiff's evidence a motion to dismiss the complaint was granted. The motion was not severed as to each set of plaintiffs, but made generally against all. It is now sought to uphold the nonsuit on the ground that "no interest in common is shown in the plaintiffs against the defendant." This was not a ground on which to dismiss the complaint against all. A cause of action was proved in two of them, and the dismissal was error in respect of them. It was for the defendant to sever his motion. A complaint cannot be dismissed as to all of the plaintiffs because a cause of action has not been made out by some of them. A general motion to dismiss in such a case has to be denied, and should have been denied in this case. *Simar v. Canaday*, 53 N. Y. 298, 13 Am. Rep. 523.

Furthermore, the Code of Civil Procedure allows a demurrer for a misjoinder of parties plaintiff (section 488, subd. 5), which was not the case formerly (Code Proc. 1848, § 144), and provides that unless the objection be taken by demurrer where it appears on the face of the complaint, or by answer where it does not, it is deemed to have been waived (Code Civ. Proc. §§ 498, 499). Not having objected by answer (for the misjoinder did not appear on the face of the complaint), the defendant was not in a position to move to dismiss because of it on the trial.

The judgment should be reversed.

Judgment of the Municipal Court reversed, and new trial ordered; costs to abide the event. All concur, except HIRSCHBERG, P. J., not voting.

WALL ST. EXCH. BLDG. ASS'N v. NEW YORK & W. CONSOL. OIL CO.

(Supreme Court, Special Term, New York County. December 16, 1907.)

EXECUTION—VACATION—STAY PENDING APPEAL.

Where a notice of appeal from a judgment and undertaking were not served until after the expiration of a stay granted by the trial justice, a levy on personal property would be discharged only on condition that the appellant pay the sheriff's and keeper's fees, under Code Civ. Proc. § 1311.

Action by the Wall Street Exchange Building Association against the New York & Western Consolidated Oil Company. On motion to discharge an execution levy on personal property. Motion granted, on condition.

Frost & Nieman, for the motion.

Alfred E. Ommen, opposed.

GIEGERICH, J. As the time within which an execution might have been issued without leave commenced to run on the day on which

the judgment was entered (*Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57 N. E. 168, 79 Am. St. Rep. 565), the stay granted by the trial justice expired on the 23d, instead of the 26th, day of November, 1907. The notice of appeal and undertaking were served upon the last-mentioned date, and under these circumstances the defendant (appellant) should pay the sheriff's fees and keeper's fees, to be taxed, as a condition to the granting of the motion to discharge the levy upon personal property, pursuant to section 1311 of the Code of Civil Procedure.

Motion disposed of as indicated, with \$10 costs to the plaintiff (respondent) to abide the event.

MILES et al. v. BARTON.

(Supreme Court, Appellate Term. December 20, 1907.)

DAMAGES—TIME TO WHICH DAMAGES MAY BE RECOVERED.

Under a contract providing that payments thereunder should be at a proportionate rate for the time property was retained beyond a specified period, plaintiffs were only entitled to recover up to the date of the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 567.]

Appeal from City Court of New York, Trial Term.

Action by Herbert L. Miles and another, copartners doing business under the firm name of Miles Bros., against James D. Barton. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and McCALL and FORD, JJ.

Jacob S. Stahl, for appellant.

Kneeland, La Fetra & Glaze, for respondents.

PER CURIAM. There is but one feature in this record that has bothered us in affirming the judgment obtained, and that is the refusal of the learned trial justice to charge, when requested:

"That if the jury finds for the plaintiffs they can only find for them up to July 10th, the date of the complaint in this action, which would be for \$600."

The refusal to so instruct the jury was based upon the belief that the contract between the parties called for these payments to be made in advance, and as the due date had passed the obligation to pay had accrued. It will be observed upon the reading of the contract that the learned court fell into this error by applying the provisions governing the payment for the Toronto engagement, which states same shall be made in advance; but the issue tried in this case covered a period subsequent thereto, and was for the retention, rather than the use, of the films, and the contract provides in this regard that the payments to be made, if any are chargeable, shall be made "at a proportionate rate for the time said property is retained beyond said period." It will thus be seen that there was no time antedating the

verification of the complaint when, as the learned trial justice erroneously concluded, the obligation became fixed, and hence within the limits defined by the pleadings, and consequently the request made should have been charged; and, as same materially affected the result, the judgment must be reversed, and a new trial ordered, unless the plaintiffs agree to reduce the same to \$600, with the costs obtained below. As so modified, the judgment will then be affirmed, without costs.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event, unless the plaintiffs stipulate to reduce the judgment to the sum of \$600, with costs in the court below, in which event the judgment, as so modified, is to be affirmed, without costs of this appeal to either party.

NEW YORK ELECTRICAL WORKERS' UNION et al. v. SULLIVAN et al.
(Supreme Court, Appellate Division, First Department. December 20, 1907.)

1. CORPORATIONS—MEMBERSHIP CORPORATIONS—MEETINGS—NOTICE.

Where the by-laws of a membership corporation contained no provisions requiring notice of any of the meetings, and it had not been the custom to send notice of regular meetings other than the annual meeting, an annual meeting held at the regular time and place was not illegal because held without notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 734.]

2. SAME—MEETINGS—QUORUM.

The common-law rule that in a society composed of an indefinite number of persons a quorum, for the purpose of elections and voting on other questions requiring the sanction of the members, consists of those who assemble at any meeting regularly called and warned, although such number be a minority of the whole, does not apply to a membership corporation the by-laws of which attempt to provide a rule for the determination of the question of quorum.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 744.]

3. SAME—STATUTES—CONSTRUCTION.

Where two by-laws of a membership corporation composed of an indefinite number of persons, providing for a quorum, were conflicting, a question of quorum should be determined by Membership Corporation Law, Laws 1895, p. 333, c. 559, art. 1, § 8, providing that a quorum should not be less than one-third of the members, or, if one-third be nine or more, it shall be not less than nine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 744.]

4. SAME—ORGANIZATION—ELECTION OF OFFICERS AND DIRECTORS—NOTICE.

Where a membership corporation consisting of an indefinite number of persons was placed in the hands of a receiver, and the receiver's report advised that all members in good standing on February 1, 1907, should be recognized as members on the termination of the receivership, and that notice of the annual meeting for the reorganization of the corporation and election of officers be given, and after the receivership proceedings were terminated a meeting was held, without notice, at which some members entitled to participate were denied that privilege, the election held at such meeting should be set aside, and a new election held after notice of the discharge of the receiver and of the holding of the meeting,

under General Corporation Law, Laws 1892, p. 1810, c. 687, § 27, authorizing the Supreme Court, on petition, to inquire concerning corporation elections and order a new election, or make such order or give such relief as right and justice may require, though neither the corporation's by-laws nor the order discharging the receiver provided for notice of meetings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 734.]

Appeal from Special Term.

Petition of the New York Electric Workers' Union and another against William J. Sullivan and others for an election of officers and directors of such organization and for other appropriate relief. From an order denying the application, petitioners appeal. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Benjamin Patterson, for appellants.

William D. McNulty, for respondents.

CLARKE, J. The New York Electrical Workers' Union is a domestic corporation organized and existing under the provisions of the membership corporation law. An action was brought against said union by the people to remove divers officers by reason of misconduct and maladministration, and a judgment was entered therein on the 8th day of April, 1907, removing a majority of the officers, directing that their removal be reported to the Governor, and appointing a receiver, who took possession on the 8th of April, 1907. On the 13th of June, 1907, the Governor appointed the petitioner, Maurice R. Jarvis, president, and certain others to the various offices of the union. On the 28th of August, 1907, the receivership terminated and the receiver was discharged. The receiver's report advised that all members in good standing on the 1st day of February, 1907, should be recognized as such upon the termination of the receivership, and recommended that notice of the annual meeting to be held on the second Wednesday of September for the purpose of electing officers, as provided by the by-laws, should be given to all members who were in good standing on the 1st day of February, 1907. The petitioner alleges that there were 1,200 members in good standing; that there is a provision of the by-laws to the effect that no member shall receive a nomination unless he is present, or has sent a written acceptance of such nomination, and is also clear on the books for three months; that some 20 members of the union held a meeting on the 28th of August, the day of the discharge of the receiver, and nominated officers; that on the 11th of September, the annual meeting was held, some 20 members being present; that no notice was given to the members of the termination of the receivership, and that no notice was given, as recommended by the receiver, of the holding of the annual meeting; that 4 members were turned away and not allowed entrance to said meeting; and that it proceeded to elect officers for the year. It is alleged that no quorum was present, and therefore the petitioner prays for a new election of officers and directors and for such other relief as right and justice may require.

This proceeding is under section 27 of the general corporation law (chapter 35 of the General Laws as amended [Laws 1892, p. 1810, c. 687]) which provides that:

"The Supreme Court shall, upon the application of any person or corporation aggrieved by or complaining of any election of any corporation or any proceeding, act or matter touching the same, upon notice thereof to the adverse party, or to those to be affected thereby, forthwith and in a summary way, hear the affidavits, proofs and allegation of the parties, or otherwise inquire into the matters or causes of complaint and establish the election or order a new election, or make such order and give such relief as right and justice may require."

The by-laws of this corporation provide as follows:

Article 3, § 1: "The regular meeting of this union shall be held on every Wednesday of each month, and at such time and place as the Union may direct."

Article 12, § 1: "All nominations for officers and standing committees to be elected at the annual meeting at the first meeting in September of each year, are to be made two weeks before such elections."

There is no provision in the by-laws requiring the giving of notice of meetings, either monthly or annual. It is conceded that, although the receiver reported that all the members should be given notice of the meeting for the election of officers, the order of the court confirming said report did not so require, and that no such notice was given. Article 3, § 5, of said by-laws, provides that:

"Twenty-five per cent. of the members in good standing shall constitute a quorum for the transaction of all business which does not involve the scale of wages or the appropriation of money."

Section 6:

"One hundred members in good standing shall constitute a quorum for the transaction of business involving the appropriation of money on the sinking fund. * * *"

Article 13, § 1, provides that:

"A quorum for meetings of the union shall consist of 10 per cent. of the membership in good standing."

Section 11 of the general corporation law (chapter 35 of the General Laws) provides that:

"Every corporation, as such, has power, though not specified in the law under which it is incorporated: * * * (5) To make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, * * * and the calling of meetings of its members."

Section 8 of article 1 of the membership corporation law (chapter 43 of the General Laws, Laws 1895, p. 333, c. 559) provides that:

"The by-laws of any such corporation may make provisions not inconsistent with law or with its certificate of incorporation regulating * * * the number of members, not less than one-third, or if one-third be nine or more, not less than nine, whose presence shall be necessary to constitute a quorum at its meetings. * * *"

There are two questions presented by this record:

First. That no notice of the annual meeting was sent to the members. It is not claimed that there is any provision of law requiring the sending of such notice. The by-laws provide for the annual meeting,

and the annual meeting was held at the regular meeting rooms of the union at the time fixed by the by-laws. There are no provisions in the by-laws for the sending of notices of any of the meetings. It is claimed that it had not been the custom to send notices of the regular monthly meetings, but it had been the custom to send notices of the annual meeting. It is further claimed that there was a patent necessity therefor in this case, because of the appointment of the receiver and his discharge a short time before the date of said meeting. Although under the circumstances of this case it would have been wise and proper to have followed the recommendation of the receiver and to have given notice of said meeting, the court failed to require it in its order, and, as the members of a corporation are held to be bound by its by-laws, I do not see how it can be held as strict matter of law that it was illegal to have held a meeting at the regular time and place without notice. It is not alleged that said meeting was held at any unusual time of day or in any foreign or unusual place.

Second. It is claimed that there was no legal quorum present. There are conflicting provisions in the by-laws. One by-law fixes the quorum at 10 per cent., and another at 25 per cent. of the membership. Neither is in strict accordance with the provisions of law, providing that the by-laws may fix the quorum at not less than one-third of the membership, or, if one-third be 9 or more, not less than 9. The petition alleges that there were about 1,200 members in good and regular standing at the time of the appointment of the receiver, and the receiver advised that all members in good and regular standing on the 1st day of February, 1907, should be recognized as such upon the termination of the receivership. There is no denial of said statement of fact as to the membership, and it is obvious that the 20 men present at the annual meeting did not constitute 10 per cent. or 25 per cent., as provided by either one of the by-laws fixing the quorum, or one-third, fixed by the membership corporation law, cited *supra*.

The respondents claim that as the two provisions of the by-laws are inconsistent, and as neither of them strictly conforms to the law, inasmuch as neither provides that "the quorum shall not be less than nine," no legal by-law has been made fixing the quorum, and that, therefore, resort must be had to the common-law rule, and the number of members present and voting at any regular meeting constituted a quorum, and a majority thereof was sufficient to transact business. The difficulty in applying that proposition is that this body was not a voluntary association, with no rules, constitution, or by-laws for its government, as was the case in *Ostrom v. Greene*, 20 Misc. Rep. 177, 45 N. Y. Supp. 852, where Mr. Justice Chester said:

"The society was composed of an indefinite number of members. There was no rule providing the number that should constitute a quorum, and in absence of such rule the members who attended the regular meetings held in accordance with the established custom constituted a quorum and were entitled to transact any business that fairly came within the purposes for which the association was formed. The fact that less than a majority of all the members appeared at any of these meetings was of no importance, because those who failed to attend impliedly gave their assent that those who did attend should by a majority vote transact the business of the association. These principles are supported by numerous authorities." *Niblock on Voluntary Societies*

(1st Ed.) § 127; 2 Kent's Com. side page 293, subd. 298; Dillon on Municipal Corporations (4th Ed.) 277; Morawetz on Private Corp. § 76.

When this case reached the Court of Appeals (161 N. Y. 353, 55 N. E. 919), Judge Vann said:

"There is a marked difference between a voluntary association with rules and one without. * * * Even if a majority of all the members was necessary to constitute a quorum in order to lawfully transact business, which, in a society composed of an indefinite number of persons, is open to question, a minority could adjourn from time to time, and hence each meeting was regularly held. *Field v. Field*, 9 Wend. 403; *Spelling on Private Corp.* 374."

In 10 Cyc. p. 329, it is said:

"The rule of common law seems to be that, where a body is composed of an indefinite number of persons, a quorum for the purposes of elections and voting upon other questions which require the sanction of the members consists of those who assemble at any meeting regularly called and warned, although such number may be a minority of the whole, in which case a majority of those assembled may elect, unless there is a different rule established by statute or by a valid by-law."

I reach the conclusion that, as this is not a voluntary association, but a corporation organized under the membership corporation law of the state, we cannot invoke the common-law rule, and that if the by-laws in question are invalid by reason of their inconsistent and conflicting provisions, or, because there is no limitation therein contained, that at least 9 members are necessary to constitute a quorum, then we must be governed by section 8 of article 1 of the membership corporation law, of which the fair intendment is that a quorum should be not less than one-third of the members, unless specifically provided that, if one-third be 9 or more, it be not less than 9.

It should be noted that the statute (section 27 of the general corporation law) under which this application was made provides that the court "should establish the election or order a new election, or make such order and give such relief as right and justice may require." The learned court below dismissed the application. We think that under the circumstances disclosed in this record the application should not have been dismissed, but that, in view of the suspension of the duties and obligations of the members of the corporation while in the hands of the receiver, notice of the discharge of the receiver and of the meetings for the election of officers should have been required to have been given to all the members.

It follows, therefore, that the order appealed from should be reversed, with \$10 costs and disbursements, and the matter remitted to the Special Term, with instructions to enter an order setting aside the election and to order a new election upon notice to all the members who were such members on the 7th of February, 1907. All concur.

CRAWFORD v. KROLLPFEIFFER.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

PARTY WALLS—CONTRACTS—CONSTRUCTION—COVENANTS RUNNING WITH LAND.

Plaintiff and decedent, who were the owners of adjoining lots, executed a party wall contract, by which it was agreed that plaintiff should build the wall at his own expense on the dividing line, and that decedent or his assigns should be at liberty to use the wall, and should pay plaintiff, his representatives or assigns, \$500 when the wall was so used. The agreement also declared that it should be binding on and inure to the benefit of the heirs, executors, administrators, and assigns of the respective parties thereto, and should be considered as a covenant running with the land, but that no part of the fee of the premises on which the wall was erected should be transferred or conveyed by such contract. *Held*, that such agreement merely created an easement in favor of each lot for the support of the wall, and that decedent's covenant to pay did not run with the land, so that plaintiff, after having conveyed his lot, could not recover on decedent's covenant against one to whom the latter's lot was conveyed by his executors, on such grantee erecting a building on the lot and using the wall.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Party Walls, § 49.]

Appeal from Special Term.

Action by James C. Crawford against Henry Krollpfeiffer. From a judgment dismissing the complaint on the merits, plaintiff appeals. Affirmed.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAMBERT, LAUGHLIN, and HOUGHTON, JJ.

Joseph Fettretch, for appellant.

Harold Swain, for respondent.

LAUGHLIN, J. This is a suit in equity to have a lien declared in favor of the plaintiff, and enforced against premises owned by the defendant, for \$500 on account of the expense of constructing a party wall. On the 28th day of February, 1899, the plaintiff owned a lot having a frontage of 20 feet on the northerly side of 118th street, commencing 225 feet westerly from the westerly line of Lenox avenue, and one Francis Crawford owned the lot next easterly therefrom and of the same dimensions. On that day the owners of these lots entered into an agreement in writing, plaintiff being party of the first part, and Francis Crawford being party of the second part, which was duly recorded in the office of the register of the county of New York, in and by which it was provided that the plaintiff should forthwith construct a party wall, the center line of which should be the line between the two lots. The dimensions of the wall were prescribed in the agreement. It was further provided that the entire cost of constructing the wall should be borne by the plaintiff or his assigns, and that—

"the said party of the second part hereto or his assigns, shall be at liberty at any time hereafter to use the said wall for all the purposes of a party wall for any house which he or his assigns may erect on said land owned by the said party of the second part, upon payment by the said party of the second part, or his assigns, to the said party of the first part, his legal representatives or assigns, the sum of \$500 in cash, such payment to be made when the wall is used."

It was further provided that, should it become necessary to repair or rebuild the wall after the same should be used by the party of the second part or his assigns, the cost thereof should be borne equally by the parties, or their representatives, heirs, executors, administrators, or assigns. The final clause of the agreement was as follows:

"Fifth. That this agreement shall be binding on and inure to the benefit of the heirs, executors, administrators, and assigns of the respective parties hereto, and shall be construed as a covenant running with the land, but that no part of the fee of said premises upon which said party wall may be erected shall be transferred or conveyed in or by these presents."

The plaintiff thereafter erected a building upon his lot, and in connection therewith erected the party wall in accordance with the agreement. The party of the second part died without having used the party wall or conveyed the premises. Title to the lot owned by him was conveyed by his executors to one Picken, subject to the party wall agreement. Picken subsequently erected a house upon the lot and used the party wall, but did not pay the \$500 to the plaintiff; and he thereafter subsequently conveyed the premises to the defendant, the conveyance being made expressly subject to the party wall agreement. The action is brought upon the theory that the \$500 became a charge upon the landowner when Picken, defendant's grantor, used the wall, and continues a charge thereon.

The question presented for decision is whether the covenant to pay ran with the land. It is clear that the covenant as to the payee, or, in other words, as to the benefit of the obligation to pay, did not run with the land, and it was so decided by this court in construing this identical agreement in *Schwenker v. Picken*, 91 App. Div. 367, 86 N. Y. Supp. 681. The obligation to pay, whoever is bound thereby, ran to the plaintiff when he constructed the wall, and he clearly did not make it in favor of his land, so that it runs to his grantee. It is expressly provided in the agreement that the fee to the land upon which the wall was constructed was not conveyed; but it is manifest that an easement was created thereby in favor of each lot for the support and maintenance of the party wall in part upon the other.

We are not now called upon to decide whether, if plaintiff still owned the lot which he owned at the time the party wall agreement was made, there would be a privity of estate between him and the owner of the other lot; for even so it is manifest that upon conveying his lot he ceased to retain any interest in the land. He could not retain an easement in favor of land which he conveyed for the support and maintenance of the wall in part upon the adjacent premises, for such easement was appurtenant to the land which he conveyed and necessarily passed to his grantee. *McKenna v. Brooklyn Union Railroad Company*, 184 N. Y. 391, 77 N. E. 615. In this respect the case of *Guentzer v. Juch*, 51 Hun, 397, 4 N. Y. Supp. 39, relied upon by the appellant is distinguishable; for there the plaintiff who built the wall had not conveyed at the time he brought the action. Moreover, that case is distinguishable upon the ground that there the action was brought against the party who first used the wall; whereas, here the defendant was not the first party to use the wall. The cases seem to hold that a covenant does not run with the

land unless there is a privity of estate, and that such a covenant does not create a privity of estate. *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611; *Sebald v. Mulholland*, 155 N. Y. 455, 50 N. E. 260; *Washburn on Real Property* (6th Ed.) §§ 1203, 1204. Where the agreement does not contemplate the present construction of a party wall, but authorizes its construction by either party in the future, the rule is different, and the covenant is said to create a privity of estate and to run with the land. *Mott v. Oppenheimer*, 135 N. Y. 312, 31 N. E. 1097, 17 L. R. A. 409; *Sebald v. Mulholland*, *supra*. The expression of opinion in *Schwenker v. Picken*, *supra*, that the parties intended that this covenant to pay when the wall was used should run with the land, was not a decision that it was effective for that purpose.

It follows that the judgment should be affirmed, with costs. All concur.

REED v. SMITH.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

1. **DISCOVERY—EXAMINATION BEFORE TRIAL.**

In an action to recover money paid to defendant for certain shares of stock under alleged fraudulent representations made with intent to deceive, such representations being contained in letters and telegrams from defendant, the examination of defendant before trial to identify the letters and telegrams, as provided by Code Civ. Proc. § 872, held authorized.

2. **SAME—AFFIDAVIT OF ATTORNEY.**

Where plaintiff resides in Tennessee and is not within the state of New York, an affidavit by plaintiff's attorney on an application to examine defendant before trial in order to identify certain telegrams and letters alleged to have been sent plaintiff by defendant is sufficient.

Appeal from Special Term.

Action by Charles Reed against Charles Head Smith. From an order denying a motion to vacate an order for the examination of defendant before trial, defendant appeals. Modified and affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, CLARKE, SCOTT, and LAMBERT, JJ.

Samuel S. Slater, for appellant.

J. S. & H. A. Wise, for respondent.

INGRAHAM, J. The action is brought to recover the sum of \$3,000 paid to the defendant for certain shares of stock of a corporation which it is alleged plaintiff was induced to purchase by and through false and fraudulent representations made to him by the defendant with intent to deceive, cheat, and defraud; that the representations made to the plaintiff are in writing, in letters and telegrams which purport to be from the defendant, and the plaintiff desires to examine the defendant to prove the writing of these letters and the sending of the telegrams. It is apparent that this evidence is most material, and is necessary for the plaintiff upon the trial of the action, and the fact as to

whether the defendant wrote the letters and sent the telegrams can be proved by the defendant. Every fact required by section 872 of the Code of Civil Procedure appears. The materiality of the defendant's letters and telegrams as proof upon the trial to prove the representations must be conceded, and the fact that the defendant would testify as to his handwriting and whether he wrote and sent the letters and telegrams can certainly be inferred.

The only question presented is whether the order should have been granted upon the affidavit of plaintiff's attorney, or whether it required an affidavit of the plaintiff personally. In the affidavit the plaintiff's attorney, who was to try the case and had charge of its preparation, deposes that the plaintiff must prove the representations made by the defendant's letters. He certainly is presumed to have knowledge of the proof required to prove the plaintiff's case, and, that fact being established, the other conclusions that the testimony of defendant as to whether or not he wrote these letters and sent the telegrams will be material upon the trial. The reason given for the affidavit not being made personally by the plaintiff is stated to be the fact that he resides in the state of Tennessee and is not within the state of New York. I think that is a sufficient excuse for the making of the affidavit by the attorney and counsel, who was to try the case and necessarily had knowledge of the proof required. It is a mere useless formality in such a case to require the client, who cannot have the knowledge as to the facts that it is necessary to prove and the nature of the proof necessary to sustain plaintiff's case that his counsel has, to make an affidavit. There certainly can be no doubt, from the facts sworn to by the plaintiff's attorney—facts which necessarily are within his knowledge—that the defendant's testimony will be most material and necessary to be used upon the trial of the action, and I think the affidavit fairly shows that the examination is sought to obtain a deposition for use upon the trial. See *Goldmark v. U. S. Electro-Galvanizing Company*, 111 App. Div. 526, 97 N. Y. Supp. 1078; *McKeand v. Locke*, 115 App. Div. 174, 100 N. Y. Supp. 704; *Grant v. Greene*, 118 App. Div. 850, 103 N. Y. Supp. 674.

The examination of the defendant should, however, be confined to the letters and telegrams sent by the defendant; and the order is modified so as to so limit such examination, and, as so modified, affirmed, without costs. All concur.

(56 Misc. Rep. 389.)

BIGELOW CO. v. AUTOMATIC GAS PRODUCER CO. et al. (two cases).

(City Court of New York, Trial Term. November, 1907.)

1. CORPORATIONS—NOTES—LIABILITY.

Where the benefit of a note signed by the president of a corporation has been received by the corporation, and there is no question of fraud, the note is a valid obligation against the maker and the indorser, though the by-laws of the corporation provide that its notes must be countersigned by its treasurer, as well as signed by the president.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1707-1718.]

2. BILLS AND NOTES—CONSIDERATION.

Under Negotiable Instruments Law, Laws 1897, p. 727, c. 612, § 51, a note given in payment of a pre-existing debt, is given for value.

Actions by the Bigelow Company against the Automatic Gas Producer Company and Alfred H. Bronson. Judgment for plaintiff.

Santiago P. Cahill, for plaintiff.

A. G. N. Vermilya, for defendants.

GREEN, J. These are two actions brought by the plaintiff against the defendants upon two promissory notes made by the defendant Automatic Gas Producer Company and indorsed by the defendant Bronson. The action designated as action No. 1 is brought upon a note for \$1,200 and interest, amounting to \$40.60, making a total of \$1,240.60. The second action, or action No. 2, is brought upon a note for \$1,000 and interest, amounting to \$29.17, making a total of \$1,029.17. Both causes were tried before a jury, and at the close of the whole case plaintiff's counsel moved for a direction of a verdict in each action, and the defendant's counsel for a dismissal of the complaint, whereupon it was agreed that the jury be discharged and that the questions be submitted to the court without a jury.

The real point involved in these actions is as to the authority of the president of the defendant company to bind the company, in the absence of specific authority to sign the note as president, and in the case of a standing existing by-law of the defendant corporation that notes must be signed by the president and countersigned by the treasurer. The notes in question were concededly signed by the corporation by its president, but were not countersigned by the treasurer, and the defendant corporation claims that, in consequence thereof, the notes are not legal obligations of the defendant corporation, and, being issued without authority, the notes and the indorsements create no legal obligations against the defendants. The evidence, however, shows that the plaintiff in the action was doing business with the defendant company, of which the defendant Bronson was a director, and that the notes were made by the president in payment for work, labor, and services performed by the plaintiff for the defendant, of which work, labor, and services the defendant corporation received the benefits and enjoyment, and that the president was virtually the manager of the company, generally managing its business. One of the notes was a renewal of a previous note given for the same purpose, and there is no claim in this case that there is any fraud, or that the corporation did not receive the benefits derived from the work and labor for which the notes were given. It is true that at the time the notes were given they were in payment of a pre-existing debt, but that is sufficient to constitute value under section 51 of the negotiable instruments law (Laws 1897, p. 727, c. 612).

The only question remaining in this case is as to whether the execution of a promissory note for value by the corporation through its president, but without the signature of the treasurer, as required by the by-laws of the corporation, creates a legal obligation against the corporation. Numerous authorities hold that in such cases, where the

paper is not diverted from its original purpose, and the company received the benefits of the proceeds, and the paper is in the hands of a bona fide holder, that a valid legal obligation is created. In the case of *National Spraker Bank v. Geo. C. Treadwell Co.*, the court held that:

"The fact that the paper was made by the president of the corporation, and was not signed by the treasurer, in accordance with the by-laws of the company, constitutes no defense," as "the paper was not diverted from its original purpose, and went into the hands of a bona fide holder, and the company received the benefit of the proceeds." *National Spraker Bank v. Treadwell Co.*, 80 Hun, 364, 30 N. Y. Supp. 77.

In a case involving the same defendant as the case above cited, and in which the trial justice directed a verdict for the plaintiff, he said:

"I assume that the president of the company, Mr. Treadwell, had no direct authority as such, under the by-laws, to make promissory notes binding the company, and that by the restrictive provisions of those by-laws obligations of the company might only be executed in a certain way. That would not render a promissory note signed in the way in which this was, and delivered under the circumstances under which the notes were delivered, of no force as against this corporation, if it is made to appear in the case that the conduct of the corporation was such with reference to the acts of the president in similar matters as to produce a well-founded belief that he was authorized to make promissory notes of this character."

The Appellate Division of the First Department, commenting upon the language of the trial justice, said that he had correctly stated the law and that nothing was left to be added by the appellate tribunal. *Grant v. Treadwell Co.*, 1 App. Div. 370, 37 N. Y. Supp. 892. See, also, *Grant v. Treadwell*, 82 Hun, 591, 31 N. Y. Supp. 702.

While there seems to be some doubt whether the mere fact that a note is signed by the president and treasurer is sufficient to establish the validity of the note, however, in order to do so, there should be proof of the specific authority to affix the corporate name to the note as its obligation, or that the corporation received the avails of the note, or that there was a course of business which justified the person in accepting it as the obligation of the corporation. *National Bank of Newport v. Snyder Mfg. Co.*, 107 App. Div. 97, 94 N. Y. Supp. 982. In the case at bar there was a course of dealings with the defendant, the defendant corporation received the benefits of the note, no question of fraud or bad faith is raised, and I am of the opinion that the notes in suit are valid legal obligations as against the defendant corporation and the indorser, notwithstanding the restrictive provisions of the by-laws of the corporation.

The motions of defendant's counsel for the dismissal of the complaints are denied. The motions of plaintiff's counsel for directions of verdicts are granted. In the action known as "No. 1" a verdict is directed for the sum of \$1,240.60, and in action No. 2 for the sum of \$1,029.17. A stay of 10 days and 30 days to make a case in each action is granted, and defendant may have exceptions of the denial of the motions to dismiss the complaints.

Ordered accordingly.

NEKARDA v. PRESBERGER.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. BROKERS—RIGHT TO COMMISSIONS—CONDITIONS—PLEADING.

Where a broker's contract for commissions provided that the amount sued for was payable out of the last cash payment, such payment constituted a condition precedent to any liability on defendant's part to pay such sum to plaintiff; and hence an allegation in plaintiff's complaint that the sum sued for "became due" on a given date was not a sufficient allegation that the condition precedent had happened.

2. SAME—RIGHT TO COMMISSIONS—FIDUCIARY RELATION.

At the time defendant employed plaintiff to sell certain real estate on commission, plaintiff was an attorney and the purchaser was one of his clients. The purchaser was also president of a corporation of which plaintiff was a director, and the contract of purchase was made for its benefit; the property being conveyed to it. *Held*, that plaintiff sustained a relation of trust to both his client and the corporation, and could not recover commissions on such sale without proof that the purchaser had knowledge of and consented to plaintiff's contract for commissions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 48-50.]

Appeal from Trial Term.

Action by Francis J. Nekarda against Mendel Presberger. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Reversed, and new trial granted.

Argued before PATTERSON, P. J., and HOUGHTON, McLAUGHLIN, SCOTT, and LAMBERT, JJ.

Milton S. Hoffman, for appellant.

Ira B. Wheeler, for respondent.

SCOTT, J. The defendant appeals from a judgment in favor of the plaintiff. The defendant held a contract for the purchase from the Carmen estate of a tract of land near Valley Stream on Long Island. He desired to sell the land and authorized plaintiff to find a purchaser. Plaintiff did find and produce a man named Zamek who agreed to buy the property for the sum of \$90,500, of which he was to pay \$1,000 in cash on the execution of the contract; \$14,385 in cash, which was to be deposited with a title company within four days after the signing of the contract, to be held by that company until it should be ready to approve the title, which was to be on June 18, 1906, or not more than five days thereafter, and then to be paid to defendant; and \$29,615 in cash to be paid on the delivery of the deed—the balance of the purchase price to be secured by mortgages. A contract embodying these terms was entered into between Zamek and the defendant. Upon the same day plaintiff and defendant entered into a contract, which referred to the above-described contract and recited the fact that plaintiff had performed certain services for the defendant in and about the sale of the premises and otherwise, whereby defendant had become indebted to plaintiff in the sum of \$14,000, which defendant agreed to pay as follows: \$7,385 in cash out of the \$14,385 to be deposited with the title company and thereafter paid to the defendant, and the remaining sum of \$6,615 "out of" the sum of \$28,915 to be paid to defendant on the closing of the title. It is for this second installment that the plaintiff now sues.

The first objection to the judgment urged by defendant raises a question of pleading. Under the contract between plaintiff and defendant the installment now sued for was to be paid "out of" the last cash payment to defendant, and, of course, it would not become due unless and until defendant received the final payment, which thus became a condition precedent to any liability on the part of defendant to plaintiff. The complaint does not allege that defendant ever received the final payment, and the defendant now insists, as he did in the court below, that by reason of this omission the complaint failed to state a cause of action. The objection is a narrow one and is extremely technical, since the evidence in the case showed that the defendant had in fact received his final payment before this action was commenced. I think, however, that the objection was well taken, and that the insertion in the complaint of an allegation that the sum "became due" on a given date was not equivalent to the happening of the condition precedent. *Tooker v. Arnoux*, 76 N. Y. 397. Nor does it appear that the defect in pleading was cured by anything that took place on the trial. The defendant did not, it is true, move to dismiss the complaint at the opening of the trial; but he did persistently object to the admission of any evidence that the final payment had been made to defendant, and at the close of the plaintiff's case moved to dismiss the complaint upon the specific ground that it was defective in the particular now pointed out.

There is a more serious objection, however, to the plaintiff's recovery, which goes to the very root of his claim. At the time he negotiated the contract of sale from defendant to Zamek he was an attorney of this court, and Zamek was one of his clients. Zamek was also the president of a corporation known as the Home Alliance Realty Company, of which the plaintiff was a director. It appears that the contract of purchase, although made by Zamek, was really made on behalf of the Home Alliance Realty Company, and it is certain that the deed of the property was made to that company. Whether the contract was made with Zamek, for whom he was attorney, or for the benefit of the realty company, of which he was a director, plaintiff bore to the purchaser a relation of trust and confidence which renders such a contract as he now seeks to enforce illegal and unenforceable, unless it was made with the full knowledge and consent of the purchaser, of which there is no evidence in the case. A similar contract came before this court in *Goodell v. Hurlbut*, 5 App. Div. 77, 38 N. Y. Supp. 749, wherein the question is thus stated and answered in the negative:

"Whether an independent contract made between the plaintiff and a third party, with whom the plaintiff is negotiating on behalf of his principal, whereby upon the execution of said contract plaintiff is individually to receive a sum of money from such third party, is a contract which the courts will enforce in an action between the agent individually and such third party."

We have recently had occasion to restate and apply this rule, which is sustained by ample authority. *Auerbach v. Curie*, 119 App. Div. 175, 104 N. Y. Supp. 233. This defense was properly pleaded, and the defendant sought, but unsuccessfully, to avail himself of it upon the trial. These errors require a reversal of the judgment, and render

unnecessary a scrutiny of the evidence presented upon the defense of payment.

Judgment and order reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

In re ROSS.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

ATTORNEY AND CLIENT—LIEN OF ATTORNEY FOR FEES.

Under Code Civ. Proc. § 66, giving an attorney a lien for services upon his client's cause of action, which attaches to a verdict, etc., in the client's favor and the proceeds thereof, in whosoever hands they may come, an attorney has such lien, where his client is the administrator of an estate, upon the proceeds of a verdict, etc., in favor of the estate, for services rendered in the action or in the institution thereof.

Appeal from Special Term, Kings County.

Petition by J. Stewart Ross to enforce an attorney's lien on money collected for Henry Gehrhardt as administrator. From an order appointing a referee, the administrator appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, RICH, MILLER, and GAYNOR, JJ.

Frank A. Crowe, for appellant.

Samuel Evans Maires (Samuel T. Maddox, Jr., on the brief), for respondent.

MILLER, J. This is a proceeding, instituted by petition pursuant to section 66 of the Code of Civil Procedure, to have the lien of an attorney on moneys collected by him determined and enforced. The appellant contends that the petitioner has no lien, for the reason that the moneys were recovered for an administrator of an estate, and hence that the administrator and not the estate is bound.

The rule that the contracts of executors or administrators bind them personally, and not their estate, has no application to this case. The petitioner claims to have recovered for the estate of the appellant money and property as the result of certain actions and special proceedings. Section 66 of the Code of Civil Procedure provides:

"From the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come."

And it does not matter that the client happens to be an executor or administrator. Matter of the Application of Knapp, 85 N. Y. 284; Matter of Kellogg, 96 App. Div. 608, 88 N. Y. Supp. 1033, affirmed 180 N. Y. 534, 72 N. E. 1144. Of course, the petitioner has no lien unless the money or property was recovered as the proceeds of a verdict, report, decision, judgment, or final order in an action or special proceeding, or as the subject-matter of an action or special proceeding, and then only for services rendered in such action or proceeding or the institution thereof; and the learned justice at Special Term so

held. We do not undertake now to pass upon the merits, but only decide that the appointment of a referee to ascertain the facts was proper.

The order should be affirmed.

Order affirmed, with \$10 costs and disbursements. All concur.

STERN v. STERN.

(Supreme Court, Appellate Division, First Department. December 13, 1907.)

1. CORPORATIONS—SALE OF STOCK—CONTRACTS—RESCISSION—ACTIONS—COMPLAINT—SUFFICIENCY.

Plaintiff alleged that at the instance of defendant's decedent he subscribed for certain shares of stock and paid decedent therefor; that, to induce plaintiff to purchase the stock, decedent fraudulently represented that he and others had organized the corporation of which he was a director, etc., to acquire furnace property and to mine, manufacture, etc., iron ore or pig iron; that the stock would be a splendid investment, well knowing that it would diminish in value and become comparatively worthless; that the company would produce 80,000 tons of ore and pig iron annually, from which it would pay dividends, whereas it was incapable of producing that quantity of ore and had paid but one dividend, and that out of capital; that decedent was personally familiar with all the facts concerning which he made the representations; and that plaintiff duly tendered back the stock and demanded the return of the consideration paid, etc. *Held*, that the complaint stated a cause of action on the theory of rescission.

2. WITNESSES—COMPETENCY—ACTION AGAINST REPRESENTATIVE OF PERSON DECEASED.

In an action against an executrix to recover the price of stock paid defendant's testator by plaintiff on the ground of fraudulent representations, a witness for plaintiff testified that he heard a conversation between plaintiff and decedent in which he participated. It appeared that the witness agreed on the day of the conversation to purchase part of the stock from plaintiff, and on receipt of the stock paid plaintiff therefor, but that the purchase was later rescinded, and that witness had no interest in any of the stock or in the result of the litigation. *Held*, that the witness was not incompetent to testify as to the conversation, under Code Civ. Proc. § 829, relating to testimony by a witness as to his transactions with a decedent in an action against the executor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 663, 664.]

Ingraham and Scott, JJ., dissenting.

Appeal from Trial Term.

Action by Benjamin Stern against Sarah Stern, as executrix, etc. From a judgment dismissing his complaint, plaintiff appeals. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

William M. Bennett, for appellant.

Charles E. Rushmore, for respondent.

LAUGHLIN, J. The action was brought originally against Simon H. Stern, and upon his death his executrix was substituted. The

allegations of the complaint tend to present two theories of liability: (1) For deceit by decedent in selling and delivering his own stock in the Pennsylvania Furnace Company to plaintiff, instead of stock in the same company which he induced plaintiff to agree to subscribe for, and led plaintiff to believe had been subscribed for, in his behalf therein; and (2) for the recovery of the purchase price paid for the stock upon the theory that its purchase was induced by false and fraudulent representations, upon the discovery of which the contract had been rescinded and the return of the stock tendered and a return of the purchase price demanded. Upon the first theory no recovery could be had, for no damages were shown, and, as the stock delivered and accepted all stood in the name of the decedent, plaintiff was chargeable with knowledge of his ownership. The plaintiff, however, upon the trial, in effect elected to stand upon the second theory, although his counsel made some claims not essential thereto which tended to obscure the real issue.

It is claimed at the outset that the complaint fails to state a cause of action upon the theory of rescission. I am of opinion that it is sufficient. It is alleged that plaintiff knew the decedent to be a man of character and pecuniary responsibility in whom he had full confidence; that on or about the 1st day of May, 1899, plaintiff, at the instance of decedent, subscribed for \$100,000 of the capital stock of the Pennsylvania Furnace Company and paid decedent \$50,000 therefor; that, with a view to inducing plaintiff to purchase said stock, decedent made false and fraudulent representations to plaintiff, in substance as follows, all of which plaintiff believed and relied upon, and all of which were false to the knowledge of decedent, to wit: That decedent represented to plaintiff in May, 1899, that he and others had organized the Pennsylvania Furnace Company, of which he was a director, shareholder, and largely interested, to acquire iron ore rights and furnace property in Pennsylvania, and to mine, manufacture, and sell iron ore or pig iron; that "the company was the biggest thing ever gotten up"; that stock in the company at \$50 per share would double in value and probably be worth three times as much, and would be a splendid investment, well knowing at the time that it would diminish in value and become comparatively worthless; that the company was capable of and would produce 60,000 tons of ore and pig iron annually, from which it would pay dividends, whereas the company was incapable of producing and never produced that quantity of ore annually or paid but one dividend, and that was paid out of capital and not out of profits. It is further alleged that decedent was personally familiar with all the facts relating to the property concerning which he made the representations, for he owned it individually until the organization of the company on the 18th day of September, 1899, and then on September 22, 1899, by deed conveyed and transferred it to the company for \$3,000,000; the property being actually worth not more than \$250,000. It is further alleged that plaintiff duly tendered back the stock and demanded the return of the consideration paid, together with interest thereon. The allegations fully set forth that the purchase of the stock was fraudulently induced by material false representations. It was conceded that decedent sold and delivered his own stock to plaintiff, and recovered and returned the consideration therefor.

One Isaac Stern, brother to plaintiff, was called as a witness in his behalf and testified that he was present and heard a conversation between plaintiff and decedent, in which he participated, the latter part of April or beginning of May, 1899, in the private office of Stern Bros. over their dry goods store on West Twenty-Third street, New York. He was asked to state the conversation. Counsel for decedent asked leave to examine him preliminarily, and developed the fact that he agreed, the day of the conversation, to purchase from plaintiff \$20,000 of the stock and subsequently paid him therefor, after receiving it, but that the purchase was rescinded by mutual agreement, and he returned the stock to plaintiff, and received his money back, and had no interest in any of the stock or in the result of the litigation. Counsel for decedent thereupon objected to the conversation on the ground that the witness was incompetent, under section 829 of the Code of Civil Procedure, upon the theory that plaintiff had derived his title through the witness. The objection was sustained and counsel for plaintiff duly excepted. The court ruled broadly that the witness was not competent to testify to any conversation between the parties, and, in effect, informed counsel that it was unnecessary to ask specific questions relating to the conversation limiting it to the stock which plaintiff did not sell to the witness; and counsel for plaintiff again excepted. This evidence was clearly competent. The witness did not purchase any of the stock of decedent. He was as competent to testify to the conversation as if he had never purchased any of it from plaintiff. The fact that he purchased part of it from plaintiff, and subsequently rescinded the contract and returned it, left the case as if he had never purchased it. Plaintiff's cause of action against decedent was in no manner derived through the witness. He stands upon the original transaction. Of course, he could only rescind in so far as he held the stock; but he did hold most of it all the time, and presumably, on his allegations, he held it all when he elected to rescind. However, that would only go to the quantum of the recovery, and would not affect the existence of his cause of action on account of the stock which he did not transfer to the witness. Plaintiff was thus erroneously deprived of an opportunity to present his evidence of fraudulent representations and develop his case; for, of course, he was incompetent to give the evidence himself, and a new trial must be awarded.

The judgment should be reversed, and a new trial granted, with costs to appellant to abide the event.

PATTERSON, P. J., and CLARKE, J., concur.

INGRAHAM, J. (dissenting). While the complaint contains allegations of many statements of the defendant's testator in relation to the future value of the property that was to be acquired by the corporation and of the stock which plaintiff purchased, and enthusiastic and as it subsequently appeared, exaggerated estimates of the advantages that would accrue to the stockholders of the company in consequence of the future operations of the company, there is but one statement of a fact that was made by the defendant's testator upon which the plaintiff

could base an action for fraud or for a rescission of the contract, and that was the alleged statement by the plaintiff that "the said company was capable of and will produce 60,000 tons of ore and pig iron annually, from which said company would pay dividends." Assuming that all of these representations alleged in the complaint were made by the defendant's testator to induce the plaintiff to purchase the stock, this statement by the defendant's testator was the only representation of the existence of a fact upon the falseness of which this action in either aspect could be based. There was no proof offered on the trial that this statement was not true, nor did the plaintiff claim upon the trial that he had evidence to prove it was false. After the testimony of the plaintiff's brother as to the interview between the plaintiff and the defendant's testator was excluded, plaintiff went on to prove his case by other testimony, and he offered all the testimony that he desired in relation to the falsity of the statement made. If the testimony of plaintiff's brother as to the statement of the defendant had been admitted, it would only have established the representation made, as alleged in the complaint, and in the absence of proof to justify a finding that this statement was false I think the court could do nothing but dismiss the complaint.

All of the other alleged representations related to what the defendant's testator expected that the corporation would accomplish. Statements that the company was "the biggest thing ever gotten up," that the shares of stock "would double in value and would probably be worth three times as much," and that the stock of the company "was a splendid investment for the plaintiff," were certainly not representations upon which a cause of action for fraud or for a rescission of a purchase of the stock would be based. The further allegation that the plaintiff supposed that he was subscribing for this stock assumed that he had understood that he was obtaining it from the company at 50 cents on the dollar, when in fact the defendant was selling him his own stock, could not justify a verdict for the plaintiff. In the first place, the plaintiff must have known that there could be no subscription of the company's stock at less than par. If the plaintiff had subscribed for the issue of stock by the company, that subscription would necessarily be at par, and not 50 cents on the dollar, and upon such subscription, whatever the subscriber paid, he would be liable to the company for the par value of the stock. But, when the stock was delivered to the plaintiff by defendant's testator, it showed upon its face that it was defendant's testator's stock, and that it stood in his name upon the books of the company; for that fact appeared upon the face of the certificate delivered to the plaintiff. He accepted those certificates as a compliance with the contract, and paid the defendant's testator for the stock, retained the stock, and received the dividends; and it is too late for him, years afterwards, to attempt to disaffirm the purchase upon the ground that the stock was the defendant's testator's stock, and not that of the company, issued as the result of his subscription to the capital stock of the company. It is evident that by this transaction the plaintiff, who had confidence in the judgment of the defendant's testator, entered into a speculation in acquiring this stock which he thought would result in large profit. This conclusion quite probably

was based upon the enthusiastic and exaggerated idea of the defendant's testator as to the result of the speculation; but I think it is quite clear that there was no fraud in the transaction to justify this action.

I think, therefore, that the judgment appealed from should be affirmed.

SCOTT, J., concurs.

SCHWEIG v. SCHWEIG.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

DIVORCE—ALIMONY—EVIDENCE.

Where, in an action for divorce for adultery, plaintiff's complaint alleged the facts on information and belief, which defendant denied under oath, and plaintiff's application for alimony and counsel fees pendente lite, based on a petition reciting that she would be able to substantiate all the allegations of the complaint by proof on trial, etc., was answered by defendant, absolutely denying the charges of adultery made in the complaint, which was not supported by any proofs showing the sources of plaintiff's information nor the grounds of her belief, her application should have been denied, with leave to renew on further proofs.

Appeal from Special Term.

Action by Anna Schweig against Arthur C. Schweig. From an order allowing alimony and counsel fees pendente lite in an action of absolute divorce, defendant appeals. Reversed, and motion denied.

Argued before PATTERSON, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

P. A. Hatting (Abraham Harris, of counsel), for appellant.

CLARKE, J. This is an appeal from an order of the Special Term awarding to the plaintiff alimony pendente lite at the rate of \$10 per week and a counsel fee of \$75. The order is based upon a petition of the plaintiff in which it is alleged:

"That she will be able to substantiate all the allegations of the complaint by proof at the trial, and that she has a good cause of action thereon, as she is advised by her counselor, * * * and that she verily believes."

The complaint alleges:

"On information and belief that at divers times and at various places in the city of New York, between the 1st day of September, 1906, and the 1st day of January, 1907, the defendant has committed adultery with a woman whose name is at present unknown to the plaintiff."

This allegation of the complaint is denied under oath by the defendant.

This order should not have been granted, under the express authority of *Downing v. Downing*, 23 App. Div. 559, 48 N. Y. Supp. 727, where this court said:

"All the allegations constituting the ground of divorce in the complaint are upon information and belief; and this motion was based upon a petition and the complaint. The defendant, answering the motion, filed an affidavit denying absolutely the charges of adultery contained in the complaint, and no proofs whatever tending to show the sources of information or the grounds of belief of the plaintiff were presented to the court. We think, under these cir-

circumstances, the plaintiff's motion should have been denied. In aid of her application she should have exhibited to the court some evidence tending to show that there was a reasonable ground for her commencing the action and that there was a reasonable probability that she might succeed in establishing her charges." *Wood v. Wood*, 61 App. Div. 96, 70 N. Y. Supp. 72.

Therefore this order should be reversed, and the motion denied, without costs, with leave to renew upon further proofs. All concur.

SCHWEIG v. SCHWEIG.

(Supreme Court, Appellate Division, First Department. December 20, 1907.)

1. DIVORCE—ALIMONY—CONDITIONAL ORDER.

An order for alimony and counsel fees provided that defendant should be permitted to visit the child of the parties in New York City twice a week on certain days at a place to be fixed by agreement. *Held*, that defendant's right to see the child was not a condition precedent to his liability for alimony, so that the wife's failure to afford him an opportunity for that purpose constituted no defense to his liability for failure to pay alimony according to the decree.

2. SAME—PERFORMANCE.

It was the duty of a husband, in a suit against him for divorce, to obey an order for the payment of alimony and counsel fees pendente lite, though erroneous, unless he had obtained a stay, or until it was modified, set aside, or reversed.

3. SAME—ENFORCEMENT—CONTEMPT—ORDER—PREJUDICE.

Code Civ. Proc. § 1778, provides for the enforcement of orders for alimony by proceedings to punish for contempt. Section 2268 provides that, when a right or remedy of a party to a civil action may be defeated or prejudiced by a neglect of duty or other misconduct, the offense must be punished as prescribed in the title relating to "proceedings to punish contempt of court other than criminal contempt"; and section 2281 declares that if accused has committed an offense charged, and it was calculated to or did defeat or prejudice the rights of the party to the action, the judge must direct punishment by fine or imprisonment. *Held*, that an order punishing defendant for contempt in failing to comply with an order requiring the payment of alimony and counsel fees which failed to determine that such failure was either calculated to or did defeat, impair, or prejudice any of the rights or remedies of plaintiff in the action was fatally defective.

Ingraham, J., dissenting.

Appeal from Special Term.

Action by Anna Schweig against Arthur C. Schweig for divorce. From an order adjudging defendant guilty of contempt for failure to comply with an order directing him to pay plaintiff certain alimony and counsel fees, he appeals. Reversed.

Argued before PATTERSON, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

P. A. Hatting (Abraham Harris, of counsel), for appellant.

CLARKE, J. This is an order adjudging the defendant in contempt for disobedience of an order requiring him to pay alimony and counsel fee pendente lite in an action for an absolute divorce, which said order was appealed from and upon said appeal has been reversed by this court in the opinion handed down herewith (107 N. Y. Supp.

904) as having been improvidently made. The order which granted the alimony pendente lite also provided:

"That said defendant be permitted to visit and see the child of the parties hereto, in the city of New York, twice a week, on Sunday and Wednesday of each week, in the city of New York, and that said plaintiff permit and allow the defendant to see said child during the pendency of this action at such place in the city of New York as may be agreed upon, or as this court shall hereafter direct."

At the time of the commencement of the action the plaintiff had been actually residing, and is still residing, in the city of Pittsburg, Pa., and since the making of said order she has not complied or attempted to comply with the provisions thereof requiring her to permit and allow the defendant to visit and see the child twice a week in the city of New York. As, however, said provision does not appear by said order to have been a condition precedent, I do not think the failure of the plaintiff to obey the provisions thereof would furnish justification to the defendant for not paying the alimony and counsel fee allowed, so long as said order remained unreversed. Although we have now reversed said order upon the ground that it was improperly granted, it was the duty of the defendant to obey it, unless he had obtained a stay, or until it was modified, set aside, or reversed.

Section 1773 of the Code of Civil Procedure provides for the enforcement of orders for the payment of alimony by the issuance of an order to show cause why the husband should not be punished for his failure to make the payment required, "and therefore proceedings must be taken to punish him as prescribed in title third of chapter seventeenth of this act." Section 2266 of the Code of Civil Procedure, contained in said title and chapter, provides that when a right or remedy of a party to a civil action or special proceeding, pending in the court or before the judge or referee, may be defeated, impaired, impeded, or prejudiced by a neglect or violation of duty or other misconduct, the offense must be punished as prescribed in this title, which is entitled "Proceedings to Punish Contempt of Court Other Than a Criminal Contempt." Section 2283 of the Code of Civil Procedure provides that upon the return of an order to show cause the questions which arise must be determined as upon any other motion, and if the determination is to the effect specified in the last section but one the order thereupon must be to the same effect as the final order therein prescribed. The section alluded to is 2281, which provides, if it is determined that the accused has committed the offense charged, and that it was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of a party to an action or a special proceeding brought in the court or before the judge or referee, the court, judge, or referee must make a final order accordingly, directing that he be punished by fine or imprisonment or both, as the nature of the case requires.

The order appealed from does not comply with sections 2283 and 2281 of the Code of Civil Procedure, in that there is no determination therein contained that the offense charged and held to have been committed was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of a party to the action. This court

held in *Socialistic Co-operative Publishing Ass'n v. Kuhn*, 51 App. Div. 583, 64 N. Y. Supp. 933:

"In a civil action, before a defendant can be punished for a contempt of court, * * * there must first be an adjudication that he is not only guilty of a contempt of court, but that his act, of which the opposing party complains, not only has a tendency to, but actually does, defeat, impair, impede, or prejudice the rights or remedies of the party complaining."

And as in the order appealed from there was no adjudication either that the defendant had been guilty of contempt or that the acts of which the plaintiff complained had defeated, or impaired, impeded, or prejudiced, its rights or remedies in any respect, this court reversed the order.

In *Fischer v. Rabb*, 81 N. Y. 235, the Court of Appeals said:

"It will be seen that the misconduct which can be treated and punished as a contempt must be such as to defeat, impair, or prejudice a right or remedy of a party to a civil action, and that the alleged misconduct does have such effect must be made to appear and be adjudicated."

This rule has been specifically applied to orders punishing for contempt by nonpayment of alimony in divorce cases. *Sandford v. Sandford*, 40 Hun, 540. *Daniels, J.*, said:

"The order from which the appeal has been taken contains no such adjudication, and because of that omission it fails to comply with what has been directed by these sections of the statute. In each of these respects the proceeding was wholly defective, and the order from which the appeal has been taken cannot be sustained."

To the same effect are *Mahon v. Mahon*, 50 N. Y. Super. Ct. 92; *Whitney v. Whitney*, 19 Civ. Proc. R. 265, 11 N. Y. Supp. 582; *Mendel v. Mendel*, 4 N. Y. St. Rep. 556.

It follows, therefore, that the order appealed from should be reversed, with \$10 costs and disbursements. All concur, except *INGRAHAM, J.*, who dissents.

(58 Misc. Rep. 623.)

McLEAN v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Supreme Court, Appellate Term. December 20, 1907.)

1. ARREST—CIVIL ACTION—UNDERTAKING—ITEMS OF DAMAGE.

The recovery on an undertaking given to obtain an order of arrest, where judgment in the action is for defendant, includes, in addition to the costs, damages for counsel fees in attempting to vacate the order of arrest, in securing bail, in the trial of the case, and for loss of earnings during imprisonment, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arrest, § 135.]

2. SAME—ACTION ON JUDGMENT FOR COSTS—RIGHTS OF ASSIGNEE OF UNDERTAKING.

Where judgment was for defendant for costs in an action in which an order for arrest had been obtained, the assignee of the undertaking given to procure the order need not ask to be made a party to an action on the judgment for costs by an assignee thereof against the surety on the undertaking, and the fact that he or his assignor have not asserted a claim for damages is no evidence that there could not be a recovery on the undertaking, and does not authorize full recovery by the assignee of the judgment for costs.

3. SAME—RIGHTS OF ASSIGNEE OF JUDGMENT.

If the assignee of the judgment had any interest in the amount recoverable on the undertaking, it would be limited to the amount of the costs, and would be at most an equitable interest in any sum which might be recovered on the undertaking in an action in which all interested claimants were parties.

4. SAME—LIABILITY ON UNDERTAKING.

A surety on an undertaking given to procure an order of arrest is liable for one cause of action thereon, and the rights of any persons to damages or costs thereunder, however acquired, must be fixed and determined in one action, in which all the claimants are made parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arrest, § 186.]

5. ASSIGNMENTS—EFFECT—RIGHTS OF ACTION—APPLICATION OF RULE.

The rule that the transfer of a principal debt carries with it all collaterals, etc., is applicable only in cases where equity requires it, and not where it would work an injury to the assignor, as where the security stands for several distinct debts; hence, where defendant in an action in which there was an order for arrest recovered judgment for costs, and the judgment was assigned to plaintiff, but the undertaking to procure the order of arrest was subsequently assigned to another, plaintiff cannot recover from the surety on the undertaking in an action in which the assignee of the undertaking is not made a party.

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

Action by James R. McLean against the Fidelity & Deposit Company of Maryland. From a judgment for plaintiff, defendant appeals. Reversed and dismissed.

Argued before GILDERSLEEVE, P. J., and McCALL, and FORD, JJ.

Frank A. Acer, for appellant.

Alfred J. Talley, for respondent.

McCALL, J. The undisputed facts in this case show that one Lynch began an action in the Supreme Court against one Bloch, the plaintiff's assignor herein, and in that action obtained an order of arrest. The defendant herein executed an undertaking on behalf of said Lynch, wherein it undertook and guaranteed that if in such action Bloch should recover a judgment, or it was finally decided that Lynch was not entitled to the order of arrest, he should pay all costs which might be awarded to said Bloch and all damages which he might sustain by reason of such arrest. This action came on for trial, and resulted in a verdict for the defendant (Bloch), and a judgment was entered in his favor for the sum of \$125.59 costs. Subsequently an execution was issued against the property of Lynch, and on June 20, 1906, was returned wholly unsatisfied. Thereafter, and on January 14, 1907, the judgment was sold and assigned by Bloch to this plaintiff. On January 31, 1907, Bloch sold and assigned all his "right, title, and interest of, in, and to the undertaking," together with "any and all causes of actions which I now have or hereafter may have upon said undertaking," to one Kinstler. This plaintiff, the owner of the judgment, seeks in this action to recover the amount thereof from the defendant, and did obtain a judgment therefor in the court below.

Inasmuch as there is nothing in the assignment, pleading, or proof which signifies that plaintiff's assignor intended to or did convey any

of his rights under the undertaking to this plaintiff, the plaintiff must establish the legal effect of the assignment of the judgment to be such as to entitle him to recover the amount thereof of the defendant, and in this action, in which he and the defendant are the only parties. Reduced to its lowest terms, the claim of the plaintiff is that the legal effect of the assignment of the judgment was to vest in the plaintiff the right to recover of the defendant the amount of costs evidenced by the judgment and unpaid by Lynch; and this without regard to the fact that the undertaking itself had been assigned by Bloch to said Kinstler. The undertaking of the defendant is an entire one, although it provides for the payment, upon the happening of a contingency, of several items of damages, viz., for the costs awarded to the defendant (Bloch) and all damages which he may sustain by reason of the arrest, not exceeding \$250. The items of damages that may be recovered, aside from the costs, consist of counsel fees in efforts to vacate the order of arrest, in securing bail, in the trial of the case, and for loss of earnings during imprisonment, etc. *Bamberger v. Kahn*, 43 Hun, 411; *Tyng v. American Surety Co.*, 48 App. Div. 240, 62 N. Y. Supp. 843; *Krause v. Rutherford*, 45 App. Div. 132, 60 N. Y. Supp. 1047.

The respondent urges, however, that, as there is no evidence that Bloch attempted to procure the vacating of the order of arrest, it must be deemed to have been properly granted, and that he or his assignor is estopped from claiming any "special" damages because of his arrest. Plaintiff also asserts that because Kinstler did not ask to be joined as a party, and presented no evidence of any kind as to damage, there is no foundation for the claim that a judgment in favor of the plaintiff would injure the rights of Kinstler. This argument is in support of a proposition that the plaintiff's recovery herein bars any claim that Bloch or his assignee may have against the defendant for damages other than the costs evidenced by the judgment assigned to the plaintiff, and that in fact there was no tenable claim at the time of the assignment of the undertaking against the defendant, except the amount of the costs awarded Bloch by the judgment in his favor. There is no validity or force in this contention. Bloch's cause of action accrued when the action brought by Lynch terminated in his favor, and he was then, and for aught that appears his assignees are now, entitled to recover, not only the costs awarded him, but also for the damages that were caused him by his arrest; and because it does not appear that up to the present time either Bloch or his assignee have asserted any claim to recover for damages is no ground or reason for affirming that proof of such damages cannot be given and a recovery be had therefor. Neither was Bloch's assignee, Kinstler, compelled to ask that he be made a party to the present action, and that he has not as yet pressed his claim is not evidence that he has none.

Assuming, then, but not deciding, that the legal effect of the assignment of the judgment against Lynch for costs vested in the plaintiff a right or interest in the amount recoverable upon the undertaking, it is clear that the plaintiff's claim therein would be limited to the amount of such costs, and by no theory could it be extended to the other elements of damage covered by the bond. The plaintiff would therefore have only an equitable interest, bounded by the amount of the judg-

ment, in any sum that might be recovered of the defendant in an action in which all interested claimants were parties. The assignment of the judgment to the plaintiff would not create the right to divide defendant's liability into as many complete causes of action as there might be owners or claimants to the several items of damage which the defendant was obligated to pay in accordance with the conditions of the bond. The defendant is liable but for one cause of action, and has a right to insist that, having incurred but one liability, all the parties claiming an interest in any sum of money which it may be found obligated to pay shall be made parties in one action, and it cannot be subjected to costs in several separate actions brought by each claimant. If, therefore, the plaintiff, by operation of law or otherwise, acquired any right or interest in the amount which may be recovered of the defendant by reason of its having given the undertaking aforesaid, those rights must be fixed and determined in an action in which all the claimants in the subject-matter are made parties.

The authorities referred to in respondent's brief add no strength to his position. The rule that the transfer of the principal debt carries with it all collaterals, etc., is well known (*Allen v. Brown*, 44 N. Y. 233), and is applicable only in cases where equity requires it, and not where it would work an injury to the assignor, as where the securities stand for several distinct debts. Now the judgment assigned to plaintiff is merely an item of damage which, when proven in an action on the undertaking, would fix defendant's liability to that extent; the defendant still remaining liable up to \$250 in amount for all other proved items of damage, showing that said security beyond peradventure stands for several possible distinct debts held by several distinct persons, all of whom, we believe, are necessary parties to a complete and final settlement of the issues involved. This, of course, will present the suggestion that the proper tribunal for a disposition of these issues is a court of equity; but in any event this judgment must be reversed.

Judgment reversed, with costs, and complaint dismissed. All concur.

DAVIS v. VAN TASSEL.

(Supreme Court, Trial Term, Ontario County. October, 1907.)

BROKERS—COMPENSATION—CONSTRUCTION OF CONTRACTS.

A contract giving a broker the sole agency for six months for the sale of realty, and providing that "at such time as a sale shall be effected" a commission shall be paid him, does not entitle the broker to a commission on a sale by the owner within the six months without the assistance of the broker.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 74.]

Action by Franklin P. Davis against Lunette E. Van Tassel, administrator of Wilford Van Tassel, for broker's commissions on a sale of real estate. Complaint dismissed.

Edward J. Cook, for plaintiff.

W. Smith O'Brien, for defendant.

SUTHERLAND, J. The contract between the defendant's intestate and the plaintiff is in writing, and reads as follows:

"It is hereby expressly agreed that in consideration of efforts put forth and to be put forth that you are the recognized sole agent for the property briefly described below for the period of six months from the 19th day of August, 1906: (1) The property known as the 'Torrey Park Hotel' and situate on the east side of and being No. 100 Sherrill St., Geneva, N. Y., together with its furnishings, with a few exceptions, for the sum of fifteen thousand dollars (\$15,000.00). (2) The premises situate on the west side of and known as 'No. 63 North Genesee St.,' Geneva, N. Y. for the sum of forty-five hundred dollars (\$4,500.00). (3) The vacant lot adjoining on the south the house known as 'No. 43 Genesee St.,' Geneva, N. Y., for the sum of two thousand dollars (\$2,000.00). Said lot being 40 feet front on Genesee St. and 233 feet deep. (4) Either or all of the lots on Clinton St. in the rear of the said No. 43 Genesee St. premises for the sum of five hundred dollars each; said lots being each 33½ feet front on Clinton St. and 125 feet deep. And at such time as a sale shall be effected for any of the above-mentioned property for the prices named, or at any other price, during said term, I hereby agree to pay you the sum of 2 per cent. on the selling price of the improved property and 5 per cent. on the selling price of the vacant property at such time as such sales are effected.

"[Signed]

"Accepted:

W. Van Tassel.

F. P. Davis."

The agreement was made August 25, 1905. October 6, 1905, the defendant's intestate entered into a written contract for the sale of the said Torrey Park Hotel and its furnishings to one Matthews for the sum of \$14,500, \$1,000 of which was for the wines, liquors, and cigars. This contract was to be performed and possession given November 1, 1905; but before that date an extension of time was given in writing until November 1, 1906. The purchaser did not perform, however, and on November 1, 1906, a written release was signed by Davis and Matthews, releasing each other from the obligations of the contract of sale. The property did not change hands, possession never having been given. The plaintiff advertised the property for sale in the Geneva papers, and also in papers in Syracuse, but was not the procuring cause of the sale, and did not attract the attention of the purchaser to the property, and participated in no manner in bringing the parties together. After the contract of sale had been entered into, the defendant's intestate informed the plaintiff that he had sold the property. The plaintiff then made a claim against the intestate for commissions on the contract price, which was refused; but the intestate offered the plaintiff by way of compromise \$200, which offer the plaintiff declined to accept.

The plaintiff bases his suit for commissions upon the peculiar wording of the contract between him and the defendant's intestate, claiming that he became entitled to the commission, no matter how the sale was brought about, because it occurred within the six months specified in the contract. This claim does not seem to me to be justified. No doubt a contract could be made whereby, in consideration of the efforts made by an agent to sell property, the owner might obligate himself to pay a sum agreed upon if the premises were sold, even without the aid of the broker; but it does not seem to me that this is such a contract. The plaintiff is constituted the recognized sole agent for the property; but there is nothing in the fact of sole agency which

in itself gives the broker any right to commissions, unless he is the procuring cause of the sale, and that his right to commissions in this case depended upon his rendering some effective service in promoting a sale seems to be in harmony with the words:

"And at such time as a sale shall be effected for any of the above-mentioned property for the prices named * * * I agree to pay you the sum of 2 per cent. * * * at such time as such sales are effected."

This language seems to me to mean sales brought about or effected through the agency created by that contract, and does not refer to a sale made by the owner himself, toward the accomplishment of which the agent contributes nothing.

The complaint must therefore be dismissed.

GERMANIA LIFE INS. CO. v. POTTER et al.

(Supreme Court, Special Term, New York County. December 26, 1907.)

1. MORTGAGES—RIGHT TO FORECLOSE—DEFAULT—TAXES.

A provision that on a mortgagor's failure to pay taxes and their payment by mortgagee the whole debt shall become due, if the mortgagee so elect, is enforceable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1164.]

2. SAME—TENDER—SUFFICIENCY.

A mortgage provided that the mortgagor should pay all taxes as soon as they became due and payable, and that in default thereof the mortgagee might pay them and the whole debt would become due, if the mortgagee should so elect. Greater New York Charter, Laws 1901, p. 389, c. 466, § 914, provides that taxes shall become due and payable the first Monday in October. The taxes not having been previously paid, the mortgagee paid them the day following the first Monday in October. Nine days later he commenced an action to foreclose. Thereafter the mortgagor tendered the amount of taxes, interest thereon, and costs. *Held*, that the tender was insufficient; the whole debt having become due at the election of the mortgagee.

Action by the Germania Life Insurance Company against Howard Nott Potter and another. Judgment for plaintiff.

Dulon & Roe, for plaintiff.

Parsons, Closson & McIlvain, for defendants.

NEWBURGER, J. Action for the foreclosure of a mortgage. The mortgage contains the following clause:

"And the said party of the first part does furthermore covenant and agree, until full payment of the amount hereby secured, to bear, pay, and discharge, as soon as the same may become due and payable, all taxes, charges, and assessments which may be imposed by law upon the said mortgaged premises, or on any part thereof, and in default thereof that it shall and may be lawful for the said party of the second part to pay the amount of any such tax, charge, or assessment, with any expense attending the same, and any amount so paid the party of the first part covenants and agrees to repay to the said party of the second part, with interest thereon, and the same shall be a lien on said premises and be secured by the said bond and these presents, and the whole amount hereby secured, if not then due, shall thereupon, if the said party of the second part so elect, become due and payable forthwith."

This clause provided that the mortgagor should pay and discharge the taxes as soon as they became due and payable. Section 914 of the Greater New York charter (Laws 1901, p. 389, c. 466) provides that taxes shall become due and payable on the first Monday of October, and that they shall become liens when they become due and payable. The first Monday of October, 1907, was on the 7th day of that month. It has been repeatedly held that a covenant in a mortgage as to payment of taxes is to be enforced the same as the covenant for the payment of interest. As was said by Mr. Justice Van Brunt in *O'Connor v. Shipman*, 48 How. Prac. 138:

"I am unable to discover any difference between a condition relating to principal and interest and one relating to taxes. If it is expressly stated that the whole principal sum shall become due because of the nonpayment of taxes, and taxes are unpaid, and the mortgagee commences his foreclosure on that account, I do not see how the court can relieve the defendant any more than they could for the nonpayment of interest. It seems to me, therefore, that the plaintiff must have judgment of foreclosure and sale."

It is conceded that the taxes were not paid on the 7th day of October, and that on the 8th day of October the plaintiff paid the same. This action was commenced immediately thereafter, and the summons was served on the 17th day of October. On the 25th day of October defendant, through his attorneys, tendered plaintiff's attorney a certified check for the amount of the taxes, interest thereon, and the costs, which was refused by plaintiff's attorney. The tender was not sufficient. The plaintiff in his complaint having elected to consider the whole of the principal due by reason of the failure to pay the taxes, the tender, to be a proper one, should have been for the whole amount of the principal, interest, taxes, and costs. While my sympathies are with the defendant in this case, I do not see how he can be relieved of the terms and covenants of the mortgage herein.

Judgment for the plaintiff.

(57 Misc. Rep. 8.)

In re SHANLEY et al.

(Supreme Court, Special Term, New York County. December 17, 1907.)

1. ATTORNEY AND CLIENT—CLIENT'S FUNDS—DEPOSIT IN ATTORNEY'S ACCOUNT—EFFECT OF BANK FAILURE.

Where an attorney, having in his possession money belonging to clients, is instructed that they wish him to deposit it in a bank for them, to be kept there for a certain period, and he deposits it in his own account in a reputable bank of high rating, in which he has carried his account for 12 years, the failure of the bank does not make him liable as an insurer, and he need not make good the amount lost in consequence thereof.

2. SAME—COMPENSATION—ALLOWANCE—EFFECT OF CONTRACT.

An attorney's contract of employment, limiting him to a certain sum to be paid proportionately by his clients, does not prohibit him from receiving in addition the allowance made in litigation which is paid by the adverse party.

In the matter of the application of Owen Shanley and others for an order requiring Patrick A. McManus to pay over moneys belonging to them. Motion denied.

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Martin & Meehan (L. N. Martin, of counsel), for the motion.
Patrick A. McManus (Edward J. Maxwell, of counsel), opposed.

GIEGERICH, J. None of the cases cited in support of the petition are similar in their facts to the case in hand. In *Massachusetts Mutual Life Ins. Co. v. Carpenter*, 49 N. Y. 668, the moneys for which the defendant was sought to be held liable had been lost through the embezzlement of a clerk selected and employed by the defendant. Neither is the case like *McGuinness v. Manhattan R. Co.*, 69 App. Div. 606, 74 N. Y. Supp. 1054, where also the loss occurred through the fraud of a clerk employed by the respondents. In this case the loss did not occur by reason of the wrongdoing of any one selected by the respondent, but solely through the failure of the bank in which the moneys had been deposited. They were deposited, it is true, by the attorney in his own name and in his own bank account; but such course was not in violation of the instructions received from the petitioners, as is stated in the petition. His instructions on the point were as follows:

"The legatees wish you to deposit the \$1,100 that he [meaning the debtor] has paid in a bank for legatees, to be kept there until the thirty days expire."

There were eight persons interested in the fund, and, while it might have been the better course for the attorney to follow to have opened a separate account in the name of each of his clients entitled to participate in the fund, I do not think that his act in depositing it as he did was such as to make him liable as an insurer upon the failure of the bank. He deposited the money in a bank in which he had carried his own account for 12 years, and which had been doing business for over 60 years, and which was given a high rating in the commercial agencies, and enjoyed the confidence and had the accounts of many prominent customers. This is not the case of an agent unjustifiably mingling a principal's moneys with his own in such manner that in the event of a partial loss it is impossible to say whose moneys were lost, such as would be the case if the moneys were physically mingled and a part of them should be stolen. Here there has been a dividend of about 40 per cent. declared upon all deposits in the failed bank, such dividend being the same upon the personal moneys of the respondent as upon those of his clients.

So far as concerns the \$125 which it is claimed he received in violation of his contract of employment, it need only be said that that contract limited him to the \$50 therein provided to be paid proportionately by the clients; but the \$125 in question was not paid by them, nor did it come out of the fund to which they were entitled, but it was an allowance made in the litigation, and was paid by the person from whom the money was collected. It is stated by the attorney, in his opposing affidavit, that it was expressly understood that any sums so allowed should be additional to the \$50. I can see no warrant for compelling an attorney to make good to a client moneys lost under the circumstances disclosed in this case.

The motion is denied, without costs.

MACDONALD v. POTTER.

(Supreme Court, Special Term, New York County. December 26, 1907.)

1. MORTGAGES—CONSTRUCTION—MATURITY.

A mortgage provided for payment of \$93,000 on June 27, 1907; both bond and mortgage declaring that the obligors should pay \$7,000 on account of the principal on the 27th day of June each year until the principal should be fully paid, the first of the installments to be made on June 27, 1905, and in the event of any installment remaining due and unpaid for 30 days the whole should become due, at the option of the holder. *Held*, that the clause as to the payment of the \$7,000 installments did not extend the time of the payment of the principal, the whole of which became due June 27, 1907.

2. ACCORD AND SATISFACTION—PAYMENT ON ACCOUNT.

Defendants owed a mortgage on which a balance of \$78,000 was due, which also provided for payments in installments of \$7,000 a year. Defendants, on or about the date the balance matured, sent plaintiffs a check for \$7,000, "being installment of principal under terms of mortgage due June 27, 1907." Plaintiffs stated that they would apply it to the payment in full of balance of the mortgage, but insisted that the entire balance was due and should be paid. *Held*, that the payment was for an installment of the principal only, and did not, therefore, constitute an accord and satisfaction.

Action by Ranaid H. MacDonald against Howard Nott Potter.
Judgment for plaintiff.

Harold Swain, for plaintiff.

Parsons, Closson & McIlvaine, for defendant.

NEWBURGER, J. The mortgage sought to be foreclosed provides for the payment of the sum of \$93,000 on the 27th day of June, 1907, with interest. The bond and mortgage provided:

"And it is hereby expressly agreed that the said obligors will pay the sum of \$7,000 on account of the principal hereof on the 27th day of June in each and every year until said principal shall be fully paid, the first of which payments to be made on the 27th day of June, 1905; and, in the event of any such installment of principal remaining due and unpaid for the period of 30 days, then and in that case the whole amount owing hereunder shall become due at the option of the holder hereof."

The defendant contends that the true construction of this clause is that the mortgage shall be payable only in installments at the rate of \$7,000 a year. There is no ambiguity in the language used. The amount of the principal became due on the 27th day of June, 1907. The clause as to the payment of \$7,000 on account of the principal did not extend the time of the payment of the principal.

The defendant, however, claims that by reason of the retention of the defendant's check of \$7,000 there was an accord and satisfaction. It appears that in June, 1907, the defendant wrote the following letter, with a check for \$7,000:

"Dear Sir: I inclose herewith my check, dated the ——— day of June, 1907, for \$1,755 on the Thirty-Fourth Street National Bank, to your order, being six months' interest due June 27, 1907, on your mortgage on The Warrington. I also inclose my check, dated the ——— day of June, for \$7,000 on Messrs. E. C. Potter & Co., to your order, being installment of principal under terms of said mortgage due June 27, 1907. Kindly note these payments on the bond as heretofore.

"Yours truly,

H. N. Potter."

On the 1st of July plaintiff replied by the following letter:

"New York, July 1, 1907.

"Mr. Howard Nott Potter, Care of Messrs. Snelling & Potter, No. 1170 Broadway, City—Dear Sir: We beg to acknowledge receipt of your check for \$1,755, being six months' interest to June 27, 1907, on \$78,000, balance of second mortgage secured by premises Nos. 161-163 Madison avenue, New York City. Also we acknowledge receipt of your check for \$7,000, which amount we will apply to the payment in full of said balance of mortgage. There seems to be a misunderstanding on your part regarding the terms of this mortgage, which was due and payable June 27, 1907. As the mortgage is past due, we must insist upon its payment in full.

"Very truly yours,

Ronald H. Macdonald & Co."

On the 8th day of July, seven days later, defendant, through his attorney, wrote the following letter:

"July 8, 1907.

"Messrs. Ronald H. Macdonald & Co., No. 29 West 34th Street, New York City—Dear Sirs: Your letter of the 1st inst. to Mr. Howard N. Potter, who has been absent from the city, has been referred to us. The check for \$7,000 was sent you in payment of the installment of that amount which became due on June 27, 1907, in accordance with what we understand from Mr. Potter was the agreement. Mr. Macdonald will recognize that he cannot keep the money and decline to observe the terms on which it is paid.

"Very truly yours,

Parsons, Closson & McIlvaine."

To this plaintiff did not reply. It will be clearly seen from a reading of defendant's letter inclosing the check that the payment was for an installment of principal under the terms of the mortgage, and was not an accord and satisfaction as is contended by the defendant. The principal became due on the 27th day of June, 1907, and, as the defendant paid the sum of \$7,000 on account of principal pursuant to the terms of the mortgage, plaintiff had a perfect right to retain the amount and credit the defendant with such payment.

Judgment for the plaintiff.

ANDERSON v. FRY et al.

(Supreme Court, Appellate Division, Second Department. December 23, 1907.)

1. DEEDS—GIFTS—VACATION—EVIDENCE.

In a suit to set aside a legatee's deed of a portion of her interest in an estate to her brother, who was one of the executors and trustees, evidence held insufficient to show that such legatee was not fully informed as to the amount of her interest in the estate, or that the deed was not executed by her voluntarily and with full knowledge of its force and effect.

2. GIFTS—VALIDITY.

A voluntary transfer or gift of a portion of a legatee's share in an estate to her brother, who was one of the executors and trustees of the fund, if voluntarily made with knowledge of all the facts, is protected to the same extent as a transfer for full consideration.

3. DEEDS—CONVEYANCE—TRUSTEE—BURDEN OF PROOF.

A beneficiary in a trust fund conveyed a portion of her interest to the trustee by a voluntary deed. Seventeen years after such conveyance, and seven years after her death, without any rescission of the transfer or explanation of delay, the representatives of the deceased beneficiary sued to set aside the conveyance. Held, that the trustee's personal repre-

sentatives were not required to show that the conveyance was made by the beneficiary with full knowledge of all the facts and of the effect of the conveyance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, *Dèeds*, §§ 562-594.]

Appeal from Special Term, Kings County.

Action by William B. Anderson, as ancillary administrator of the estate of Mary Elizabeth Purkess, deceased, against John C. Fry and another, as executors of the estate of John C. Fry, deceased. From an interlocutory judgment setting aside a deed and for an accounting, defendants appeal. Reversed on both law and facts.

This case has been on appeal here before, but the merits were not decided. 116 App. Div. 740, 102 N. Y. Supp. 112.

John and William Fry came to this country from England in or about 1860, and resided here thereafter. William died in 1878, and his will was probated in New York county, in this state, where he resided, in the same year. They left behind them in England three sisters, Sarah (who became Mrs. Billett), Mary (who became Mrs. Purkess), and Rhoda; also another sister who did not survive William; and a brother James. The family was in ordinary life and without property of any amount. William accumulated a considerable fortune in this country. He left a legacy to each of his said brothers and sisters, viz., \$50,000 to his brother John, \$25,000 to his brother James, \$25,000 to his sister Sarah, \$25,000 to his sister Rhoda and \$12,000 to his sister Mary; and \$25,000 to his cousin Herbert Fry, who also lived in England. He also created a trust of \$10,000 in his executors as trustees to pay the interest thereon to his uncle John Billett for life. He gave the "residue and remainder" of his estate to his said brothers and sisters and cousin Herbert, share and share alike. He then in a separate bequest gave the said principal of \$10,000 of the said uncle Billett trust to his said "residuary legatees," i. e., his said brothers and sisters and cousin, on the expiration of the trust. He appointed his said brother John (with him in this country) and seven other persons his executors. Several of them acted as such with the brother John, the precise number not appearing.

This suit is by the ancillary administrator of Mary's estate to set aside a deed of gift by her to her said brother John, while he was acting as executor, of part of her share under the said will of William, and for an accounting. John died on October 29th, 1894, a resident of Brooklyn, N. Y., and letters testamentary were issued to his executors in Kings county. Mary died intestate on December 19th, 1897, letters of administration were granted in England to her husband, Mr. Purkess, and ancillary letters were granted thereon in Kings county. The said executors of John (who are his two sons) are the defendants.

(1) John sent a draft for the said legacy of \$12,000 to his sister Mary in England on or about May 20, 1879, on the return to him by Mary of the receipt for it dated May 5, 1879, which he had sent to her to sign in advance of payment; and at the same time he paid the said legacies to his said other two sisters and his brother James and cousin Herbert in the same way.

(2) On June 12, 1879, Mary wrote a letter to John from Southampton in which she returned to him the receipts of herself and her said two sisters for \$25,000 each out of the residuary, dated June 6, 1879, the same having been sent to them by John to be signed and returned in advance of the payments. In that letter she wrote: "If there should be anything more after this to come to me I should like you to keep it out there and invest it for yourself or the children," i. e., his children.

(3) After receiving this letter John wrote a letter to the three sisters, dated July 5, 1879, beginning "My dear sisters." The envelope was addressed to and received by Sarah (Mrs. Billett) at her house in Southampton. In the letter he wrote to them that he enclosed "three drafts, one for each, equivalent to \$25,000, your receipts for which were duly received," i. e., by Mary's letter above mentioned. He also enclosed three powers of attorney by each of them to him for them to sign before the United States consul and return to him to enable him thereafter (as he wrote in substance) to do all the business without

getting new papers from them every time he had to act for them. He wrote that he had sent the same paper to their brother James and cousin Herbert, the other two residuary legatees. He also wrote: "These papers is to give me power to purchase for you your share of those Harlem mortgages as we agreed when I was with you last summer." And further: "It will not be necessary to sign any more after this as I shall be able under it" (the said power of attorney) "to collect all the remainder due to you and send it to you from time to time." And also: "Your share of the mortgages will be about \$30,000 each, this will bring you 6 or 7 per cent. payable half yearly." He says he has also written to James, and that they can talk with James, who will explain the matter to them if they do not understand it. He advises them to invest all he has remitted to them in United States 4 per cent. bonds or else in British consols, and to give their banker instructions to purchase the same for them.

(4) At the time this letter was received by Sarah, the sisters Mary and Rhoda were living or staying either permanently or for a time with her at her house in Southampton, and the brother James came there upon its receipt, and they all met and consulted, and went to the banker together and gave him orders to buy the consols. Cousin Herbert also came on the same occasion and stayed two days, and talked with them about the matter. This all appears by a letter of Sarah to John dated July 24, 1879, which was in answer to John's said letter of July 5, 1879, to the three sisters. She also encloses with that letter the said three powers of attorney which he had sent for execution by the three sisters. They had all gone together with James before the United States consul and executed them, and also to the banker and ordered him to invest their money in consols. She writes also that James and Herbert mentioned about the expense of "these papers," the powers of attorney, and that "we" want to pay the same. She then writes: "You say there will be more money due to me do not send me any more what is my share for the future I wish you to invest for yourself or for my namesake as I have more than ever I shall live to spend and I rather you have it I have told them all this is my wish."

(5) Sarah's evidence was taken herein by commission. She testifies that John used to write to all three sisters as he did in the said letter of July 5, 1879, and the one that got the letter would show it to the others, and that she showed this letter to Mary and Rhoda.

(6) Also, on October 22, 1903—six years after Mary's death—her son wrote to his cousin, the defendant John C. Fry (son of the said John Fry, and one of his executors), as follows: "I have discovered a letter written by your father dated July 5, 1879, informing my mother that her share of the Harlem mortgages which were agreed upon when your father was in England in 1878 was \$30,000." This is the same letter which is mentioned above of that date, and informing the sisters that the share of each in the mortgages would be \$30,000. The plaintiff produced it on the trial in response to a notice by defendants to do so. There is a dispute on the evidence whether Sarah's husband gave this letter to Mary's said son, or whether he found it among his mother's papers.

(7) Rhoda also gave to John all future sums coming to her from the estate, as appears by a letter by her to John dated Southampton, March 25, 1882. She wrote: "I told you to keep the money for yourself and only send me the interest. * * * Whatever you like to do with the money for yourself you do it and send me the interest that is all I want." She encloses a copy of her will without giving its contents. After her death it was found that she made a later will, leaving everything to John and his family.

(8) On August 9, 1880, Mary executed and delivered a deed of gift to John of all money or property he then had in his possession belonging to her and collected from the executors of William, or might thereafter collect or receive from the said executors on her account, "together with all my right, title and interest in and to all and every part of the remaining or residuary estate" of the said deceased.

At this time Mary, who was 39 years old, was engaged to be married to Mr. Purkess, and they were married 3 months and 20 days later, viz., on November 29, 1880.

(9) On September 4, 1880, Sarah executed and delivered to John a similar deed of gift. Rhoda did also, but the date of hers does not appear.

(10) In or about August, 1880, John went to England, and visited his three said sisters at Sarah's house in Southampton. He was with them less than a week.

(11) On November 10, 1880, John (having returned home) wrote to Rhoda as follows: "I am glad to say all the property is doing nicely all rented and everything going on satisfactorily you will soon receive a notice from the court here that we are ready to settle our accounts as executors, it will not be necessary for you to take any notice of it as I attend to it for you a notice will also be sent for Sally and Mary it is just a matter of form and requires no answer."

(12) On December 10, 1880, Rhoda wrote a letter to John saying among other things as follows: "We received the court papers you spoke of but we shall take no notice of them."

(13) On December 19, 1880, Mary wrote to John from Reading (where she lived after her marriage) among other things as follows: "I saw the manager of the bank and I have decided to let everything remain as it is in my own name. I shall be able to explain to you when I see you again, and if you will be kind enough to let me know what I owe for making out the draft I will send you an order for the amount, and I am much obliged for the trouble you have taken." This "draft" it was agreed on the trial meant a draft of her marriage settlement, she having been married a few weeks previously to Mr. Purkess.

(14) On February 11, 1881, John wrote to Rhoda enclosing her a draft equivalent to \$453.68 for interest and "rent for Harlem property." He also informed her that all incumbrances on the Harlem property have been paid off and that her share of the rent thereafter will be about £20 per month.

(15) On March 15, 1881, John wrote to Rhoda as follows: "The estate is now all settled up and all the money divided. I received for your share \$3,283.36. I have invested this for you with the other and will send you the interest $\frac{1}{4}$ yearly as you requested." This sum was the final sum to each in the distribution, as appears by the account.

(16) On March 24, 1884, John wrote to Rhoda enclosing a draft for £204 for interest, and informs her that he expects that the money from which uncle Billett's interest came will be paid over to the executors soon, as they had given notice to the parties who had it on interest to pay it over, and that her share will be one-sixth of the \$10,000. He also says he will invest it for her and send her the interest, unless she wants him to send the principal, in which case he will send it if she will let him know. This has reference to the said \$10,000 put in trust with the executors by the will for uncle Billett for life. He had recently died.

(17) On April 14, 1884, Sarah wrote to John acknowledging a letter and draft for money, and in which she wrote concerning this same trust fund of \$10,000 as follows: "With respect to uncle's money, my share you keep it there at interest as you say and when you come we will see about it. Rhoda received your letter sent by this mail no doubt you sent to Mary same time as you sent to us and if so she will write to you."

(18) On March 14, 1887, John wrote to Mary acknowledging receipt of a letter written by her husband in her name asking for her one-sixth share of the Billett trust fund of \$10,000, and enclosing a draft therefor. It does not appear whether she requested or authorized her husband to write the letter.

(19) On October 4, 1900, Mary's widower wrote to John's son, one of the defendants, among other things, that he had seen the will of Rhoda, who had died; that it left all her property to John and his family, and if her property was not divided among the next of kin he would contest the will.

(20) On October 22, 1903, the son of Mary wrote to his cousin, the defendant John C. Fry, calling on him to account for the share of the writer's mother, Mary, in the said William Fry's estate, as he could use the money to advantage in his business on the London stock exchange. This letter has already been referred to above, as the one the writer wrote of as "informing my mother" that the share of each in the mortgages would be \$30,000. His mother had died nearly six years before, namely, on December 16, 1897.

(21) After the execution of the three deeds of gift by the three sisters to John he continued to send the interest on Rhoda's share to her, and an annuity of £400 a year to Sarah.

(22) This action was begun on October 28, 1904, which was more than 24 years after the deed of gift by Mary to John was made, and 7 years after Mary died.

(23) At the time of the commencement of this action all of the executors and their attorneys and counsel, and all of the residuary legatees under the will of William excepting Sarah (Mrs. Billett), who was about 76 years old, and the United States consul at Southampton, who took the acknowledgments to the various papers from time to time, had died.

(24) The sums which John received from the executors of William and kept, and which the defendants claim he had a right to keep under the deeds of gift, were in the case of Mary, as well as of the other two sisters, \$10,000 on September 9, 1879, \$10,000 on June 22, 1880, \$21,058.34 on January 1, 1881, and \$3,283.86 on February 28, 1881, making a total of \$44,341.70.

(25) Mrs. Billett in her deposition testifies that Mary told her she had given her share to John, also that Mary knew that Rhoda had done the same.

(26) In the power of attorney (dated July 18, 1879) and the deed of gift (dated August 9, 1880) Mary describes herself as residing in Southampton, where Rhoda also lived during the same time, and the only place that they appear by the evidence to have lived there was at the home of Sarah (Mrs. Billett). After her marriage Mary lived at Reading with her husband. She had been a parlor maid and he was a butler.

(27) The said power of attorney of each sister to John in terms authorized him to receive for the sisters any money or property that thereafter came to them from the executors of the estate of William, and also to invest the same for them. It also authorized him to consent to a partition of the residuary estate, and to sell real and personal estate, and to receive bonds, mortgages or other securities in such division and sell the same and reinvest. This is the instrument on which the trust established by the judgment herein is based, and, as has been said, the deed of gift was executed about a year later.

The claim of the complaint is that all of the said moneys was received by John as trustee under the said power of attorney, and that he always held the same thereunder. The claim of the defendants is that Mary (like the other two sisters) made a gift thereof to her brother John.

Argued before HIRSCHBERG, P. J., and WOODWARD, RICH, MILLER, and GAYNOR, JJ.

L. A. Gould, for appellants.

Howard Taylor (William B. Anderson and William Williams, on the brief), for respondent.

GAYNOR, J. A purchase of the trust property by a trustee of himself, or at his own sale, or even at a judicial sale, is voidable at the mere election of the beneficiary, within a reasonable time, without regard to its fairness (*Davoue v. Fanning*, 2 Johns. Ch. 252; *Jackson v. Walsh*, 14 Johns. 407; *Conger v. Ring*, 11 Barb. 356); but a gift or sale of the trust property by a beneficiary to his trustee does not come under this rule. It is not voidable at the election of the beneficiary, but may only be set aside by a court of equity at the suit of the beneficiary for fraud, undue influence or unfairness. The only distinction between such a suit and a similar one not by beneficiary against trustee is that the burden of proof is on the trustee to show that the transaction was free and fair. *Nesbit v. Lockman*, 34 N. Y. 167; *Graves v. Waterman*, 63 N. Y. 657; *Barnard v. Gantz*, 140 N. Y. 249, 35 N. E. 430; *Pickslay v. Starr*, 149 N. Y. 438, 44 N. E. 163, 32 L. R. A. 703, 52 Am. St. Rep. 740.

The learned trial judge found as a fact that Mary, the beneficiary, knew that the instrument she executed—viz., the deed of transfer or gift by her to her brother John—purported to assign to him her remaining interest in the residuary of the estate of her brother William; John being at the time an executor of the said estate, and also her agent by power of attorney to collect and invest her share thereof. There is no finding by the learned trial judge of any affirmative act of fraud or undue influence by John upon Mary, and there could be none on the evidence. The judgment rests on a finding of fact that he “failed to disclose, and thereby concealed from her, material facts bearing upon the nature and value of the property” she transferred to him. This finding is erroneous. The evidence is to the contrary. Although the burden of proof be regarded as on the defendants (of which something remains to be said because of the delay in bringing this suit), some leniency therein was met after the lapse of 24 years from the making of the gift and the commencement of the suit, during which time the transaction was never questioned by Mary who lived for 17 years after it, or by any one during her life or afterwards, and all of the several persons who had any knowledge of the transaction, save one (her sister Sarah) had died, and the written evidence concerning it had frittered away. But the evidence produced, although made up of odds and ends got together with difficulty after the lapse of a generation, was ample, without invoking such leniency, to show that the gift was free and voluntary; that the intention to make it arose and matured in the mind of the beneficiary without any suggestion from the trustee; that he did not conceal from her the amount of her share of the estate, but discovered the same to her; and that she made the gift with full knowledge that it was large, and of the approximate amount of it.

In her letter of June 12, 1879, to her said brother John, she expresses a gathering if not an already gathered intention of giving to him the remainder of her share. “If there should be anything more after this to come to me I should like you to keep it out there and invest it for yourself or the children,” she writes. In this letter she acknowledges receipt of \$12,000 (her specific legacy of that amount) which had already been sent to her, and encloses three receipts of herself and her two sisters signed in advance for \$25,000 more for each out of the residuary. The learned trial judge overlooked this fact, and says that she then only knew of the \$12,000, and thought that it was substantially all that she was to get. But if her letter suggests any lack of knowledge by her, we have in the letter which her said brother wrote to her and her two sisters after the receipt of it, viz., on July 5, 1879, and accompanying the drafts for \$25,000, absolute proof that he had no thought of taking advantage thereof; no thought of deceiving her by concealing from her the substantial magnitude of the amount of her share remaining. He writes concerning the mortgages of the estate, and says that the share of each of them therefrom will be \$30,000, not \$20,000 as the learned trial judge inadvertently says. This alone disclosed to the sisters the substantialness of their remaining shares. It completely disposes of the claim which prevailed below, that when Mary made the deed of transfer or gift of her remaining share to her

said brother about one year later, viz., on August 9, 1880, she thought that she had already received substantially the whole of her share in the two payments to her of \$12,000 and \$25,000, and that only a comparatively unsubstantial amount remained. It is true that when all of the assets had been entirely marshalled and liquidated a year and a half later still, the remaining amount for each was shown to be \$44,000; but the essential thing is that the sisters, the same as the two other residuary legatees, viz., the brother James and cousin Herbert, were informed, by means of the said letter, if in no other way, before the making of the said deed of transfer, that they still had a very large amount, comparatively, coming to them. Probably no one knew what would be the full amount when everything was liquidated, including odds and ends and interest, but they all knew from this letter, at least, without regard to any growth of their knowledge on the subject during the year between the writing of the letter and the making of the deed of transfer, that it would not be trifling or small, but substantial—in fact, very large, compared with the amount already received; that out of one class of assets alone \$30,000 would be realized for each. It is impossible to say that while the sisters would make the gift (for the other two did the same as Mary) knowing it to be \$30,000, they would not if they knew it to be more.

But this letter does not stand alone. The tenor of all of the letters and acts of the trustee is so uniformly one of frankness and honesty that it would falsify a finding of fact that he cheated his sisters by concealing from them knowledge of the substantial amount of their shares. Why should he conceal it? He never asked them to give him their remaining shares. He lived 3,000 miles away from them, and they voluntarily, and without a suggestion from him, wrote to him that they gave him such shares. And when we bear in mind that their brother James and cousin Herbert, who lived near them, and with whom they were on terms of intimacy and affection, and with whom they advised about the estate, received their shares in full by payments made from time to time after the said deed of transfer was made, we would be taxing credulity beyond what it could bear to believe that they never told the amounts they received to the sisters. Were they in a conspiracy of silence and concealment with their trustee to cheat the sisters? It is to be presumed that family matters in which all the members of the family are taking part, and consulting together about, are known to them all. The trustee should not be disgraced after his death by adjudging that a family arrangement which has gone unquestioned for a generation was procured by him by a breach of trust by him to his sisters, without the most careful consideration if not hesitation.

But it is said that it is not proved that Mary ever saw the said letter or was informed of its contents. The three sisters were living together in affection and concord at Southampton, England, in the home of the one of them who was married, Mrs. Billett. The letter is addressed "My dear sisters," and in it the writer says he encloses the three drafts of \$25,000, one for each. The envelope was addressed to Mrs. Billett. The learned trial judge says there is no evidence that she "transmitted" the letter to Mary, overlooking that the sisters were all living together,

and that it was not until after Mary was married that she went to live at Reading with her husband. Mrs. Billett is still alive out of all of the six residuary legatees, several executors, the lawyers of the executors and others, the United States consul who took the acknowledgments to the deeds of gift, powers of attorney and other papers; and testifies that she showed the letter to her two sisters. She says that it was usual for the brother to write to them all by one letter, and that the one who received it would show it to the others. But in addition to this we have the conclusive fact that Mary and her two sisters, and the brother James and cousin Herbert (the other two residuary legatees in England, who had also received a similar letter and drafts for the same amount), had a family meeting at Mrs. Billett's house on the receipt of the letter, and discussed the information and advice contained in it. They also went to the bank together—the three sisters and the brother—and invested their money as advised to do in the letter; and they executed and returned to their brother the powers of attorney by each of them to him which he enclosed with the said letter to them for execution to enable him as he wrote to thereafter deal with the estate without being obliged to get new papers from them every time he had to act for them. To hold in the face of all this that there is no evidence, or that it is not proved, that Mary had knowledge of the contents of the said letter, is to set at naught evidence which according to every day life, and what we all know of the common relations of family life, is conclusively to the contrary. It was found below that Mary did not read the letter or know of its contents. There is no more reason to say that of her than of the others, and that would be conceded folly. If Sarah (Mrs. Billett) had not testified that the letter was shown to Mary, the fact would be obvious from the other facts. And there is no reason to doubt her evidence. That it is not contradicted by direct evidence, nor by any inferences from evidence, and is not surprising or suspicious, nor improbable, but inherently probable, requires that it should not be disregarded. *Hull v. Littauer*, 162 N. Y. 569, 57 N. E. 102.

And the giving of the powers of attorney of itself meant that they all knew that what remained of the estate was considerable. They were not given merely to deal with a remaining trifle after the estate had been substantially administered and divided.

It is said that it is incredible that Mary would have made the deed of gift if she had known that there was a substantial amount still to come to her. And yet her two sisters did the same thing without suggestion or request from their brother and trustee, but wholly on their own initiative, as their letters to their brother 3,000 miles away show, and as Mary in all probability, and according to the testimony of Mrs. Billett and her letter of July 24, 1879, knew. While their preference toward their brother may seem extraordinary, it must be remembered that in England, growing out of the rule of primogeniture, the family tie and family pride is very strong, and the notion of a family head possessing the bulk of the family property is the general and controlling one. The three sisters were fairly educated, intelligent and prudent, as their letters show, and at the time Mary executed the deed of gift she was 39 years old. That she was then

engaged to be married and was married within four months thereafter, does not annul the fact that she did execute the paper.

It is also said that Mary's letter to her said brother of December 10, 1880, proposing to pay for the draft of her marriage settlement which he had drawn at her request and sent to her, shows that she could not have been aware that she had only four months before made him a gift of such great magnitude. But we find the other two sisters, who had made the same gift to him, uniting with their brother James and cousin Herbert in proposing to pay their brother the expense of the powers of attorney they had executed before the American consul. English formality and punctiliousness required that they should make the suggestion of payment, however well they knew it would not be entertained. We must not judge their conduct by what would be improbable elsewhere.

The payment by the trustee to the sisters of the one-sixth share of each in the fund of \$10,000 set apart by the will with the executors in trust for uncle John Billett, for him to receive the income of it for life, and then be divided by the trustees among the residuary legatees, which trust terminated in 1884, was not inconsistent with the fact of the gifts by the sisters. The deed of gift was in terms confined to the residuary estate, to such moneys and property as the executors had collected or should collect or have for the residuary, whereas the trust fund was set apart and was a separate fund out of the residuary fund and could never go back into it and thus return to the hands of the executors as such. It is true that the executors were the trustees, but nevertheless they did not hold the fund as executors. If (to illustrate) the executors had all died, the fund would not have gone to an administrator with the will annexed, but to a trustee appointed by the court, and by the terms of the trust he would not on the death of the beneficiary pay the fund to the administrator to go into the residuary, but would himself divide it among and pay it to the residuary legatees. It was not a part of the residuary estate, and the executors, as such, could never get it back, but had to divide and distribute it as trustees under the trust clause of the will.

It would be easy to make too much of the letter of John to the sisters, or one of them, that they need not take any notice of the citation to the executors' accounting, as he would attend to it. This, though a thing not to be encouraged, is often done with no wrong intention; and where there is a dishonest intention it is not done so directly and openly.

There are three rules of law which govern the case in the aspects in which it stands on the facts:

1. If the beneficiary was substantially informed of the magnitude of the gift she was making, her deed of transfer must stand; for it was found below that she knew of the purport of the instrument, and there were no undue influence or affirmative statements or acts of fraud. The cases on this head have already been cited. A voluntary transfer or gift is as much protected by law as is a transfer or contract for a full consideration. *Picksley v. Starr*, 149 N. Y. 432, 44 N. E. 163, 32 L. R. A. 703, 52 Am. St. Rep. 740.

2. She was bound to promptly claim a rescission of her deed of transfer, and if necessary begin a suit to rescind it, on learning at any time substantially of the amounts paid to other residuary legatees, if she claimed to have made it by reason of a concealment of facts by the trustee; and a failure to do so ratified it. *Masson v. Bovet*, 1 Denio, 69, 43 Am. Dec. 651; *Cobb v. Hatfield*, 46 N. Y. 533; *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799. This rule applies between trustee and beneficiary; but where a trustee purchases the trust property of himself, or at his own sale, there may be no requirement of such prompt objection by the beneficiary, for the trustee may be presumed to have made the purchase in the interest of the beneficiary, which cannot be so when the beneficiary makes the sale to him; but even in the latter case delay ratifies the transaction. *Adair v. Brimmer*, 74 N. Y. 539; *Harrington v. Erie County Savings Bank*, 101 N. Y. 257, 4 N. E. 346; *Kahn v. Chapin*, 152 N. Y. 305, 46 N. E. 489.

3. After the lapse of a considerable time the rule putting the burden of proof on the trustee does not apply without some evidence on the plaintiff's side at the outset showing ignorance of the facts by the beneficiary when he made the gift or sale. To quote from a case of highest authority:

"The plaintiff is not entitled to a strict application of the equitable rule, which she might have invoked if she had moved with some degree of diligence to set aside the agreement and release, and to demand an accounting. An acquiescence for sixteen years requires some explanation. If it was due to an ignorance of the facts for which the executors were responsible, it should have been shown." *Geyer v. Snyder*, 140 N. Y. 394, 35 N. E. 784.

The delay in the present case was 17 years during the beneficiary's life and 7 years after her death. There was no evidence on the plaintiff's side in explanation or excuse of the failure to rescind the deed of gift and bring a suit for that purpose, and the burden of proof was therefore not on the defendants, although the case was decided and has been reviewed in this opinion, on the theory that it was.

The judgment should be reversed on both the law and the facts.

Interlocutory judgment reversed on the law and the facts, and new trial granted; costs to abide the final award of costs. All concur, except HIRSCHBERG, P. J., not voting.

(57 Misc. Rep. 94.)

PECK v. PECK.

(Supreme Court, Special Term, New York County. December 16, 1907.)

DISCOVERY—PRODUCTION AND INSPECTION OF WRITINGS—MATERIALITY.

Where the materiality of a deed appears from plaintiff's motion papers, and it is the only document involved in the litigation, plaintiff is entitled to discovery and inspection thereof, and the same is not to be denied because a summons only, and no complaint, was served; the materiality of the deed appearing from the motion papers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Discovery, § 115.]

Action by Samuel W. Peck against Josephine Peck. Motion by plaintiff for discovery and inspection. Motion granted.

Wolf, Kohn & Ullman (Sol. Kohn, of counsel), for the motion.
Leidy & Goldstein (Herman B. Goldstein, of counsel), opposed.

GIEGERICH, J. Upon the undisputed facts shown the petitioner is clearly entitled to a discovery and inspection of the deed in suit. It is objected by the defendant that since a summons only has been served the plaintiff is not entitled thereto, under the decision in *Rhoades v. Schwartz*, 52 App. Div. 379, 65 N. Y. Supp. 111. In that case it was held that a discovery and inspection could not be had, because it was not made to appear that the defendant intended to rely upon the deed or document sought to be inspected for its defense, and that unless it were so made to appear it could not be said that it was necessary for the petitioner to have an inspection of that document. In the present case the materiality of the deed distinctly appears from the motion papers, which deed the plaintiff seeks to have set aside for fraud. It is the only document involved in the litigation, and therefore the plaintiff should have such discovery and inspection, so that she may be able to show in her complaint whether or not that paper bears her signature, or whether it was used under the circumstances charged in her moving affidavit.

The motion is therefore granted, with \$10 costs. A referee will be named on the settlement of the order to direct and superintend the discovery and inspection.

MUTUAL LIFE INS. CO. OF NEW YORK v. GRANNISS.

(Supreme Court, Special Term, New York County. December 24, 1907.)

1. PRINCIPAL AND AGENT—ACTION BY PRINCIPAL AGAINST AGENT—PLEADING—AUTHORITY.

Ratification by a principal of an unauthorized act of an agent has a retroactive efficacy, and is equivalent to an original authority; and hence an allegation that there was no authorization is an allegation of absence of authorization in any form, whether previously or subsequently given.

2. CORPORATIONS—OFFICERS—UNAUTHORIZED PAYMENTS—ACTIONS—PLEADING.

In an action by a corporation against one of its officers, an allegation that defendant caused to be paid to another person named a sum of plaintiff's money, knowing that such other person was not authorized by plaintiff to receive or disburse it, nor was plaintiff indebted to such person, does not state a cause of action, since, notwithstanding the existence of the facts alleged, money might properly be paid him on behalf of plaintiff.

3. COSTS—COSTS ON DEMURRER—DISCRETION OF COURT.

Under the express provisions of Code Civ. Proc. § 8232, where issues of law and of fact are joined between the same parties to the same action, and the issue of fact remains undisposed of, the awarding of costs upon an interlocutory judgment on demurrers is within the court's discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13; Costs, § 217.]

Action by the Mutual Life Insurance Company of New York against Robert A. Granniss. On demurrer to the third and fourth causes of action in the complaint. Demurrer to third cause overruled. Demurrer to fourth cause sustained.

See 103 N. Y. Supp. 835.

White & Case, for demurrer.
James McKeen, opposed.

GIEGERICH, J. The complaint sets forth five separate causes of action, to the third and fourth of which the defendant has interposed a demurrer upon the ground of the insufficiency of the facts stated. The third cause of action, stated in outline, alleges that in the year 1904 the defendant, being then a director and vice president of the plaintiff company, made or authorized a payment of \$2,500 out of the plaintiff's moneys for the purpose of defraying the expenses of a campaign conducted by a political party for the election of its nominees, and that such payment was unlawful and a waste of the assets of the plaintiff, and was made or authorized by the defendant through want of faithfulness and ordinary vigilance and diligence in the discharge of his duties to the plaintiff, "and that said payment was made without authority or authorization by the plaintiff." The allegation that the payment was made without authority or authorization is the one challenged in the argument; the claim being made that, if there was subsequent ratification by the plaintiff, then no cause of action exists against the defendant, and that it is a necessary part of the plaintiff's case to plead the absence of such ratification. It is established by the decisions of this state, however, that an allegation of authority is sustained by proof of ratification; ratification by a principal of an unauthorized act of an agent having a retroactive efficacy and being equivalent to an original authority. *Hoyt v. Thompson*, 19 N. Y. 207, 219; *Merritt v. Bissell*, 84 Hun, 194, 32 N. Y. Supp. 559. The latter case was reversed in 155 N. Y. 396, 50 N. E. 280, but upon the ground that the evidence did not show a ratification, and not upon the ground that the evidence offered in proof of ratification was inadmissible under the allegation of authority. On behalf of the defendant an attempt is made to distinguish and evade the application of the authorities just cited to the case presented in these pleadings on the ground that the averment here is not that there was authority, but that there was not authority; but I cannot recognize any distinction. Ratification is a form of authorization, and consequently an allegation that there was no authorization must be deemed to be an allegation that there was no authorization in any of its forms, whether previously given or subsequently given and operating retroactively. The demurrer to the third cause of action is therefore overruled, with leave to the defendant to answer within twenty days.

The fourth cause of action, which is also demurred to, alleges that the defendant, as director and vice president as aforesaid, affixed his signature to a certain voucher admitting the receipt by one Robert Olyphant from the moneys of the plaintiff of the sum of \$25,000, and that the defendant by so signing the voucher intended and did cause the amount mentioned to be paid to Olyphant, knowing at the time that "the said Olyphant was not authorized by the plaintiff to receive or disburse the said sum, or any other moneys of the plaintiff on its behalf, nor was the plaintiff indebted to the said Olyphant," and that by reason of the defendant's act the money was lost to the plaintiff. It is argued that the portion of the averment contained in the quotation marks just above is incomplete and not sufficient to show any wrongdoing on the part of the defendant, and that it might well be that Olyphant was neither authorized to receive or disburse moneys

of the plaintiff on its behalf, nor possessed of any claim against it as a creditor, and still it might be entirely proper that money be paid to him by the plaintiff, or on behalf of the plaintiff, to be by him paid over to some creditor of the company, or otherwise properly disposed of. If, for instance, he had been acting as agent on behalf of some principal from whom the board of directors of the plaintiff had properly and within the scope of their powers purchased securities or supplies, or made any other investment or purchase, the payment to him as such agent would have been entirely lawful, and the mere fact that the investment resulted in a total loss or the merchandise was not delivered would not have the effect of making the defendant liable. The demurrer to this cause of action is well grounded and should be sustained, with leave to the plaintiff to amend within 20 days.

Demurrer disposed of as indicated, without costs. Code Civ. Proc. § 3232; *Nat. Gum & Mica Co. and A. Wilhelm Co. v. MacCormack*, N. Y. Law Journal, June 18, 1907.

(56 Misc. Rep. 413.)

FARMERS' LOAN & TRUST CO. v. McCARTHY et al.

(Supreme Court, Special Term, New York County. November, 1907.)

WILLS—LEGACIES—ABATEMENT—DISTRIBUTION PRO RATA.

Where an executor with power of sale sold testator's real estate and converted the proceeds, so that the assets were insufficient to pay specific pecuniary legacies, though he paid some of them in full, and such proceeds formed the only fund from which the legacies, specific and residuary, could be paid, the loss should be borne ratably by both classes of legatees.

Action by the Farmers' Loan & Trust Company, trustee, against James R. McCarthy and others, for accounting and construction of a will. Judgment rendered.

James T. Horan and George S. Mittendorf, for plaintiff.
Mervyn MacKenzie, for defendants Neifert and others.
Williams & Caldwell, for defendants Crites and others.

BISCHOFF, J. Amanda E. McCarthy died seised of four parcels of real estate in this city and possessed of moneys in bank and other personalty, aggregating in value \$4,300, besides certain household effects and personal belongings. By her will she provided for the payment of specific cash legacies, amounting to \$11,000, and disposed of her residuary estate by creating a trust as to two-thirds for designated beneficiaries, and bequeathed the remaining one-third to her sister, Emiline Bittenbender. The will contained a power of sale in the following terms:

"Fourteenth. I authorize my executors for the execution of this my last will to sell and dispose of all my property, whether real or personal, or any part thereof, at public or private sale at such times and upon such terms and in such manner as to them shall seem proper for the benefit of my estate."

Albert J. Wise qualified as executor under the will and exercised the power of sale as to three of the parcels of real estate, the proceeds of sale being more than sufficient to satisfy the debts of the testatrix

and to pay all the legacies; but it appears that this executor made away with all the funds thus coming into his possession, with the exception of \$2,500 paid by him to satisfy the legacies of two of the legatees in the sum of \$1,000 each in full, and \$500 paid upon account of a legacy of \$3,000 to one legatee. Thereafter the executor died hopelessly insolvent. The plaintiff, as trustee, has become possessed of the proceeds of the sale of the fourth and remaining parcel of real estate, and the main question presented in this action is whether the specific legatees are to suffer by this devastavit, or whether the loss falls upon the persons interested in the residuary estate, or proportionately upon both.

The rule seems to be well settled that, where a devastavit occurs after a fund for the payment of specific legacies has been set aside, residuary legatees who have received their share may not be compelled to account to the specific legatees (*Buffalo Loan, Trust & S. D. Co. v. Leonard*, 154 N. Y. 142, 146, 47 N. E. 966); and it is also the general rule that a shrinkage of assets merely does not affect the rights of specific legatees to payment; the loss in such a case being made to fall upon the residuary legatees, because it affects only the residue of the estate. *Id.* In the present case there was no shrinkage of assets, and the amount which came into the hands of the executor was amply sufficient to pay all the legacies. No fund was set apart by him to pay them, and no payment was made to any of the persons entitled, excepting the three legatees above referred to. In my view of the case, the loss should be apportioned ratably between all the legatees, specific or general, whose claims remain unpaid. The testatrix clearly intended that all her estate, real and personal, should constitute a common fund for division among these classes of persons to be benefited; for the directions as to a sale of the real estate were mandatory in character, leaving discretion to the executor only as to the time and manner of sale. This power of sale related generally to all four parcels of real estate; and the circumstance that the executor had only sold three does not alter the fact that the proceeds of the remaining parcel, when sold, was by intention included in one and the same fund for the payment of all legacies. For all purposes of administration there was a conversion of the realty into personalty, and the devastavit simply lessened the whole fund thus applicable. These two classes of legatees were equally innocent, and the broad principle that equality is equity should find its expression here. Certainly the testatrix did not prefer one class over the other in such a situation, for it is not readily conceivable that she contemplated a devastavit by her chosen personal representative; and the suggestion that the specific legatees were lax in the enforcement of their rights, because they did not demand payment from the executor at the moment when the legacies should have been paid in the course of an orderly administration, overlooks the fact that the residuary legatees had an equal right to insist on an early settlement of the estate.

I do not find that the exact situation presented in this case has been passed upon by the courts of this state; but upon general principles of law I must hold that the case should be disposed of as I have indicated. In England a similar result was reached in the case of *Dyose*

v. Dyose, 1 P. Wms. 305; and, while the ruling of that case, in some of its aspects, was criticised (see *Matter of Chadwin*, 3 Swanst. 380), the criticism is found to have referred not to the rule as actually applied in the Dyose Case, but to some extension of the rule to facts not then before the court and to a situation not presented in the case at bar. The specific legatees who have received their legacies should not be required to contribute to the general fund, since they were entitled to what they received, and the devastavit actually affected only the fund which is to be applied to the payment of the other specific legatees and the claims of persons entitled to the residue. My conclusion is that the amount of the fund which, but for the devastavit constituted the assets available for the debts and legacies should be determined upon a reference; that the referee should take proofs of the debts, if any, and determine the amount payable to the administratrix with the will annexed of Amanda E. McCarthy, deceased; that, after the payment of debts, the fund remaining be distributed as between the specific and the residuary legatees in such proportion that the loss occasioned by the devastavit may be equally shared.

There is a question presented by the pleadings, although not touched upon by the briefs of counsel, relative to the provisions of the will whereby a trust was created in one-third of the residuary estate for the benefit of Hattie A. McCarthy. By the terms of this trust the beneficiary was not to receive all the income, as it would appear; the payment to her by the trustee being limited to the sum of \$15 per week. Doubtless this would result in an unlawful accumulation of income, if the amount coming into the hands of the trustee and applicable to payment to the beneficiary exceeded the expressed weekly installment, and the income thus accumulated would, under the provisions of the statute, be payable to the person presumptively entitled to the next eventual estate. That person, however, was the beneficiary named, since she was to receive the whole of the principal of the trust fund upon her arriving at the age of 40 years, and the trust itself is not invalid. In view, however, of the condition of the estate because of the devastavit, this question of construction does not appear to be very material, since there can be no surplus income for disposal, the small sum now applicable for investment, as the trust fund, being incapable of yielding an income approaching \$15 per week in any possible aspect.

Form of decision and interlocutory judgment may be presented upon notice of settlement in accordance with the views expressed.

Judgment accordingly.

DUDLEY et al. v. PEOPLE'S TRUST CO.

(Supreme Court, Special Term, Kings County. December 30, 1907.)

1. ESTATES—CREATION OF FEE—ABSOLUTE POWER OF DISPOSITION GIVEN TO OWNER OF PARTICULAR ESTATE—STATUTORY PROVISIONS.

The provisions of Real Property Law, Laws 1896, pp. 579, 580, c. 547, §§ 129-132, which change limited estates into fees where an absolute power of disposition is given the owner of the particular estate, while applicable to personal as well as real property, are re-enactments of the provisions

as to powers contained in the Revised Statutes, and are predicated upon an absolute vesting in fee in the person to whom is given the power of appointment of a particular estate for life or for years, but have no application where the title is vested in a trustee and a subordinate power is given to a beneficiary under the trust.

2. TRUSTS—CONSTRUCTION—ESTATE OF CESTUI QUE TRUST—POWER OF APPOINTMENT AS TO PRINCIPAL.

By a trust deed empowering the trustee on the death of the grantor, to divide the trust fund into equal parts and hold such parts in trust for the grantor's children, giving each of them during his life the income from a single part, and providing that, on the death of each of such children who might survive the grantor, the principal of his share should be transferred as such child might appoint by will, and in default of such appointment to his legal representatives, the grantor intended that each part should be held by the trustee during the life of the beneficiary to whom such part was set off, the income therefrom being paid during such period to such beneficiary, and that only after the death of such beneficiary should his part go as by his will appointed, or, in default of such appointment, to his legal representatives.

3. SAME—CONSTRUCTION AS TO GRANTEES.

Where a trust deed provides that after the death of the grantor title to the property shall remain in a trustee, and its income only be paid to beneficiaries, their claim to an absolute title in the trust property by reason solely of the death of the grantor is incompatible with a claim by them of income under the trust deed, and is of itself sufficient to defeat their contention that by the power of appointment given in the deed, and effective only on the death of each of them, they were thereby and from the death of the creator of the trust, when only they became entitled to the income of the fund, vested with the absolute title to that fund.

Action by Ethelyn H. Dudley and others against the People's Trust Company. On motion by plaintiff for judgment on the pleadings. Complaint dismissed.

Stickney, Maclay & McBurney, for plaintiffs.
Wingate & Cullen, for defendant.

ABBOTT, J. This is a motion by plaintiff for judgment on the pleadings. It appears from these pleadings that on July 11, 1900, one Henry O. Pearce executed a trust deed of that date, whereby he assigned to one Edgar O. Pearce \$40,000 of personal property, to be held by said Edgar O. Pearce and his successors, in trust to collect the income of said fund and apply the same to the use of the grantor during his life, and upon his death to divide the fund into four equal parts, and to continue to hold such divided parts in trust for his four children, Ethelyn H. Dudley, Ida A. Morgan, Arthur E. Pearce, and Waldo R. Pearce, during their respective lives, receiving the income of each portion and applying the same to the separate use of such children during each of their natural lives. The deed of trust further provided that, upon the death of each of such children who might survive said Henry O. Pearce, the principal of his or her share should be transferred and set over to such person or persons as such child might appoint by his or her last will and testament, and in default of such appointment to the legal representatives of such child. The trustee died in 1906, leaving him surviving Henry O. Pearce and all his above-named children. On May 6, 1907, in an action brought in this court by Anna A. Pearce, as executrix of said deceased trustee, against Henry O. Pearce and his said children, the People's Trust

Company of Brooklyn was by order entered on that day appointed as substituted trustee of the aforesaid trust, in place of said Edgar O. Pearce, deceased, and still continues to act as such trustee. All the children of Henry O. Pearce, who died in April, 1907, survived him, and are plaintiffs in this action. They claim, in their complaint herein, judgment that the substituted trustee account for the trust fund in its hands, and be duly discharged from the trusts under said deed assumed by it, and that it deliver to each one of said children, the plaintiffs herein, the fourth part of the trust fund to which each is entitled. The plaintiffs, as justification for this claim, rely upon the provisions contained in sections 129 to 132 of the real property law (Laws 1896, pp. 579, 580, c. 547), claiming that thereunder the entire estate and ownership of each of these plaintiffs became absolutely vested in them upon the death of the creator of the trust, because thereupon the power of appointment given to each, tacked on to the life interest in the income of the portions disposable under such appointment, terminated the trust and created an absolute ownership by each beneficiary of such portion. The subdivisions of the real property law which plaintiffs claim work this result are the following:

"Sec. 129. When estate for life or years is changed into a fee.—Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers and encumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed and the property is not sold for the satisfaction of debts.

"Sec. 130. Certain powers create a fee.—Where a like power of disposition is given to a person to whom no particular estate is limited, such person also takes a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors, purchasers and encumbrancers.

"Sec. 131. When grantee of power has absolute fee.—Where such a power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee is entitled to an absolute fee.

"Sec. 132. Effect of power to devise in certain cases.—Where a general and beneficial power to devise the inheritance is given to a tenant for life, or for years, such tenant is deemed to possess an absolute power of disposition within the meaning of and subject to the provisions of the last three sections."

These sections, while applicable to personal as well as real property (Re Moehring, 154 N. Y. 423, 48 N. E. 818), are nothing more than re-enactments of the provisions as to powers contained in the Revised Statutes (Hume v. Randall, 141 N. Y. 499, 36 N. E. 402), and are all predicated upon an absolute vesting in fee in the person to whom is given the power of appointment of a particular estate for life or for years. They have no application where, as here, the title is vested in the trustee and a subordinate power is given to a beneficiary under the trust. The distinction is clearly expressed in Chaplin on Express Trusts and Powers as follows (page 459):

"The foregoing principles under which the grantee of an absolute power of disposition takes a fee do not apply where the title is vested in a trustee and a subordinate power is given to a beneficiary under the trust. Hume v. Randall, 141 N. Y. 504, 505, 36 N. E. 402, and cases cited. Nor does such a case fall within section 130, above quoted, where an absolute power of disposition, given to any person to whom no particular estate is limited, results in a fee.

For, while a present estate is vested in a trustee, a power of disposition in another, subject to the trust, is not an absolute power of disposition while the trust lasts. It is the absence of power in the beneficiary to convey the entire fee, including the present estate, which in such a case prevents the statute from operating to give him a fee."

This statement is the doctrine of *Asche v. Asche*, 113 N. Y. 232, 21 N. E. 70, where it is said in discussing the sections of the Revised Statutes for which the cited provisions of the real property law are a substitution (page 236 of 113 N. Y., page 71 of 21 N. E.):

"Merger is accomplished in law when two or more estates in the same property unite in the same person, and when such estates comprise the whole legal and equitable interest in such property the person holding them becomes the absolute owner. *Mickles v. Townsend*, 18 N. Y. 575; *Bouv. Institutes*, §§ 1993-1995. Merger requires the existence of two estates, a greater and lesser, and, upon merger taking place, the lesser estate is said to be extinguished and absorbed in the greater; but this cannot take place where there is an intermediate estate. Merger takes place by virtue of unity of seizin. *Mickles v. Townsend*, *supra*. There could, therefore, be no merger here, because of the existence of a valid trust with the right in the trustees to the possession of the trust fund for the purpose of management and control during the life of its beneficiary. The trust must exist so long as the widow lives, and during her life there could be no merger. She has no estate in the subject of the trust. She had an interest in it as beneficiary, but it was essential to the existence of that interest that the trust estate should be maintained. The destruction of the trust would necessarily terminate her interest therein, and there would then be nothing to merge. As was held in *Pauling v. Hardy, Skinner*, 62: 'Where an estate and a mere right in the land, not an estate, meet in the same person, the merger will not take place because such an interest is not an estate.'"

To my mind the plain intention of the creator of this trust was that each of the four portions into which it was to be divided after the death of the grantor should be held by the trustee named by him, or his successor, during the life of the beneficiary to whom such portion was set off, the income therefrom being paid, during such period, to said beneficiary, and that only after the death and by the will of such beneficiary the portion so held for his or her benefit should go as by such will appointed, or, in default of such appointment, to his or her legal representatives. A merger, to work in these children an absolute title to the portions so carefully set apart and provided for by the donor, would be a perversion of his intention in the creation of the trust which no court of equity, unless constrained by mandatory statute law, would for an instant tolerate. So it is said by the Appellate Division in this Department, in *Zarkowski v. Schroeder*, 71 App. Div. 526-528, 75 N. Y. Supp. 1021, 1023:

"It is well settled that in equity the union of legal and equitable estates in the same person does not effect a merger, unless such was the intention of the parties and justice and equity require it."

The claim of the plaintiff under the deed of trust to an absolute title in the trust property, by reason solely of the death of the creator of the trust, who has provided in that deed that title to the property should, after his death, remain in another as trustee, and its income only be paid to the plaintiffs as life beneficiaries, is, in my opinion, incompatible with their claim of income under the trust deed, and of itself sufficient to defeat their contention that, by power of appoint-

ment given in the deed, and effective only upon the death of each of the plaintiffs, such plaintiffs are thereby, and from the death of the creator of the trust, when only they became entitled to the income of its fund, vested with the absolute title to that fund. See *Matter of Gorden*, 172 N. Y. 25, 64 N. E. 753, 92 Am. St. Rep. 689.

I conclude, therefore, that the trust created by the deed of Henry O. Pearce still remains in effect, and that the corpus of the property is still property held by the defendant as succeeding trustee, and as to each part must be so held by it until the death of the child entitled to the income of that part. I have carefully examined all the cases cited on behalf of the plaintiffs, and find nothing in any of them which tends to alter this view. *Tallmadge v. Sill*, 21 Barb. 34, was predicated upon laws that existed prior to the enactment of the Revised Statutes, and there the power of appointment had been executed. In *Re Moehring*, 154 N. Y. 423, 48 N. E. 818, the life estate was given outright and absolutely to the beneficiary, with power of disposition. There was not there, as here, an intervening trust. The same is true of *Deegan v. Wade*, 144 N. Y. 573, 39 N. E. 692, and of *Hume v. Randall*, 141 N. Y. 499, 36 N. E. 402.

I conclude, therefore, that judgment should be entered dismissing the complaint on the merits, with costs to the defendant.

DEHRING v. CITY OF NEW YORK.

(Supreme Court, Trial Term, New York County. November 8, 1907.)

1. MUNICIPAL CORPORATIONS—EMPLOYÉS—DISCHARGE—CIVIL SERVICE REGULATIONS.

Plaintiff was appointed temporary investigator of complaints under regulation 34 of the municipal civil service commission in force in 1898, providing that where there is no eligible list for a position a temporary appointment may be made, and that the right of the appointee to retain the position shall cease within five days of the receipt by the appointing officer of an eligible list. No eligible list was ever certified. Regulation 34 of the municipal civil service rules, promulgated July 11, 1899, under express provisions of Laws 1899, p. 795, c. 370, provides that any temporary appointment shall not continue for longer than one month. *Held*, that plaintiff's appointment was temporary, and he could be summarily discharged in one month from the promulgation of the new rules.

2. SAME.

The fact that no eligible list was certified to the appointing officer did not make the temporary appointment permanent.

3. SAME—PUBLIC EXIGENCY AUTHORIZING SUSPENSION OF RULES.

The public exigency under which the civil service laws and regulations yield is such a public necessity as amounts to an emergency, and they may not be disregarded where an appointee's services are merely clerical, consisting in the main of making entries and filing papers in connection with the preparation of a city map, with the completion of which he was not charged.

4. SAME—ACTION FOR SALARY—TITLE TO OFFICE.

The title to a position within the civil service laws cannot be tried in an action for salary.

5. SAME—RIGHT OF RECOVERY—QUANTUM MERUIT.

A person discharged from a position in the civil service of a city to which he was not entitled under the civil service rules cannot recover, in an action for salary, on a quantum meruit for services rendered.

Action by James C. Deering against the city of New York. Judgment for defendant dismissing the complaint on the merits.

Swanstrom & Keyes (J. E. Swanstrom, of counsel), for plaintiff.

F. K. Pendleton (Arthur Sweeney, of counsel), for defendant.

PLATZEK, J. The plaintiff, on December 22, 1898, was appointed temporary investigator of complaints in the board of public improvements by the president, Maurice F. Hollahan, at a salary of \$125 per month, pursuant to regulation 34 of the municipal civil service commission in force in 1898. On June 30, 1899, or thereabout, Mr. Hollahan notified the plaintiff, in writing, of his appointment as clerk of street openings, at the rate of \$1,500 a year. His name was then placed on the pay roll as clerk of street openings; but the municipal civil service commissioner declined to so certify his name, and it was stricken therefrom. Before December 22, 1898, plaintiff had taken a civil service examination for the position of clerk and failed to pass. On December 19, 1899, his name was certified as temporary clerk, and at the end of that month he received and receipted for \$52.41 for 13 days' pay at the rate of \$125 per month. The plaintiff's salary as temporary investigator of complaints was paid up to June 30, 1899. He obtained no compensation from June 30 to December 19, 1899. He claims to have discharged the duties of investigator of complaints from December 22, 1898, to December 19, 1899. It is undisputed that all the requirements of regulation 34 of the municipal civil service commission in effect at the time the plaintiff was appointed temporary investigator of complaints were in all respects complied with. On July 11, 1899, the municipal civil service commission promulgated new regulations, pursuant to chapter 370, p. 795, Laws 1899, including new regulation 34, providing that provisional appointments shall not continue for a longer period than one month, "nor shall any provisional appointment in force at the time of the adoption and promulgation of these rules continue for a longer period than one month, nor another successive temporary appointment be made to the same position under this rule."

The plaintiff contends that he was appointed under the old regulation 34 existing in 1898; that there was then no eligible list in existence; that no proper eligible list was ever made or certified; that he was designated temporarily pending the preparation and certification of a civil service list; that he was entitled to continue in the occupation of his position uninterruptedly until the certification of an eligible list to the appointing officer; that the law of 1899 and the new regulation 34 did not apply to him or his position. This contention is not sustained by any authoritative adjudications. The municipal civil service rules of 1898 have been superseded by those promulgated July 11, 1899, pursuant to chapter 370, Laws 1899. It has been repeatedly held since that an appointment to a position in the civil service of the city of New York, made in 1898, and when no eligible list for the position existed, is temporary in its nature, and the appointee may, under the rules of July 11, 1899, be summarily discharged in one month from the latter date. *People ex rel. Metz v. Lantry*, 32 Misc. Rep. 80, 66 N. Y. Supp. 185; *Ulrich v. City of New York*, 33 Misc. Rep. 508, 67 N. Y. Supp. 716; *Matter of O'Sullivan*, 54 App. Div. 374, 66 N. Y. Supp. 611, af-

firmed 166 N. Y. 596, 59 N. E. 1128. The fact that the civil service commission failed to certify to an appointing officer an eligible list for a position does not make a temporary appointment permanent. *People ex rel. Orr v. Scannell* (Sup.) 66 N. Y. Supp. 182.

The record fails to disclose evidence to bring the cause within the rule established in *McBride v. City of New York*, 56 App. Div. 520, 67 N. Y. Supp. 550, and *Gallagher v. Same*, 115 App. Div. 662, 101 N. Y. Supp. 229, which plaintiff invokes. In these two cases the courts held that there was an urgent public emergency and exigency for the appointment of a nurse in the Randall's Island Asylum and watchmen in the Brooklyn Disciplinary School, in the absence of an unexhausted eligible civil service list. Where a public exigency exists within the meaning of the civil service laws and regulations, the law and rules yield when the public necessity amounts to an emergency, but not otherwise. The services performed by the plaintiff were not complicated or technical, but merely clerical, and in the main consisted of making entries and filing papers in connection with the preparation of a city map, and with the completion of which map he was not charged.

This action is to recover salary for services performed, and not for damages for a wrongful discharge. Mr. Deering was only an employé (clerk), and not a city officer. To entitle him to recover he should have taken steps to cause his name to be certified (after June 30, 1899) and placed on the pay roll. The question as to the title to the position cannot be tried in an action for salary. *Hagan v. City of Brooklyn*, 126 N. Y. 643, 27 N. E. 265; *Eckerson v. City of New York*, 80 App. Div. 12, 80 N. Y. Supp. 168; *Walters v. City of New York*, 119 App. Div. 464, 105 N. Y. Supp. 950. Nor can the plaintiff recover in this suit on a quantum meruit. *Graham v. City of New York*, 33 Misc. Rep. 56, 66 N. Y. Supp. 754; *Matter of O'Sullivan*, 54 App. Div. 374, 66 N. Y. Supp. 611; *Haswell v. Mayor, etc.*, 81 N. Y. 255. It also appears that the plaintiff signed the pay rolls in May, June, and December, 1899; the heading of which stated payments to have been received in full for services for the time and in the capacity named. Query: Did not the plaintiff voluntarily acquiesce in and accept the situation of which he now complains, without objection or protest on his part? *Bannister v. City of N. Y.*, 40 Misc. Rep. 408-412, 82 N. Y. Supp. 244, affirmed 96 App. Div. 625, 88 N. Y. Supp. 1091, and *Kent v. Quicksilver Min. Co.*, 78 N. Y. 189; *Beardsley v. City of N. Y.* (Law Journal, Sept. 10, 1904) 108 N. Y. Supp. —.

Judgment for defendant dismissing the plaintiff's complaint on the merits.

HAIGH v. EDELMAYER & MORGAN HOD ELEVATOR CO.

(Supreme Court, Appellate Division, First Department. January 10, 1906.)

1. APPEAL—REVIEW—QUESTIONS OF FACT—CONFLICTING EVIDENCE.

Where the jury on conflicting evidence found for plaintiff, plaintiff's version will be accepted on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

2. NEGLIGENCE—PERSONS LIABLE—LIABILITY OF ONE RENTING MACHINERY.

An owner of a hod hoisting elevator who rented the same to a contractor was only bound to see that the elevator, when installed, was safe, and, when called on from time to time, to shift the headpiece from one floor to another to inspect it, and beyond that the owner was under no obligation to inspect or repair unless called on to do so.

3. SAME—EVIDENCE—RES IPSA LOQUITUR.

The mere fact that the headpiece of a hod hoisting elevator broke is not evidence that the headpiece was defective or unsafe when installed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 217–224.]

4. SAME.

That three years after the accident defendant was unable to comply with plaintiff's demand that the pieces of the broken headpiece of a hod hoisting elevator be produced on the trial does not warrant the inference that the headpiece was defective or unsafe when installed.

Appeal from Trial Term.

Action by Hartley A. Haigh against the Edelmeyer & Morgan Hod Elevator Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed, and a new trial ordered.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAMBERT, SCOTT, and HOUGHTON, JJ.

Frank V. Johnson, for appellant.

Carlisle Norwood, for respondent.

SCOTT, J. The plaintiff has recovered a judgment for the damages resulting from serious injuries caused by the falling of a hod elevator owned by defendant. From this judgment the defendant appeals.

The plaintiff was a foreman in the employ of a firm of masonry contractors engaged in erecting two buildings in the city of New York. These contractors rented from defendant a hod hoisting elevator, which was used to carry bricks, mortar, and other material to the several floors of the building. The elevator was so constructed that it could be used to carry either hods or wheelbarrows. When the accident had occurred it had brought two wheelbarrows to the fourth floor of one of the buildings. It was contended by defendant that plaintiff was riding on the elevator when it fell. The plaintiff denied this, and, since the jury on conflicting evidence has necessarily found in plaintiff's favor upon this issue, we accept his version, which was that while the elevator was at rest he undertook to take one of the wheelbarrows off the elevator, standing for that purpose with one foot on the platform of the elevator, and the other on the floor of the building, when suddenly the elevator fell to the bottom of the building, carrying him with it. The elevator was raised and lowered by a cable which ran to what is termed a "headpiece," carrying a wheel over which the cable ran, thence to another wheel at the end of the headpiece, and thence down through the building and out to the street, where it was operated by a stationary engine. The immediate cause of the fall of the elevator was the breaking of the headpiece. What caused it to break does not appear. It was constructed of two planks about nine inches wide and two inches thick, held apart by separators and firmly bolted together. The wheel over which the cable ran

was between these planks resting upon them. There was no evidence as to any agreement between the contractors and defendant as to whose duty it should be to inspect the elevator while under hire by the contractors. When a hod-hoisting elevator was hired, it was the custom of defendants to install it in the building, leaving it to be used, operated, and handled by the contractors to whom it was leased, and his employés. The defendants had nothing more to do with it, except that, as the building progressed, they would upon notice send their riggers to shift the headpiece up to another story, and put in additional lengths of guides for the elevator to run upon. This particular elevator had been in the building for some weeks, and there was evidence that at times it had been used to carry excessive weights above its designed capacity. There is no evidence that the headpiece which broke was improperly constructed, or that its material was defective, or that there were any apparent defects either in the headpiece or other parts of the machine. The principal question in the case was as to the measure of the defendant's obligation.

Were they bound only to see that the elevator when installed was of proper material and properly installed, or were they charged with the duty of continuous care and inspection? The court in its charge did not attempt to instruct the jury specifically upon this point, saying only that it was the duty of the defendant to exercise reasonable care and precaution to see that the elevator and the apparatus connected therewith were reasonably safe for the uses for which it was furnished. Further than this the court did not define the limits of the defendant's duty and responsibility. The defendant requested the court to charge that the plaintiff had no cause of action against the defendant, unless the jury found from the evidence that the headpiece which broke and caused the accident was defective and improperly constructed when it was last placed and installed in position by the defendant herein, and that the accident is directly attributable thereto. The court declined to so charge, and the defendant duly excepted. In our opinion the request was a proper one, and it was error to refuse it. Under the agreement between the contractors by whom plaintiff was employed, there was nothing, so far as appears, which required the defendants to keep the elevator and its several parts in repair, or to keep it under inspection for the purpose of discovering defects which might develop by reason of its use. A case presenting a very similar question came before the Court of Appeals in *King v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 181, 23 Am. Rep. 37. The defendant in that case owned a derrick which was placed on a dock and used for transferring rails from boats to cars. It made a contract with one Dillon, by which the latter agreed to unload from barges and vessels, and place upon cars all rails belonging to defendant which might arrive during a certain period. Dillon was to have the use of defendant's derrick. There was a dispute as to who was to keep the derrick in repair; plaintiff claiming that defendant had agreed to do so, and defendant claiming that its agreement was that it should make repairs when it was notified by Dillon that they were necessary. It did not appear that the derrick was not in good repair when the contract was made. In time, the hook supporting the gaff or boom and the tackle

of the derrick became worn, and broke while transferring a rail, falling upon plaintiff and causing the injuries complained of. The court had charged the jury, in effect, that it was the duty of the railroad company not only to see to it that the derrick was suitable and proper when furnished to Dillon, but also to keep it in order while it was in use by Dillon under his contract. An exception to this instruction brought before the Court of Appeals the very question presented by the request to charge in the present case, which is quoted above and which was refused by the trial judge. The Court of Appeals, speaking through Judge Andrews, held that the jury had been erroneously instructed; that, in the absence of any contract on the defendant's part to keep the derrick in repair, it had performed its full duty when it furnished a derrick suitable and safe at the time for use, and that as a general proposition the owner of an implement or piece of machinery may lawfully allow another to take and use it, and if, in using, it becomes defective and causes injury to a third person, the owner is not liable. The same principle, as we consider, governs the present case. It was undoubtedly the defendant's duty in the first instance to furnish an elevator which was safe and suitable for the uses to which it was to be put, and we think that, when it was called upon from time to time to shift the headpiece from one floor to another, it was its duty to inspect it to see whether or not it continued to be a safe and proper appliance to use. Beyond this, in the absence of a special agreement, it was under no obligation to inspect or repair unless called upon to do so. The defendant was entitled to have the jury properly instructed as to the extent of its obligations, and the failure to so instruct it requires a reversal of the judgment. There was no evidence that the headpiece was defective or unsafe when installed. Certainly the mere fact that it broke was not such evidence (*Dougherty v. Milliken*, 163 N. Y. 527, 57 N. E. 757, 79 Am. St. Rep. 608; *Duhue v. Hamburg American Packet Company*, 184 N. Y. 404, 77 N. E. 386, 112 Am. St. Rep. 615), nor can any inference to that effect be drawn from the fact that three years after the accident the defendant was unable to comply with plaintiff's demand that the pieces of the broken headpiece should be produced upon the trial. The plaintiff's counsel repeatedly and persistently, without rebuke from the court, brought before the jury the fact that the defense was being conducted by an insurance company. This fact was not relevant to any issue in the case, and could have been emphasized for no other purpose than to give plaintiff an unfair advantage before the jury. This practice has been repeatedly condemned by this court and the Court of Appeals, and in the present case was carried to an extent which would have necessitated a reversal of the judgment, even if the record had presented no other reversible error.

Judgment and order reversed, and a new trial granted, with costs to appellant to abide the event. All concur. **PATTERSON, P. J.**, in result.

ERIE R. CO. v. ROCHESTER-CORNING-ELMIRA TRACTION CO.

(Supreme Court, Special Term, Chemung County. July 12, 1907.)

1. APPEAL—STAY OF PROCEEDINGS—OPERATION OF APPEAL.

Under Code Civ. Proc. § 1310, providing that, where an appeal to the Court of Appeals shall be perfected, the appeal stays all proceedings to enforce the judgment or order appealed from, an appeal to the Court of Appeals from an order of the Appellate Division directing the Board of Railroad Commissioners to issue a certificate of public convenience and necessity, pursuant to Railroad Law, Laws 1892, p. 1395, c. 676, § 59, operates as a stay of all proceedings under that order, on service and filing of a notice of appeal and the giving of the undertaking required by section 1326.

2. INJUNCTION—GROUNDS OF RELIEF—IRREPARABLE INJURY.

Mere illegality of a certificate of public convenience and necessity, issued pursuant to Railroad Law, Laws 1892, p. 1395, c. 676, § 59, is insufficient to warrant injunctive relief; but it must appear that pursuant to the certificate defendant is about to do something or is threatening to do something harmful to plaintiff and injurious to its interests.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 9, 10-13.]

3. SAME.

The fact that plaintiff opposed the issuance of a certificate of public convenience and necessity, pursuant to Railroad Law, Laws 1892, p. 1395, c. 676, § 59, before the Board of Railroad Commissioners and on appeal from its decision, cannot be regarded as a substitute for the fact that plaintiff will be irreparably injured by threatened proceedings under the certificate, so as to entitle it to injunctive relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 14.]

Action by the Erie Railroad Company against the Rochester-Corning-Elmira Traction Company for injunction. Defendant's demurrer sustained, and complaint dismissed.

On or about the 22d day of August, 1906, the defendant presented to the Board of Railroad Commissioners of the state of New York its petition, alleging that it was a domestic street surface railroad corporation organized for the purpose of building and operating a street surface railroad from the city of Rochester, N. Y., to the city of Elmira, N. Y., and prayed for the issuance of a certificate of public convenience and necessity, pursuant to section 59 of the railroad law of the state of New York (Laws 1892, p. 1395, c. 676). The board appointed a time and place for a public hearing upon said application, and at the time and place appointed the plaintiff appeared and opposed the granting of the certificate. Thereafter, and on the 5th day of December, 1906, the said board decided that the application be denied and the certificate refused. Subsequently this order of the Board of Railroad Commissioners was reviewed by the Appellate Division of the Supreme Court in and for the Fourth Department, and on the 5th day of March, 1907, that court granted its order directing the Board of Railroad Commissioners to issue such certificate of public convenience and necessity. The plaintiff immediately appealed to the Court of Appeals from said order, giving the undertaking required by section 1326 of the Code of Civil Procedure, and due notice of the taking of the appeal and the giving of the undertaking, was served upon the Board of Railroad Commissioners on or about the 22d day of March, 1907. Afterwards and on the same day the Board of Railroad Commissioners met and granted the certificate of public convenience and necessity, pursuant to section 59 of the railroad law. Briefly these are the allegations, and all the allegations, contained in the complaint, excepting an allegation of a legal conclusion to the effect that the certificate was illegally issued.

Reynolds, Stanchfield & Collin, for plaintiff.
McIntire, Shattuck & Glenn, for defendant.

COMAN, J. I have had no difficulty in reaching the conclusion that the plaintiff's appeal to the Court of Appeals from the order of the Appellate Division operated as a stay of all proceedings under that order. It is true that the authorities upon this question are in a state of some confusion, but it seems to me that the language of the statute itself is too plain and explicit to justify an extended discussion. Section 1310 of the Code of Civil Procedure provides:

"Where an appeal to the General Term of any court or to the Appellate Division of the Supreme Court or to the Court of Appeals or otherwise has been heretofore or shall hereafter be perfected, as prescribed in this chapter, and the other acts if any required to be done to stay execution of the judgment or order appealed from have been done the appeal stays all proceedings to enforce the judgment or order appealed from."

A careful examination of the Code fails to disclose that any other act is required to be done in order to perfect the appeal or stay the execution of the order appealed from in this case, or of any similar order, except the service and filing of a notice of appeal and the giving of the undertaking required by section 1326. Sections 1327-1331 provide for the giving of additional undertakings in certain cases, but none of these sections have any application to an order of this character. To hold that the giving of the undertaking provided for by section 1326 did not operate to stay proceedings under the order appealed from would be to render utterly meaningless the language above quoted from section 1310. As is stated in a standard text-book on Procedure:

"Where a statute providing for appeals generally requires a general bond, and in specific instances certain designated bonds are required, and a general provision is made giving to the operation of an appeal, upon compliance with the provisions of the various sections of the statute, the effect of a supersedeas, an appeal in a case which does not come within the specific instances in which peculiar bonds are required operates as a supersedeas under the bond required for appeals generally."

But, in order to entitle itself to the injunctive relief asked for in this action, it seems to me that the plaintiff is bound to allege and establish something beyond the mere illegality of the certificate of convenience and necessity. The mere issuance and delivery to the defendant of this certificate cannot operate harmfully upon the plaintiff. It must be alleged and shown that, pursuant to that certificate, the defendant is about to do something or is threatening to do something harmful to the plaintiff and injurious to its interests. Upon this point the complaint is wholly barren of allegations or suggestions. There is no allegation that defendant is threatening to or about to construct a railroad. There is no allegation that any line to be constructed will compete with the plaintiff or in any way injure or interfere with its business. It is suggested that some inference favorable to the plaintiff upon this point is to be drawn from the fact that it had an interest and a standing in the proceeding before the state board and its review by the court; but I fail to see that any such significance is to be given to that fact. Certainly it cannot be said that an allegation to

the effect that in a former proceeding a party has litigated the issuance of a certificate can be regarded as a substitute for an allegation that a party will be irreparably injured by threatened proceedings under that certificate. It seems to me, therefore, that, while the complaint may be construed as charging a technical or inconsequential wrong against the plaintiff, there is an entire failure to allege such an actual and substantial wrong or apprehended injury as has always been held necessary to entitle a party to the equitable relief asked for in this action.

The demurrer must therefore be sustained, and the complaint dismissed, with costs.

CROSS v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

MUNICIPAL CORPORATIONS—INSPECTOR OF POLICE—REMOVAL—REINSTATEMENT—COMPENSATION.

An inspector of police who is reinstated is entitled to the salary attached to the position from the date of the order of reinstatement to the date of the resumption of his duties as inspector.

Appeal from Trial Term.

Action by Adam A. Cross against the city of New York. From a judgment granting insufficient relief, plaintiff appeals. Modified and affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Abram I. Elkus, for appellant.

Theodore Connolly, for respondent.

PER CURIAM. The judgment must be modified by increasing the amount for which judgment was rendered by the salary attached to the position of inspector of police from November 11, 1904, the date of the order by which plaintiff was reinstated, to December 22, 1904, the date on which he resumed his duties as inspector (*McVeaney v. Mayor, etc.*, 80 N. Y. 185, 36 Am. Rep. 600); and, as so modified, it will be affirmed, without costs (*Grant v. City of New York*, 111 App. Div. 160, 97 N. Y. Supp. 685).

G. W. JONES LUMBER CO. v. FULTON.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

APPEAL—DEFAULT JUDGMENT—CONTEMPT.

Under Code Civ. Proc. § 1294, providing that one aggrieved may appeal, except from a default judgment, a judgment debtor, permitting a default order finding him guilty of contempt for disobeying an order in supplementary proceedings, on rule to show cause, cannot appeal, and his remedy lies in applying to the court for the opening of the default.

Appeal from Special Term.

In the matter of supplementary proceedings on a judgment in favor of the G. W. Jones Lumber Company, judgment creditor, against

William H. Fulton, judgment debtor. From an order adjudging the judgment debtor guilty of contempt of court and imposing a fine, he appeals. Dismissed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Robert L. Turk, for appellant.

CLARKE, J. The plaintiff obtained a judgment against the defendant, after personal service of the summons, for \$1,262.27, which was filed and docketed. Thereafter execution was issued thereon, and, the said judgment not having been paid, an order for the examination of the defendant, judgment debtor, was made in proceedings supplementary to execution. He failed to appear for examination as required, and his default was noted. Thereafter an order was personally served upon the judgment debtor requiring him to show cause at Special Term, Part 1, why he should not be punished as for a contempt for his misconduct and offense in disobeying the order requiring him to appear for examination. Thereafter an order was made which recited the proceedings theretofore had, the return of the order to show cause, and that the defendant judgment debtor had failed to appear, either in person or by attorney, and adjudging and determining that the judgment debtor was guilty of a contempt of court in having willfully disobeyed the order in proceedings supplementary to execution, in that said judgment debtor failed to appear as required by the terms of said order for examination, and that said misconduct was calculated to and actually did impair, impede, and prejudice the rights and remedies of the plaintiff and judgment creditor, to his actual loss or injury in the sum of \$1,012.27, the balance remaining due on the judgment recovered, besides the costs of the motion. For the said misconduct the order fined the judgment debtor the sum of \$1,012.27, with \$10 costs of the motion, and ordered his committal to the county jail, to be there detained in close custody until he should pay said sum or be discharged according to law. From said order this appeal is taken.

No question of jurisdiction is here involved. It appears affirmatively upon the face of the papers that the summons in the original action, the order to appear for examination in supplementary proceedings, and the order to show cause why the judgment debtor should not be punished for his contempt in failing to obey said order, were all personally served upon the judgment debtor. The court, therefore, had jurisdiction of the subject-matter and the person of the appellant. Section 1294 of the Code of Civil Procedure provides:

"A party aggrieved may appeal in all cases prescribed in this chapter, except where the judgment or order of which he complains was rendered or made upon his default."

"If a party permits an order or judgment to be taken against him by default when he has been notified to appear and has thus had his opportunity to object, he will be deemed to have acquiesced, and afterwards he can no more attack the same upon appeal than if he had expressly assented to the order or judgment. * * * The remedy of a party in such case is to apply to the court to have the default opened or to have the judgment or order set aside and he can thus obtain all the relief he ought to have." *Flake v. Van Wagenen*, 54 N. Y. 25.

That case, said Allen, J., in *Innes v. Purcell*, 58 N. Y. 388, "merely reaffirms a well-settled principle and is decisive of this appeal."

The appellant, not having appeared upon the return of the order to show cause, and the order adjudging him in contempt having been made upon said default, had no right to appeal therefrom.

The appeal is therefore dismissed, without costs. All concur.

BURNS v. CROW.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. EVIDENCE—EXPERT TESTIMONY—FORM OF QUESTION.

An expert witness cannot be required to give an opinion based on conflicting evidence, and questions asking if, from the description as heard in court, the evidence as to which was conflicting, and from what the witness saw in relation to an opening in a scaffold, he would say the scaffold was a safe, proper, and secure one, are improper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2306.]

2. SAME—OPINION EVIDENCE—CONCLUSIONS.

The questions were objectionable as calling for conclusions of the witnesses; for, though expert testimony is admissible to show the character and strength of the materials used, the proper manner of constructing them, and the weight they will sustain, the question whether the scaffold was safe was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2309.]

3. MASTER AND SERVANT—ACTIONS FOR INJURIES—PLACE FOR WORK—EVIDENCE—SUBSEQUENT CHANGES.

In an action by a servant for injuries resulting from an insufficient platform and runway, evidence as to subsequent precautions taken to prevent similar accidents is inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Master and Servant, § 918.]

Patterson, P. J., dissenting.

Appeal from Trial Term.

Action by Mary Burns, administratrix, against William L. Crow, for negligence resulting in the death of plaintiff's intestate. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and McLAUGHLIN, HOUGHTON, SCOTT, and LAMBERT, JJ.

Frank V. Johnson, for appellant.

Edward J. Gavegan, for respondent.

McLAUGHLIN, J. Action to recover damages for death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant. Plaintiff had a recovery, from which defendant appeals.

The intestate, at the time of his death, was in the employ of the defendant, who was constructing a 12-story building, the framework of which was iron and the walls brick. The framework had been substantially completed and the walls had been carried to the floor of the twelfth story. The masons, in laying the bricks, stood upon scaffolding made of planks, which were, in the first instance, placed

upon iron beams and girders of the building; but, as the wall increased in height, a sufficient number of planks to make a platform was taken from near the wall of the building and placed upon wooden horses, and as each succeeding floor was reached the same method was pursued. Whenever the scaffolds upon which the masons were at work were at such height that the servants who carried the mortar and brick could not reach them from the planks laid upon the floor beams, a lower scaffold was made by placing planks upon smaller horses, called "ponies," from which planks extended to the floor. The brick and mortar were taken up in an elevator. At the time of the accident the elevator only ran to the eleventh floor. The intestate was engaged, with others, in carrying brick and mortar. Immediately preceding the accident he took a hod full of brick from the elevator, went up on the run, stepped on the lower platform, turned around, and dumped the brick onto the platform on which the masons were at work. In doing so he in some way—just how does not appear—fell from the lower platform, went into the open space immediately beneath the platform on which the masons were at work, and received injuries from which he died shortly thereafter.

It is not claimed that the platform or scaffolding was defective in quality or construction. The sole contention is—and the case was sent to the jury upon this theory—that the defendant was negligent, if at all, in not covering the opening into which he fell. The defendant contends that he was under no obligation to have this space covered, that there was nothing in the nature of the work to indicate that covering was necessary, and the fact that there was no covering was obvious to the intestate, and he, having continued in defendant's employ with knowledge of this fact, assumed the risk. I have reached the conclusion that the judgment must be reversed for errors committed at the trial, and, inasmuch as the evidence at the new trial may be different from what it was at the one which resulted in the judgment appealed from, it would serve no useful purpose to consider or pass upon the contentions of the respective parties.

At the trial the witness Hunt, after he had testified that he had built a great many scaffolds, was asked the following question:

"Q. Now, from the description of this scaffolding and opening that you have heard here in court, and what you saw at the time, would you say that that scaffolding was a safe, proper, and secure one?"

The question was objected to on various grounds, which were overruled, and an exception taken, and the witness answered:

"No sir, it was not safe. To make it safe and proper and secure, I would cover it in with planks—planks right in the opening before I put my scaffold."

A similar question was put to the witness McGlone, which was also objected to, and the objection overruled, and an exception taken. He stated that the scaffold was not safe. The questions were improper in form and called for a conclusion of the witness. They were improper in form, inasmuch as they required the witnesses to draw inferences from conflicting testimony of other witnesses. Where the facts are controverted, or are not entirely clear, a hypothetical question may be put to a witness who is competent to testify, based

upon the facts claimed to have been established; but such witness cannot be required to give an opinion based upon conflicting evidence. *Guterman v. Liverpool Steamship Co.*, 83 N. Y. 358; *Reynolds v. Robinson*, 64 N. Y. 589.

The objections to the questions should also have been sustained because the answers called for conclusions of the witnesses; that is, whether the scaffold and run were safe. This was the very question which the jury had to pass upon. It was, in effect, permitting the witness to say to the jury that the plaintiff is entitled to recover. *Dolan v. Herring-Hall-Marvin Safe Co.*, 105 App. Div. 366, 94 N. Y. Supp. 241. Testimony of this character has been many times condemned. *Harley v. B. C. M. Co.*, 142 N. Y. 31, 36 N. E. 813; *Dougherty v. Milliken*, 163 N. Y. 527, 57 N. E. 757, 79 Am. St. Rep. 608. It is true expert testimony is admissible with reference to the character and strength of materials used in the construction of scaffolds, the proper manner in which to construct them, and the weight which they will sustain. *Jenks v. Thompson*, 179 N. Y. 20, 71 N. E. 266. This class of evidence is admitted for the purpose of laying before the jury all of the facts, to the end that they may determine whether a person has performed his duty in furnishing a reasonably safe place for his workmen; in other words, whether the scaffold is safe, in view of the weight put and the work performed upon it.

The witness Hunt was also permitted to testify, against the objection of defendant's counsel, that immediately following the accident the opening under the mason's platform was covered. This also necessitates a reversal of the judgment. *Getty v. Town of Hamlin*, 127 N. Y. 636, 27 N. E. 399. What occurred subsequent to the accident, or what precautions were taken to prevent similar accidents, could not be proved for the purpose of showing that the defendant's negligence was the cause of the intestate's death. Whether that were caused by defendant's negligence necessarily had to be determined from the facts as they existed at the time of the injury. *Clapper v. Town of Waterford*, 131 N. Y. 382, 30 N. E. 240.

The judgment and order appealed from must be reversed, and a new trial ordered, with costs to appellant to abide event.

HOUGHTON, SCOTT, and LAMBERT, JJ., concur. PATTERSON, P. J., dissents.

SHIRLEY v. BERNHEIM.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

PLEADING—COMPLAINT—AMENDMENT.

Plaintiff alleged that, while he was the owner and in possession of 1,600 shares of certain stock, he pledged it to defendant for a loan of \$800; that he had tendered payment of the loan, with interest, and demanded the return of the stock, but that defendant refused to deliver the stock, and had converted it. The answer denied that the stock was delivered as collateral security and pleaded a counterclaim for the amount of the loan and interest. Plaintiff, in reply, reiterated his allegation of the giving of the stock as security, and averred his readiness to pay the note and interest on the return of the stock. As the case was about to be called for

trial, plaintiff applied for leave to amend by filing an additional alternative cause of action alleging that the 1,600 shares were delivered to defendant of which 800 were given as collateral security and 800 as a bonus, and that the transaction was usurious and void. *Held*, that plaintiff should have been permitted to file such amendment on payment of costs of the action to the date of the order, costs of the motion, and filing a stipulation that, if he recovered judgment, the amount due on the note, with legal interest to the date of the trial should be deducted therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 686-709.]

Patterson, P. J., and Clarke, J., dissenting.

Appeal from Special Term.

Action by James Shirley against Lee S. Bernheim. From an order denying plaintiff's motion for leave to amend his complaint, he appeals. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Alfred B. Cruikshank, for appellant.

J. Garfield Moses, for respondent.

SCOTT, J. The plaintiff appeals from an order denying his motion to amend the complaint. The action was begun in October, 1906. This motion was made in November, 1907, when it was probable that the cause would shortly be reached for trial. The action is for damages for the conversion of 1,600 shares of mining stock. The complaint alleges that in December, 1905, plaintiff, being the owner and in possession of 1,600 shares of the capital stock of the Giroux Consolidated Mines Company, obtained from defendant a loan of \$8,000, for which he gave his promissory note payable in six months, and also delivered to defendant, as security for said loan, the aforesaid 1,600 shares of stock; that after said note became due plaintiff tendered to defendant the amount due on said note with interest, and demanded a return of said stock, but defendant refused to deliver said stock to plaintiff, but has disposed of and converted said stock to his own use to plaintiff's damage. The answer admits the loan, and the demand for the return of the stock, but denies that the 1,600 shares of stock were delivered as collateral security, and sets up a counterclaim for the amount of the loan and interest. In reply plaintiff reiterates his allegation of the loan and the giving of the stock as security, and his demand and tender, and asserts that he is ready and always has been ready to pay the note, with interest, upon the return and delivery to him of said shares of stock.

It now appears that defendant will claim, and perhaps will establish by proof, that only 800 shares of the stock were given as collateral security for the note, and that the other 800 shares were given by plaintiff to defendant as a bonus for making the loan. The defendant himself, who is a nonresident, makes no affidavit, but certain of his attorneys have made affidavits, in which, without expressly admitting the giving of the 800 shares of stock as a bonus, they do not deny it, but content themselves with statements and arguments intended to show that the plaintiff and his attorneys must have known at the time the complaint was drawn just what the actual facts regarding

the transaction were. The object of the amendment is to insert in the complaint a second and alternative cause of action, stating the facts as it is now understood that the defendant will claim that they were, to wit, that at the time of making the loan 1,600 shares were delivered to defendant, of which 800 were given as collateral security for the note, and 800 as a bonus, and further alleging that this transaction was usurious and void. It is not a fatal objection to the amendment that the plaintiff, if allowed to amend the complaint, will give two apparently inconsistent statements of the transaction upon which his cause of action rests. Upon two vital points there will be no discrepancy, namely, that a loan of \$8,000 was made and a note given for it, and that at the same time 1,600 shares of stock were delivered to defendant. It is not possible to forecast what the evidence will show as to the purpose for which the stock was delivered, and equally impossible to tell which version of the transaction will be accepted by the jury. If the plaintiff is required to go to trial upon the theory that the whole 1,600 shares were given as collateral, and the evidence shows that only 800 shares were given as collateral and the remainder as a bonus, the plaintiff would be compelled to bring a second action, which it would be his right to do. We should then have arrived at the very position the case will be in if the amendment be allowed, except that there would be two trials instead of one; nor is it an insuperable objection to the amendment that by its means the plaintiff seeks to attack the transaction as usurious. An amendment should not be discriminated against merely because it involves or sets up usury, if it appears that the party seeking to plead it does not seek thereby to gain an unfair or inequitable advantage over his adversary. In the present case the plaintiff frankly admits his indebtedness, and repeatedly expresses his entire willingness to pay it, if he can but secure the return or the value of his stock. If the defendant did, in fact, exact an usurious loan, there is certainly no inequity in requiring him to surrender the consideration upon receiving payment of his loan, with interest. The plaintiff has delayed his application for leave to amend, but the granting of the motion will not necessarily delay the trial, nor require the production at the trial of any evidence that would not be necessary under the pleadings as they now stand. Upon the whole, we think that the plaintiff should be permitted to so frame his complaint as to conform to the state of facts that may develop at the trial, but such amendment must be made upon terms that will prevent hardship to the defendant.

The order appealed from will therefore be reversed without costs, and the motion granted, upon condition that plaintiff within 10 days after the entry of the order hereon pay to the attorneys for the defendant all costs of the action to the date of the order, and \$10 costs of motion, and serve on said attorneys a stipulation that, if judgment be rendered in favor of the plaintiff, there shall be deducted from the damages recovered the amount due upon plaintiff's note, with legal interest to the date of trial. All concur, except PATTERSON, P. J., and CLARKE, J., who dissent.

OBERMEYER & LIEBMAN v. ADISKY.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. COSTS—PAYMENT—WHAT CONSTITUTES.

Plaintiff's attorney in proceedings supplementary to execution was adjudged to personally pay the costs on dismissal of proceedings to examine defendant. Subsequently defendant paid the judgment, and by agreement made a reduction to cover the costs which the attorney was directed to pay. *Held*, that as the costs belonged to defendant, and not to his attorney, defendant's deducting them in paying the judgment amounted to their payment, and plaintiff's attorney could not be compelled to pay them again.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 1025.]

2. CONTEMPT—FAILURE TO PAY COSTS.

Code Civ. Proc. § 779, provides that costs of motions may be collected by execution, except where the remedy of enforcement by contempt proceedings exists, which is expressly provided by section 2007 in case of special proceedings instituted by state writs. *Held*, that an attorney cannot be punished for contempt for disobeying an order to personally pay the costs upon dismissal of proceedings to examine defendant in proceedings supplementary to execution.

3. SAME—ELEMENTS OF OFFENSE—PREJUDICE TO RIGHTS OF ANOTHER.

Under Code Civ. Proc. § 2281, providing that a person may be punished for contempt upon proof that he has committed the offense charged, and that it was calculated to or actually did defeat or prejudice the rights of a party to an action, etc., an attorney cannot be punished for contempt for failing to obey an order to personally pay costs in a proceeding, where there was no adjudication that his failure was calculated to or did defeat, prejudice, etc., the rights of the complaining party.

Appeal from Special Term.

Action by Obermeyer & Liebman against Abraham Adisky. Judgment for plaintiff. From an order in supplementary proceedings adjudging Joseph Gans, an attorney, guilty of contempt in failing to obey an order to pay costs, he appeals. Reversed.

Argued before PATTERSON, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Joseph Gans, in pro. per.

McLAUGHLIN, J. The plaintiff recovered a judgment for something over \$300 against the defendant, and, being unable to collect the same, proceedings supplementary to execution were instituted. A copy of the order directing the defendant to appear for examination was returnable July 18, 1907, while the original order was made returnable July 17, 1907. This fact having been called to the attention of the learned justice before whom the examination of the defendant was about to be had, the proceeding was dismissed, with \$10 costs; and thereupon the appellant, as attorney for the plaintiff, on the same day obtained another order for the examination of the defendant in similar proceedings, which order was made returnable July 20, 1907. On the return day the judgment debtor appeared and by his attorney moved to dismiss the proceeding, upon the ground that the costs awarded on the dismissal of the first proceeding had not been paid. The motion was granted, with \$10 costs, which, together with the \$10 costs previously awarded, the attorney was di-

rected personally to pay. The attorney did not pay the costs, and thereupon a motion was made to punish him for contempt by reason of such failure. The motion was granted, with an additional \$10 costs, which he was directed to pay within a certain time, or, in default thereof, that a warrant issue for his arrest. He appeals from this order.

The order directing the attorney to personally pay the costs is not in this record, nor does it appear to have been before the court on the motion which resulted in the order appealed from. It is impossible, therefore, to determine the exact terms of it, except so far as the same may be ascertained from the affidavits of the attorneys. It would seem, before a person could be adjudged guilty of contempt in failing to obey an order, that that order must be before the court. That is the best evidence of its terms. But, if it be assumed that the order contained the provisions claimed by the defendant in the affidavit made by his attorney, then it seems to me, upon the uncontradicted facts, there had been no violation of the order. The fact is not disputed that on the day upon which the second proceeding was dismissed the attorney for the plaintiff stated to the judgment debtor, in the presence of his attorney, that he intended to appeal from the order resulting in the second dismissal and the imposition of costs upon him personally; that the judgment debtor thereupon requested him not to appeal, or take any further proceedings in the matter, as he intended to pay the judgment; that he subsequently did pay the judgment, received a satisfaction, which was filed, and the judgment canceled and discharged of record; that when he paid such judgment a reduction was made, at his request, of more than \$20, the costs of the motions above referred to. The costs which the attorney was directed to pay belonged to the defendant—not his attorney (*McIlvaine v. Steinson*, 90 App. Div. 77, 85 N. Y. Supp. 889; *Oishei v. Nat. St. Ry. Co.*, 110 App. Div. 709, 97 N. Y. Supp. 447); and therefore, when an allowance was made to him for that amount, it was a payment, and the attorney could not be compelled to pay the same over again. If the client had taken the \$20, handed it to his attorney, and the attorney had then handed it to the defendant, no one, I take it, would seriously contend that he had not complied with the order directing him to pay the costs, and yet that, in effect, is precisely what took place. The plaintiff paid him \$20 by deducting it from the amount of the judgment which he had to pay. Indeed, if the costs had not been paid, I do not think the attorney, even though he was directed personally to pay the costs, was guilty of a contempt of court in failing to do so. Code, § 779, provides how costs of motions can be collected. It is by execution, except where special provision is otherwise made. Section 2007, Code Civ. Proc.

The order must also be reversed for another reason. The attorney could not be punished for contempt until it had been determined, not only that he had failed to pay the costs as directed, but that his failure in this respect was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of the complaining party. Section 2281, Code Civ. Proc. The order appealed from

contained no such adjudication, nor is there even a suggestion in the record of any facts from which one might be inferred. *Fischer v. Raab*, 81 N. Y. 235; *First National Bank v. Fitzpatrick*, 80 Hun, 75, 30 N. Y. Supp. 15; *Dailey v. Fenton*, 47 App. Div. 418, 62 N. Y. Supp. 337; *Socialistic Co-op. Pub. Ass'n v. Kuhn*, 51 App. Div. 583, 64 N. Y. Supp. 933.

The order appealed from, therefore, must be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs. All concur.

HESS v. ZAHN et al.

(Supreme Court, Special Term, New York County. January 6, 1908.)

1. **WILLS—CONSTRUCTION—CONTINGENT INTEREST.**

Testator declared that, on the death of his wife, all his estate then remaining should be divided into three equal parts, one to go to his son W., or to his heirs should he have died, another to his son H. or his heirs should he have died, and the remaining third in trust to apply the income to the use of testator's daughter for life, remainder to her children, etc. *Held*, that the interests of the sons contingent, depending on their surviving the widow, under the rule that where there is no gift, but a direction to executors or trustees to pay or divide, or to pay at a future time, the vesting of the interest will not take place until the arrival of such time.

2. **SAME—"HEIRS"—WIDOW.**

Where a will directed that, on the death of testator's widow, all his estate then remaining should be divided into three equal parts, one to go to his son W. or to his heirs should he have died, the word "heirs" should be construed to mean "next of kin," or those related by blood, entitled to take the personal estate of one dying intestate, and did not include W.'s widow.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 4, pp. 3241-3265; vol. 8, pp. 7677-7678.]

3. **SAME—CONTINGENT INTEREST—MORTGAGE.**

Where beneficiaries under a will took a contingent, and not a vested, interest, a mortgage executed by them on such interest did not create a valid lien on the proceeds of the estate in the hands of the executor.

4. **SAME—ADVANCEMENT—PAYMENT—RECOVERY—INCOME.**

Where testator charged his sons' interest in the estate with certain advancements, with interest, and provided that the principal thereof should not be payable until the sons received their share of the estate, a payment made by the sons on such indebtedness in her lifetime to their mother, who was entitled to receive the income of the estate as tenant for life, was voluntary and could not be regarded either as income or profit, so that the surviving executor and trustee of testator's estate was not entitled to recover any sum which the widow so received from the executor of her estate.

Action by Henry Hess, Jr., as sole surviving executor and trustee under the will of Casper Hirtler, deceased, against Rosa Zahn and others for the construction of the will.

Finck, Embree & Cobb (Duane P. Cobb, of counsel), for plaintiff.

Hitchings & Palliser, for defendant Rosa Zahn.

Rushmore, Bisbee, Rogers & Stern, for defendant Marie Hirtler.

Baldwin & Blackmar (Lucias R. Judson, of counsel), for defendants Brainard.

Henry Herrold, for defendant Hoch.

NEWBURGER, J. Casper Hirtler died on the 1st day of November, 1891, leaving him surviving Margaretha, his widow, and William Hirtler, Henry Hirtler, and Rosa Zahn, children. He left a last will and testament and a codicil. William Hirtler, a son, married the defendant Marie E. Hirtler on the 16th day of April, 1895, and died on the 15th day of March, 1904, no issue him surviving, but leaving a last will and testament, by which he bequeathed and devised all his property to said Marie E. Hirtler, his widow. Henry Hirtler, a son of the deceased, married the defendant Theresa W. on November 10, 1885, and died on the 2d day of April, 1900, intestate, leaving him surviving Theresa W., his widow, and Casper Hirtler, a son, who has just attained his majority, and Frank Hirtler, an infant, over the age of 14 years. Margaretha Hirtler, the widow of Casper Hirtler, died on February 3, 1906, leaving no issue, but leaving a last will and testament, which has been probated and not contested. Casper Hirtler by his will, after providing for the payment of his debts and making a number of bequests, provided in the fourth, fifth, and sixth clauses of said will the following:

"Fourth. All the rest, residue and remainder of my estate, real and personal, of whatever kind and wherever situated (excepting my dwelling house and premises, number one hundred and thirty-five East Ninety-Second street, in the city of New York, and the furniture and other articles therein contained, and my personal effects hereinbefore devised and bequeathed to my wife during her life), I give, devise and bequeath to my executors hereinafter named, or such of them as may qualify, and the survivors or survivor of them, in trust, to have and to hold the same and receive the rents, issues, profits and income thereof, and from time to time to pay and apply the net income arising therefrom to my beloved wife, Margaretha, for and during the term of her natural life so long as she remains my widow.

"Fifth. In case my said wife shall re-marry, then it is my will and I do hereby direct, that upon such re-marriage, my said executors and trustees, their survivors or survivor shall divide the said rest, residue, and remainder of my said estate (excepting the house and premises number one hundred and thirty-five East Ninety-Second street, in the city of New York, and the furniture and other articles therein contained, and my personal effects), into three equal parts, and my said executors, their survivors or survivor shall continue to hold one of such parts in trust as aforesaid, to receive the rents, issues, profits and income thereof, and pay and apply the net income arising therefrom to my said wife for and during the rest of her natural life; and the other two parts of the rest, residue and remainder of my estate shall thereupon be further subdivided into three equal parts, one of which three equal parts I give to my son William, or to his heirs at law should he fail to survive me; another of said equal parts I give to my son Henry or to his heirs at law should he fail to survive me, and the third and remainder of said parts I give to my executors, or such of them as may qualify, or the survivors or survivor of them, in trust, nevertheless, to have and to hold the same, to invest and reinvest the same as hereinafter provided, to receive the rents, issues and profits thereof, and to pay and apply the income thereof to the use of my daughter, Rosa Zahn, for and during the term of her natural life, and upon her death I give said part so held in trust for her unto her children then living, and the issue of any of her children who may have died leaving issue; the issue of any deceased child of my said daughter to take the share or portion which his, her or their parent would have been entitled to, if living.

"The foregoing provisions for my said wife are made for her in lieu of dower.

"Sixth. It is my will and I do hereby direct that upon the death of my said wife, Margaretha, all my estate real and personal which may then remain undivided, shall be divided into three equal parts, one of which equal parts I give and bequeath to my son William or to his heirs at law should

he have died; another of said equal parts I give to my son Henry, or to his heirs at law should he have died, and the third and remainder of said equal parts I give to my executors, or such of them as may qualify, or the survivors or survivor of them, in trust, nevertheless, to have and to hold the same, to receive the rents, issues and profits arising therefrom, and to pay and apply the income thereof to the use of my said daughter, Rosa Zahn, for and during the term of her natural life, and upon her death, I give said part so held in trust for her unto her children then living and the issue of any of her children who may have died leaving issue; the issue of any deceased child to take the share or portion which his, her or their parent would have been entitled to, if living."

The executors ask the court to construe whether, under these provisions of the will, the interests of William and Henry were vested or contingent in view of the fact that both died before Margaretha, the widow, the life beneficiary. There can be no question that from a reading of the entire will and codicil, under the sixth clause of the will, the interests of the sons were contingent and dependent upon their surviving the life beneficiary. The rule has been laid down in the case of *Warner v. Durant*, 76 N. Y. 136, by Mr. Justice Folger in delivering the opinion of the court, as follows:

"This case presents the question whether a legacy became vested in the legatee in his lifetime, though he died before the time fixed for the payment. It is a general principle that where a gift is absolute, and the time of payment only, postponed, time, not being of the substance of the gift, but relating only to the payment, does not suspend the gift, but merely defers the payment. This principle will not act in this case to vest the legacies, for the gift was not, in the outset, to the legatee; and another rule is to be noticed. It is this: Where there is no gift, but by a direction to executors or trustees to pay or divide, and to pay at a future time, the vesting in the beneficiary will not take place until that time arrives. Here the gift was at first to the executors, to hold in trust for five years, and at the expiration of that period to pay over to the legatee. But this rule does not act in this case; for there has been a distinction grafted upon it. It is this: Where the gift is to be severed instantaneously from the general estate for the benefit of the legatee, and in the meantime, the interest thereof is to be paid to him, that is indicative of the intent of the testator that the legatee shall at all events have the principal, and is to wait only for the payment until the day fixed."

The rule thus laid down has been followed in a long line of decisions, and is now the settled rule of this state.

The second question submitted is: Who are the respective heirs at law to take under the sixth clause of said will? Having determined that the interests of the sons William and Henry were contingent and not vested, the only heirs at law under the sixth clause of the will are Rosa Zahn and the children of Henry Hirtler, namely, Casper and Frank C. The claim of Marie E. Hirtler, the widow of the son William, that under the will of her husband she is an heir at law, is untenable. It has been repeatedly held in this state that the word "heirs" means next of kin, and that the words "next of kin" do not include a widow or husband. In *Tillman v. Davis*, 95 N. Y. 17, 47 Am. Rep. 1, the court said:

"The primary meaning in the law of the word 'heirs' is the persons related to one by blood, who would take his real estate if he died intestate, and the word embraces no one not thus related. It is not strictly proper to so designate persons who succeed to the personal estate of an intestate. The proper primary signification of the words 'next of kin' is those related by blood to take personal estate of one who dies intestate; and they bear the same relation to

personal estate as the word 'heirs' does to real estate. The words 'heirs' and 'next of kin' would not ordinarily be used by any testator to designate persons who were not related to him by blood. In this case, if the testatrix had intended that the widow of Davis should take by substitution in his place the whole or any part of the legacy given to him, it is presumable that her name would have been mentioned. Or if it had been intended by the testatrix that those persons should succeed to the shares mentioned in the eighth, ninth, and tenth clauses of the will who were entitled to take under statutes of distribution, she would not have used the word 'heirs,' but would have designated them as the persons entitled by law to take the personal property in such cases. It is presumable that she was attached to the legatees named in those clauses by ties of affection or of blood; and hence that she desired that the persons of the same blood, who might also be relatives of her blood, should succeed to the property. In this state it has uniformly been held, when the question has arisen for consideration in the courts so far as we are able to discover, that the word 'heirs' applied to the succession of personal estate means next of kin, and that the words 'next of kin' do not include a widow or a husband of an intestate. In *Drake v. Pell*, 3 Edw. Ch. 251, the will directed a division of personal estate among nine children of the testator, and provided that in case any of them should die after him, and after having attained the age of 21 years, then the portion or interest of the child so dying should go to the 'heirs, devisees, or legal representatives' of the child so dying. One of the children, a daughter, died intestate, leaving a husband and children, and one of the sons died intestate, leaving a widow and children; and it was held that neither the term 'heirs' or 'legal representatives' included the husband or widow, that those terms meant 'next of kin,' and that a husband or widow did not answer to the description of 'next of kin.' In *Wright v. Trustees of Meth. Epia. Church*, Hoff. Ch. 202, a legacy was given by a testator to his second cousin, Euphemia Murray or to her heirs. She had died before the date of the will, leaving a husband and children; and it was held that the word 'heirs' meant next of kin, and did not include the husband, as he was not next of kin to the wife. The learned assistant vice chancellor writing the opinion cited various English authorities to sustain his decision. In *Slosson v. Lynch*, 43 Barb. 148, under a marriage settlement, the wife was to have the income for life of certain personal property with a certain power of appointment by will or otherwise and in the event of her death before her husband, and, in the absence of any appointment, then the property was to go to her issue then living and the children of such as might be deceased, and, in default of such issue, 'to the next of kin of the party of the first part'; and it was held that the words 'next of kin' meant those of the kindred or blood who took by the statute of distributions in case of intestacy, but excluding a widow as such; and the learned judge writing the opinion cited and commented upon many English decisions. In *Murdock v. Ward*, 67 N. Y. 387, the residue of personal property was directed to be 'equally divided among and paid to the persons entitled thereto as their, or either of their next of kin according to the laws of the state of New York, and as if the same were personal property, and they or either of them had died intestate.' And it was held that next of kin meant relatives in blood, and did not include a widow. In *Luce v. Dunham*, 69 N. Y. 38, a testator directed that all the rest, residue, and remainder of his estate should be divided among his 'heirs and next of kin in the same manner as it would be by the laws of the state of New York' had he died intestate; and it was held that the words 'next of kin' did not include a widow, and that the addition of the words referring to the laws in case of intestacy did not enlarge the class of legatees so as to include her."

See, also, *Snider v. Snider*, 11 App. Div. 171, 42 N. Y. Supp. 613; *Matter of Devoe*, 171 N. Y. 281, 63 N. E. 1102; *Platt v. Mickle*, 137 N. Y. 106, 32 N. E. 1070.

Having determined that the interests of William and Henry were contingent, and not vested, it is unnecessary for me to further discuss the claim of the defendants Brainard, for, unless they had a vested interest in the estate, the mortgage executed by them to the Brainards

is not a valid lien upon the proceeds of the estate in the executor's hands.

The next question as to whether the sum of \$5,087.50 now in the hands of the executor of Margaretha Hirtler was received by Margaretha Hirtler, as executrix, makes it necessary to examine the second and third clauses of the codicil, which provide:

"Second. I do hereby charge against the share or portion of my estate to be received by my son William or to which he may be entitled under the provisions of my said will, the sum of eight thousand two hundred and fifty dollars together with interest thereon from the date of my decease; being one half of the sum of sixteen thousand five hundred dollars which I have loaned and advanced to him and my son Henry. And I direct that the said sum shall be deducted from the share or portion of my estate to which my said son William may be entitled to under the provisions of my said will:

"Third. I do hereby charge against the share or portion of my estate to be received by my son Henry or to which he may be entitled under the provisions of my said will the sum of eight thousand two hundred and fifty dollars together with interest thereon from the date of my decease; being one half of the sum of sixteen thousand five hundred dollars which I have loaned and advanced to him and my son William. And I direct that the said sum shall be deducted from the share or portion of my estate to which my said son Henry may be entitled to under the provisions of my said will."

It will be noticed in these clauses that the decedent charged against his sons' interests in the estate, or against any sums of money to which they might be entitled under the provisions of the will, the amount of their indebtedness to him, together with interest, and it is clear from a reading of these clauses that the principal with interest should not be payable until the sons received their share of the estate, and, if during the lifetime of their mother any payments were made by them, it was voluntary and could not be held to be either income or profit; and therefore the plaintiff herein is not entitled to recover from the executor of Margaretha Hirtler's estate any sum of money she may have received from the sons of the decedent, Casper Hirtler.

Submit findings and decree in accordance with the views herein expressed.

WITHERS et al. v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. MUNICIPAL CORPORATIONS—PUBLIC BUILDINGS—ARCHITECTS—EMPLOYMENT—COMPENSATION.

Laws 1898, p. 751, c. 628, provides for the rebuilding of the New York City prison, authorizes the commissioner of correction to employ architects to prepare plans, and declares that, when any work provided for by the act shall have been authorized and the plans therefor approved by the board of estimate and apportionment, the commissioner of correction shall carry out the work. The board of estimate and apportionment, on approving the general plans, authorized the construction of the building, with the exception of the cell work and certain other work. The architects who had prepared the general plans were employed by the commissioner of correction to prepare detailed plans and specifications for the construction of such cell work, etc., in the prison, but these plans and specifications were not approved by the commissioner or by the board of estimate and apportionment, and, to the time when the services of the architects were dispensed with, the work had not been authorized by the board of estimate and apportionment. *Held*, that the city was not liable to the archi-

fects for the compensation which the commissioner had agreed to pay them for preparing such detailed plans and specifications and supervising the work.

Appeal from Trial Term.

Action by Frederick Clarke Withers and another against the city of New York. From a judgment for plaintiff entered on a directed verdict, and from an order denying a motion for a new trial, defendant appeals. Reversed and new trial granted.

See 86 N. Y. Supp. 1105.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Terence Farley (Theodore Connolly and Charles A. O'Neil, on the brief), for appellant.

Albert Stickney, for respondents.

LAUGHLIN, J. The action is brought to recover damages for a breach of contract. The plaintiff Withers and the decedent Dickson, were architects. It is alleged in the complaint that they were duly employed to prepare detailed plans and specifications for the construction of the cell work, heating, lighting, ventilating, and plumbing for the new city prison at Centre, Franklin and Leonard streets, in accordance with general plans which they had duly prepared on their employment by the commissioner of correction and which had been approved by the commissioner and by the board of estimate and apportionment. The verdict was directed upon the theory that the architects were entitled to recover 5 per cent. of the cost of construction for preparing the detailed plans and specifications and supervising the construction, less the disbursements they would have incurred, and that the cost of construction of this work would have been \$280,000, and that the expenses that would have been incurred by the architects in the performance of the contract, which were not incurred owing to their discharge, would have been \$1,000. The defendant introduced no evidence. The plaintiffs recovered a former verdict upon the same theory upon evidence that does not materially differ from that in the record now before us, and the judgment was reversed and a new trial granted by this court. *Withers v. City of New York*, 92 App. Div. 147, 86 N. Y. Supp. 1105.

It appeared in the former record by uncontroverted evidence, as in this, that the general plans prepared by the architects were duly approved by the commissioner of correction and by the board of estimate and apportionment. It then appeared and now appears that neither the commissioner of correction nor the board of estimate ever approved the detailed plans and specifications prepared by these architects for the cell work, heating, lighting, ventilating, and plumbing for the prison, and that down to the time when the services of these architects were formally dispensed with this work had not been authorized by the board of estimate and apportionment. On the former appeal this court decided that under the special act (chapter 626, p. 751, Laws 1896) conferring legislative authority for this work, the commissioner of correction was authorized to employ architects to prepare plans and specifications for the work and to obligate the city to pay them reasonable compensation for their services in so doing, even though the

plans should not be approved or the work authorized by the board of estimate and apportionment, and that, in the event that the plans should be approved and the work authorized by said board, the commissioner of correction was then, and only in that event, authorized to employ architects to supervise the construction of the work. We also held that the detailed plans and specifications for this particular part of the work never having been approved by the board of estimate and apportionment, and the work not having been authorized, the commissioner was without authority to employ architects to supervise the work, and that his agreement to pay the architects 5 per cent. for supervising the work, if made, was not binding upon the city. The board of estimate and apportionment on approving the general plans authorized the construction of the building, with the exception of the cell work, steam heating, ventilating, plumbing, elevator, and sidewalks, and a contract for the work thus authorized was duly let, the performance of which was supervised by the architects, who evidently received their compensation in full therefor. There is evidence tending to show that the commissioner of correction authorized these architects to prepare detailed plans and specifications for the cell and other work not covered by the contract for the construction of the shell of the building.

It follows, therefore, that the judgment and order should be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

(57 Misc. Rep. 57.)

PEOPLE ex rel. LAZARUS v. COLEMAN et al., Board of Fire Com'rs.

(Supreme Court, Trial Term, Chemung County. December 23, 1907.)

MUNICIPAL CORPORATIONS—FIRE DEPARTMENT—DISCHARGE OF MEMBER—REINSTATEMENT.

Under Elmira City Charter, Laws 1894, p. 1458, c. 615, § 164, making it the duty of the board of fire commissioners to appoint a chief engineer and such assistant engineers as necessary, and providing that the chief engineer and an assistant engineer so appointed might hold their respective positions during good behavior or until the board by unanimous vote should decide that such chief engineer or assistant engineer was incompetent, but that in case of misconduct they might be removed by a majority of the board, where the first assistant engineer was removed and his office abolished, but by the same resolution of the fire commissioners another office was created having substantially the same duties, the changes being merely colorable, to permit the commissioners to remove occupants of that and other positions and substitute others, the first assistant engineer was entitled to reinstatement.

Mandamus by the people, on the relation of Elijah Lazarus, against William T. Coleman and others, constituting the board of fire commissioners of the city of Elmira. Order directed for the issuance of a peremptory writ.

H. H. Rockwell, for relator.

John F. Murtaugh, City Atty., for respondents.

COMAN, J. This is a proceeding by mandamus, instituted for the purpose of compelling the board of fire commissioners of the city of Elmira to restore the relator to duty as first assistant engineer of

the Elmira fire department and reinstate him in his said office or position of first assistant engineer. The motion for a writ of mandamus was made at Special Term and was denied. Thereupon the relator appealed to the Appellate Division, Third Department, and the order of the Special Term was reversed, and an alternative writ of mandamus granted. *People ex rel. Lazarus v. Coleman*, 99 App. Div. 88, 91 N. Y. Supp. 432. The respondents now raise the question that the Appellate Division had no jurisdiction to grant the alternative writ. This question seems to have been determined adversely to the respondents in the case of *People ex rel. Kavanagh v. Grady*, 20 App. Div. 27, 46 N. Y. Supp. 645. It would seem, also, that the only way in which the respondents can raise this question is by appeal from the order of the Appellate Division. In any event, I do not feel at liberty to review this question at this time, as such course would involve a review of the action of the appellate court in this very proceeding.

This case was originally tried before Mr. Justice Lyon and a jury at the Chemung Trial Term held in November, 1905, and resulted in a disagreement of the jury. The case was submitted to this court at this term upon the evidence taken upon the former hearing, under a stipulation of the parties. I have carefully read and considered the evidence in the case, and think that the following facts are clearly established by the evidence:

On the 1st day of February, 1904, and for some time prior thereto, the relator was a member of the fire department of the city of Elmira, holding the position of first assistant engineer. At the time in question there were also four other assistant chief engineers, designated, respectively, as second, third, fourth, and fifth assistant chief engineers. Under the provisions of the city charter (Laws 1894, p. 1458, c. 615, § 164) as then in force it was the duty of the board of fire commissioners to appoint a chief engineer and such assistant engineers as said board might deem necessary, through whom said board might promulgate all rules, regulations, and orders to the whole department, and who should have the immediate direction and control of the said department, subject, however, at all times, to the rules, regulations, and orders of said board, and to the orders of any member thereof, provided the orders of any such single commissioner do not conflict with the rules, regulations, and orders of said board then in effect, and such chief engineer and assistant engineer and each fireman appointed in the manner aforesaid may hold his respective position during good behavior, or until said board by unanimous vote shall decide such chief engineer, assistant engineer, or fireman to be incompetent or inefficient and cause his removal; but in case of misconduct on the part of such chief engineer or fireman, then he may be removed by the decision of a majority of said board as hereinafter provided, and in case said board, by reason of disagreement or otherwise, should fail to appoint in the manner above specified such chief engineer or necessary firemen, then a majority of such board may nominate and, with the approval of the common council, by concurring vote of at least two-thirds of the common council elected, may appoint such chief engineer or firemen, and upon warrant of appoint-

ment duly filed shall appear the approval of the common council, properly certified by the clerk, and all such appointments shall have the same effect as though made by the unanimous action of the board as hereinabove provided. At a meeting of said board of fire commissioners, held January 22, 1904, the following resolutions were adopted:

"Resolved, that on and after February 1, 1904, the following officers, to wit, first assistant engineer and fifth assistant engineer, be, and the same are, hereby abolished."

"Resolved, that on and after February 1, 1904, there be and are hereby established the offices of first district chief and second district chief, who shall respectively have charge of that part of the city lying east of the Erie Railroad and that part lying west of the Erie Railroad. Further resolved, that the said district chiefs shall have immediate control of the men, horses, and apparatus in their respective districts, and shall, in the absence of the chief in their respective districts, perform all duties to be performed by said chief in said district, and shall, in the absence of the chief, have full command of fires in said district. Further resolved, that the clerk of the civil service commission be requested to hold an examination as soon as possible of applicants for said offices and certify a list of said applicants eligible for appointment by this board to said offices."

"Resolved, that the second assistant engineer, third assistant engineer, and fourth assistant engineer be known and designated as 'captains'; that in accordance with said change rule 4 of the rules of the Elmira fire department be stricken out, and the following inserted: 'Rule 4. The officers of the department shall be known and designated as follows: First—Chief. Second—First District Chief. Third—Second District Chief. Fourth—Captain.'"

It will be readily seen that the duties and powers of the district chiefs, as prescribed in the resolution quoted, are exactly such as would be appropriate to an assistant chief engineer. The district chiefs are to "have immediate control of the men, horses, and apparatus in their respective districts, and shall, in the absence of the chief in their respective districts, perform all duties to be performed by said chief in said district, and shall, in the absence of the chief, have full command of fires in said district." I do not see how the duties of assistant engineer could have been more succinctly and clearly defined than is done by this resolution. It is true that the resolution divides the city into two districts, and that the first district chief is given charge of that part of the city lying east of the Erie Railroad and the second district chief of that part lying west of the Erie Railroad; but this is merely a division of duties and powers between the assistants which the fire commissioners could have made under the authority of section 162 of the charter, without any pretense of abolishing the office of assistant chief engineer or changing the name of said office.

It is entirely clear to my mind, from the evidence in the case and from the resolutions of the fire commissioners, that no substantial change was made in the office or its duties, that the changes were merely colorable, and that they were made for the purpose of permitting the fire commissioners to remove some or all of the occupants on the positions in question and substitute others in their places. I am not greatly concerned with the motives which prompted the members of the board to take this action. It seems to me that, whether their motive was political or personal, or whether it was solely to improve the efficiency of the department, is wholly immaterial. How-

ever proper their motives, they must follow the forms provided by law for the removal of the relator, and not resort to subterfuges to accomplish such purpose. The purpose and effect of their action was to remove the relator from a petition to which he had been regularly appointed, and which he was entitled to hold during good behavior, without taking the steps required by the charter, and without giving him any notice or opportunity to defend himself, as provided by the civil service law and the rules promulgated thereunder. The law looks at the substance, and not at the form, and if, by such a proceeding as this, the relator and others similarly situated could be removed from positions which were supposed to be protected by the civil service provisions of the state Constitution and laws, such provisions would become a mere mockery.

It is idle to say that the relator has not been removed from his position. A copy of the resolution quoted was served upon him by the clerk of the board, accompanied by a letter of notification that his services as a member would not be required after February 1, 1904. He reported for duty to the chief engineer on the morning of February 1st, and was told that his services were no longer required, and his insignia of office were demanded and taken from him. All those things came to the knowledge of the board, and, if they did not expressly ratify them, they impliedly did so by their silence and inaction.

I therefore direct that an order be entered for the issuance of a peremptory writ of mandamus, requiring the respondents, and, if necessary, their successors in office, constituting the board of fire commissioners, to restore the relator to duty as first assistant engineer of the Elmira fire department and to reinstate him in his said office, with costs and disbursements to be taxed.

POWERS v. MILLER.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. MASTER AND SERVANT—DEATH OF SERVANT—NEGLIGENCE—QUESTION FOR JURY.

In an action for the death of an employé in a stoneyard, resulting from a stone falling on him, whether the death was caused by defendant negligently causing the stone to be moved by a derrick *held*, under the evidence, a question for the jury.

2. TRIAL—DISMISSAL OF COMPLAINT—PROPRIETY—CONFLICTING EVIDENCE.

It is not proper to dismiss a complaint where there is a substantial conflict of evidence upon the material question in issue; and where there is any reasonable evidence in support of an issue, the litigants are entitled to have it submitted to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 359.]

Appeal from Trial Term.

Action by Annie Powers, administratrix, against David Miller, for negligent death. From an order setting aside a verdict for plaintiff and dismissing the complaint, and from a judgment thereupon entered, plaintiff appeals. Reversed, and new trial granted.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAMBERT, HOUGHTON, and SCOTT, JJ.

M. L. Malevinsky, for appellant.

George F. Hickey, for respondent.

LAMBERT, J. The plaintiff's husband was employed as a chain-man in the defendant's stoneyard on Second avenue, city of New York, on the 15th day of September, 1902. Working with him was one Beidenger. It was the duty of these men to fasten grabs upon a stone which was being handled by means of a derrick operated by steam power, so that the stone might be sawed to the proper dimensions. The stone was upon skids upon a car. The man who was operating the derrick was located some distance above the plaintiff's intestate and his fellow laborer. One cut had been made upon the stone. It was desired to change its position for a second cut. The defendant was present. The chain or rope, with the grab hooks, was lowered to the stone, Beidenger attached his grabs, and plaintiff's intestate was engaged in adjusting other grabs, when it is claimed that the defendant, intruding in a detail of the work, gave the signal to the derrick man to start the machinery without giving the deceased proper time in which to do his work, with the result that the grabs placed by Beidenger operated to turn the stone over upon plaintiff's intestate, causing his death. The defendant denied that he gave this order; but there was a clear conflict of evidence upon this point, and we are of the opinion that a question was presented for the determination of the jury.

Another theory was advanced by the defendant to the effect that both Beidenger and plaintiff's intestate had attached their grabs, and that the stone was raised some four or five inches from the car, when a piece of the stone chipped out under one of the grabs, causing the stone to fall, with the result as stated above. The learned trial court reserved a ruling upon a motion to dismiss the complaint until after the verdict. Then, upon a motion being made to set aside the verdict on the usual grounds, the court called up the motion to dismiss, and, on defendant making "all the motions," as counsel put it, the court set aside the verdict and dismissed the complaint. As already indicated, there was a question for the jury to determine, and it was error for the court to dismiss the complaint. It may have been proper to set aside the verdict on some of the grounds set forth in section 999 of the Code of Civil Procedure; but to go beyond that and dismiss the complaint, thus closing the door of recovery upon the plaintiff, is without warrant in the record. It is never proper to dismiss a complaint where there is a substantial conflict of evidence upon the material question in issue, even though in the judgment of the trial court the evidence is not sufficient to justify a verdict. The court may set the verdict aside and grant a new trial, and this it is often its duty to do; but, so long as there is any reasonable evidence in support of an issue, it is the right of litigants to have that evidence passed upon by the jury.

The order appealed from should be reversed, with costs, and a new trial granted, with costs to abide the event. All concur.

COHALAN v. PRESS PUB. CO.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

ACTION—CONSOLIDATION—LIBEL.

Where two actions for libel between the same parties were based on separate publications relating to a single official act by plaintiff, it was improper to deny defendant's motion to consolidate, since plaintiff should recover only actual damages and lawful punitive damages, which are recoverable in a consolidated action, while without a consolidation defendant cannot be protected against a recovery of greater damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 632-675.]

Appeal from Special Term.

Action by John P. Cohalan against the Press Publishing Company. From an order denying its motion to consolidate two actions brought by the plaintiff against it for libel, it appeals. Reversed, and motion granted.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

W. H. Van Benschoten (John M. Bowers, on the brief), for appellant.

William McArthur, for respondent.

LAUGHLIN, J. The defendant publishes a daily newspaper, known as the World, in which the alleged libelous articles were printed. The article which is the basis of the first action was published on the 4th day of May, 1907. In the editorial column of the World on that day, under the heading "The Black List," which was printed in capital type, the defendant published the names of 27 state senators, including that of the plaintiff, who voted against the removal of Superintendent of Insurance Kelsey, and at the close of the list stated that their names should be on the political black list of all honest citizens, that they were public enemies and should henceforth be treated as such, and that not one of them should ever again be allowed to hold an office of profit or trust by the votes of the people of our state. The complaint in the second action sets forth the publication on the 4th day of May, 1907, of the article which is the basis of the first action, the reiteration thereof in substance in the issues of the newspaper on the 5th and 6th days of May, the republication thereof in substance, with the addresses of the senators, on the 8th day of May, and the publication on the editorial page on the 9th day of May of a picture or cartoon of large dimensions, representing a public pillory, with a number of persons, including the plaintiff, standing thereon, with their necks and hands depicted as firmly fastened in the pillory, representing them as undergoing bodily torture and mental disgrace, with a placard above each, giving his name, and over one of such characters, conspicuously printed, was the name "Cohalan," and at the front edge of the platform was printed in large type the words "Public Contempt," and underneath the cartoon were printed the words "In the Pillory." Each action was commenced more than a month after the publication, and only two days intervened between the commencement of the two actions.

It is perfectly clear that all of the publications relate to the same matter. They are all criticisms of the action of the plaintiff and the other senators who voted against the removal of the Superintendent of Insurance, who was on trial before the Legislature. They do not reflect on the official conduct of the plaintiff generally or concerning many different acts. They all relate to a single official act. It would be impossible to separate the damages caused by the publication of each of these articles. It is manifest that they should be presented to the same jury, to assess the entire damages, should the plaintiff succeed, in one action. The plaintiff cannot be prejudiced by the consolidation of these actions, excepting upon the theory that, if he should be permitted to prosecute them separately, he might recover more damages than he has sustained; but that could only result from the liability of juries passing upon the articles separately to correctly estimate the damages caused by each separate publication, which is not prejudice recognized by the law. The plaintiff should recover only his actual damages and such punitive damages as the law allows. Those he may recover with the actions consolidated, and without their consolidation the defendant cannot be protected against a recovery of greater damages.

It follows, therefore, that the order should be reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs. All concur.

READER v. HAGGIN.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. PLEADING—BILL OF PARTICULARS—DEMAND FOR AFFIRMATIVE RELIEF.

A demand for affirmative relief is not essential to authorize the court to direct a bill of particulars, which may be granted of defenses not involving a counterclaim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 963-971.]

2. SAME.

In an action for slander, plaintiff alleged that defendant had stated that a mining company of which plaintiff was an officer was a fake concern, and that its officers were frauds, blackmailers, and liars. Defendant's answer set up that he was a stockholder in another mining company owning valuable mines in a certain district; that plaintiff and others organized plaintiff's company under a name similar to that of defendant's company to deceive the public; that plaintiff and other officers of her company issued advertisements falsely representing that their company owned mines which it did not own and that it was joint owner with defendant and others in some of their richest mines; that to injure defendant's company and extort money plaintiff requested an employé of defendant's company to prevent their acquisition of certain mines by inducing parties with whom defendant's company had contracted to break their contracts, etc. *Held*, that plaintiff was not entitled to a bill of particulars; it not being probable that she would be surprised by any proof offered under defendant's allegations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 963-971.]

Appeal from Special Term.

Action by Eleanor Rawle Reader against James B. Haggin. From an order denying plaintiff's motion for a bill of particulars of the partial defense contained in the answer, she appeals. Affirmed.

See 114 App. Div. 112, 99 N. Y. Supp. 681.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Alexander S. Bacon, for appellant.

Clifton P. Williamson, for respondent.

LAUGHLIN, J. The action is to recover damages for slander. The alleged slander relates to the plaintiff's connection with the Cerro de Pasco Tunnel & Mining Company. The slanderous words alleged to have been uttered by the defendant of and concerning the plaintiff, are as follows:

"The Cerro de Pasco Tunnel & Mining Company (a company of which the plaintiff herein was then and still is an officer) is a fake concern. It is a strike against me (meaning the defendant) and my associates. That Cerro de Pasco Tunnel & Mining Company has no property and it has no mines, and is a fraud on those who have been induced to buy its stocks. It is a fake concern. Its officers (meaning this plaintiff, among others) are frauds, blackmailers, and liars, and have published false statements about the financial condition, alleged property rights, and business of the company, and the purpose of the company is to blackmail me and my associates as owners of mines in Peru."

The complaint contains seven counts, each alleging the utterance of the same slanderous words, but to different people and at different times. The facts pleaded "for a separate and partial defense to the entire amended complaint herein and by way of mitigation of damages," concerning which the plaintiff desires a bill of particulars, are, in substance, that the defendant was a stockholder in the Cerro de Pasco Mining Company, a widely known and reputable corporation owning valuable mines in the Cerro de Pasco district of Peru; that the plaintiff and others organized the Cerro de Pasco Tunnel & Mining Company, mentioned in the alleged slanderous utterances under a name closely resembling the name of the company in which the defendant was a stockholder, for the purpose of deceiving the public and inducing the investment of money in its stock and obligations, in the belief that it was the company in which defendant was a stockholder, to his injury and to the injury of his company; that the plaintiff and the other officers of the company with which she was connected issued or caused to be issued prospectuses and advertisements falsely, stating and representing that their corporation owned or controlled mines and other properties which it did not own or control, and that it was joint owner with the defendant and certain of his associates in some of their richest mines in said district of Peru, and thereby induced the purchase of stock in the new company in the belief that such statements were true; that with the purpose and intent of causing the older company, in which defendant was a stockholder, and the defendant and his associates as owners of mines in Peru, great injury and pecuniary loss, and of extorting money from them, and of hindering, embarrassing, and otherwise injuring them in the acquisition of mines in said dis-

trict, the plaintiff procured the new company to be incorporated with a name closely resembling the other, and requested one Juan Garland, who then was and prior thereto had been employed in Peru by the old company and by the defendant and his associates, to betray his employers and prevent their acquisition of certain mines by inducing and procuring parties in Peru who had made contracts under which their mines were to be acquired to violate such contracts and to institute legal actions and proceedings to recover possession of the mines, and sought to coerce the old company, the defendant and his associates, into paying a large sum of money "to the plaintiff and her said corporation."

A demand for affirmative relief is not essential to authorize the court to direct a bill of particulars, and bills of particulars are granted of defenses not involving a counterclaim or demand for affirmative relief, as of a defense of breach of warranty to an action on an insurance policy (*Dwight et al. v. Germania Life Ins. Co.*, 84 N. Y. 493), or of contracts interposed as a defense (*Kelsey v. Sargent*, 100 N. Y. 602, 3 N. E. 795), or of matter pleaded in justification in libel (*Wynkoop-Hallenbeck-Crawford Co. v. Albany Evening Union Co.*, 26 App. Div. 623, 49 N. Y. Supp. 662); but doubt has been expressed in some cases as to the propriety of requiring or the authority of the court to order a bill of particulars with respect to matter pleaded as a partial defense or in mitigation of damages (see *Hatch v. Matthews*, 85 Hun, 522-529, 33 N. Y. Supp. 332; *Newell v. Butler*, 38 Hun, 104; *Holmes v. Jones*, 13 N. Y. St. Rep. 57). It is unnecessary in this case to resolve the doubt on that point, and, since matter pleaded as a partial defense or by way of mitigation may, in some instances, render admissible the introduction of evidence which may reduce the recovery to nominal damages in which case it would differ from a complete defense only in a very small degree, I deem it inadvisable at this time to express an opinion on the question. In so far as the matters pleaded as a partial defense and by way of mitigation are not specific and definite charges, they relate to the motives of the plaintiff, to official action by the company with which she was connected or its officers, in which she participated, or to printed or written matter prepared and issued, or caused to be prepared and issued, by her and other officers of the company. It is not probable that any proof will be offered under these allegations which will take the plaintiff by surprise, or which she will not be as well prepared to meet as if defendant were required to furnish her a bill of particulars.

It follows that the order should be affirmed, with \$10 costs and disbursements. All concur.

WEBER v. INTERNATIONAL RY. CO.

(Supreme Court, Special Term, Erie County. December 30, 1907.)

1. DAMAGES—INQUISITION—VACATION—ERRORS.

An inquisition on a writ of inquiry before the sheriff having been voluntarily entered into, defendant was not entitled to have the same vacated and a new writ issued for trial before the court merely because of the admission of improper evidence by the sheriff, unless it appeared to the trial court that injustice had been done.

2. SAME—HEARING.

On a motion to set aside a finding of a sheriff's jury and to issue a new writ of inquiry, the court will not critically examine the effect of each objection to evidence made, but will merely consider the case as a whole.

3. SAME—PAIN AND SUFFERING.

In an action for personal injuries, pain and suffering is an element of damage of which there is no specified standard.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 233.]

4. EVIDENCE—DEMONSTRATIVE EVIDENCE—BLOODY CLOTHING.

On a writ of inquiry before a sheriff's jury in an action for personal injuries, defendant was not prejudiced by plaintiff's exhibiting to the jury a shirt saturated with blood which plaintiff wore at the time he was injured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 679.]

5. SAME—RECORD—CONTENTS—ADDRESS OF COUNSEL.

On a motion to set aside an inquisition before a sheriff's jury and for the issuance of a new writ of inquiry, it was neither necessary nor proper to present the whole address of counsel before the sheriff's jury to the court, though certain portions thereof were objected to.

Action by Henry M. Weber against the International Railway Company. On motion to set aside an inquisition and for the issuance of a new writ of inquiry. Motion denied.

John H. Clogston and John H. Brogan, for plaintiff.
Cohn & Chorman, for defendant.

MARCUS, J. This is a motion to set aside an inquisition, and that a new writ of inquiry issue. The action was brought to recover damages for personal injuries sustained in a collision of railway cars, and the evidence shows that the injuries are of a serious character. The jury awarded \$4,000 damages.

In *Bossout v. Rome, etc., R. Co.*, 131 N. Y. 37, 29 N. E. 753, it is held that, even where the assessment is by a jury at circuit, the rules for reviewing the trial of an action did not prevail, that a motion may be made to set aside the inquisition, but it will not be granted, however, simply because of the admission of improper evidence, but only where it appears that injustice has been done; and the motion is addressed to the discretion of the court. A fortiori where the assessment is by a sheriff's jury under the supervision of a layman. In *Sharp v. Dusenbury*, 2 Johns. Cas. 117, the court said:

"The parties, by their agreement, made the sheriff as a judge at a circuit; and when parties agree to submit a controversy to the decision of the sheriff, the inquest is to be considered as in the nature of an arbitration, and in such case the court will never set aside the inquisition merely because the sheriff admits improper, or rejects proper, evidence."

In *Mankleton v. Lilly*, 3 N. Y. St. Rep. 421, the action was for slander, and the sheriff permitted the defendant to introduce evidence of matters which had no legitimate bearing in mitigation of damages. The jury award plaintiff \$50, and the court set aside the inquisition. But that case is materially different in its circumstances.

The defendant's counsel had the privilege of having the damages assessed by a jury at the trial term, under the supervision of a justice of this court, but did not see fit to avail himself of it, but consented that they should be assessed by a sheriff's jury. He now asks that the ver-

dict be set aside, and that the execution of any new writ of inquiry herein be had before a justice of this court at a regular trial term thereof. Counsel was aware that plaintiff would call physicians to establish the nature and extent of his injuries, and that various questions would be put to them calling for their professional opinions upon a variety of matters relating to the same, including the reasonable certainty or even probability of the injuries being of a permanent character. It was not to be expected, of course, that the sheriff would be competent to make rulings upon the admissibility of evidence of that kind without falling into frequent, and, perhaps, serious, error. It is neither expected nor required that the sheriff shall apply the rules of evidence with the same strictness or accuracy as a judge trained in the law. Of all this the counsel was well aware, and yet he thought it advisable or desirable to try the experiment, take the risk, and run his chances. Now, he seeks to be relieved of the resultant consequences, upon the ground that the sheriff really did commit the very kind of errors he might have been expected to commit, under the circumstances. Perhaps it would be more charitable to relieve the sheriff from the accusation and impose the responsibility upon plaintiff's counsel. Some of the questions, however, to which objection was taken, and which related to the probabilities as to the permanency of the injuries, and so forth, may, it would seem, be sustained upon the authority of *Kelly v. United Traction Company*, 88 App. Div. 283, 85 N. Y. Supp. 9.

Numerous objections to evidence were taken during the course of the hearing, but it is not reasonable to expect that the court, upon a motion of this character, should review all, or even most of them, or critically examine and weigh the effect of each item. The duty of the court is merely to take the case as a whole and weigh it as a whole, and then determine whether the ends of justice require our interference with the verdict. The ground of defendant's motion is that the damages are excessive, and made so by the admission of certain incompetent, speculative opinions of the physicians, and other testimony of an inadmissible character. The jury may, possibly, have given a little more damages than they otherwise would if some of this evidence had been excluded, but this is not apparent—only problematical and doubtful—for, leaving out of consideration some of this evidence that counsel says is merely opinion as to probable consequences, there remains ample competent testimony as to the serious character of the injuries, and their effect upon plaintiff's ability to earn a competent and sufficient livelihood for himself and family. Taking the facts alone, and the fair, just inferences that the jury would be warranted in drawing therefrom, it cannot be said that the verdict rendered was unfair, unjust, or excessive. The pain and suffering was an element of damage—of which there is no standard—and we must assume that the jury took that in consideration in making up their award. Defendant called two physicians whose opinions were, as usual in such cases, in some respects inconsistent with or in contradiction of the testimony given by the plaintiff's two experts. These experts were examined and cross-examined, and re-examined in a most thorough manner, and the whole matter was most thoroughly threshed out for the benefit of the jury. They formed their judgment upon all the material, and we

do not perceive it is our duty to set aside their verdict. Upon appeal from decision of surrogates, who are counsellors at law, their judgment will not be reversed for error in admitting or rejecting evidence, unless it appears that the exceptant was necessarily prejudiced thereby. Code Civ. Proc. § 2545. And in equitable suits a judgment will not be reversed because of the admission of improper evidence, unless it can be seen that the error has affected the result. *Nickell v. Tracy*, 100 App. Div. 86, 91 N. Y. Supp. 287. And this rule should be most liberally applied in favor of the rulings of a sheriff—a mere layman—and to uphold the determination of the jury.

Another ground of objection is that plaintiff's counsel was permitted to make "divers improper statements to the jury during the conduct of the case and in summing up the case before the jury" to the defendant's prejudice; that "it was the duty of the counsel to use even greater care than upon the trial of an issue to do nothing which should prejudice." We believe it is permissible even in trials for homicide to exhibit the bloody clothes to the jury, but surely it was to be expected that the plaintiff's shirt should be saturated with blood, and it is not perceivable how the jury could be prejudiced by showing that of which they were already supposed to be cognizant. The learned counsel, it appears, used improper and intemperate expressions, displayed great zeal and ardency in behalf of his client, and perhaps went beyond the bounds of legitimate advocacy. Still we are unable to perceive that it is the duty of the court to set aside the inquisition in view of all the evidence adduced. We are not aware that counsel have a legal right to sum up to the sheriff's jury; however, both counsel apparently consented to it, as both availed themselves of the privilege. And, however edifying and instructive the address of counsel may be, it is neither proper nor necessary, in a matter of this kind, to present the whole of it to the court.

Motion denied, with costs.

PEOPLE v. WEICK.

(Supreme Court, Appellate Division, First Department. January 10, 1906.)

1. CRIMINAL LAW—TRIAL—HYPOTHETICAL QUESTIONS.

A hypothetical question in a homicide case, stating that an instrument used looked like one or the other of certain instruments and that a certain substance seen looked like skin or membrane, was proper, where the testimony was in the language of the question and the witness was familiar with the instruments named, but could not state definitely on account of the brief view.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1073, 1074.]

2. HOMICIDE—POSSESSION OF INSTRUMENTS—CONDUCT.

In a manslaughter case, it is proper to show that shortly after an alleged abortion accused had in her possession instruments for that purpose, and tried to hide them or gave an unreasonable explanation for her possession of them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 364.]

3. CRIMINAL LAW—TRIAL—CONDUCT OF COUNSEL.

Conduct of the prosecuting attorney in attempting to go outside the evidence in a criminal case is not prejudicial, where it was promptly objected

to and he was admonished by the court to confine his remarks to comments on the evidence before the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1693.]

4. SAME—APPEAL—REVERSAL.

The fact that in a criminal prosecution the November term was extended into December, and that the place of trial was transferred from the Criminal Court building to the County Courthouse, will not warrant a reversal of a conviction.

Appeal from Criminal Term, New York County.

Margaret Weick was convicted of manslaughter in the first degree, and appeals. Affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Edward Hymes, for appellant.

Robert S. Johnstone, Deputy Dist. Atty., for the People.

HOUGHTON, J. The defendant was indicted for manslaughter in the first degree in having caused the death of one Matilda Walsh through performing a criminal operation upon her, and the trial jury found a verdict of guilty as charged. The record discloses sufficient evidence to warrant the jury in finding that the decedent was pregnant, and that the defendant performed, by means of an instrument, an unnecessary abortion upon her, from the effects of which she died. The defendant introduced no evidence in her own behalf, and she does not press insufficiency of evidence as a ground of reversal; but she insists that the hypothetical question which the court permitted to be propounded to the people's expert witness was improper, and embraced facts not established by the evidence, and that the people were erroneously permitted to prove that on the day following the alleged operation several "bougies"—instruments used for producing abortion—were found in defendant's possession, and, further, that the assistant of the district attorney, representing the prosecution, was guilty of improper conduct upon the trial.

We think none of these positions are well taken. The principal objection to the hypothetical question is that it embraced a statement that the instrument which the witness saw the defendant withdraw from the vagina of the decedent looked like a bougie or catheter, and that in the bloody discharge from her person there were substances which looked like skin or membrane, and that upon the post mortem examination there was present in the uterus a substance that looked like placental tissue to the doctors who observed it. Various witnesses had testified before the jury in the language stated in the question. The witness who saw the instrument withdrawn from the person of the deceased could not say positively, from the brief view she had of it, that it was a bougie or catheter; but she testified, being familiar with the instruments, that it looked like one or the other, either of which could be used to produce abortion, and she also testified that in the bloody discharge there was a substance which looked like membrane or skin. This was permissible evidence, and was testimony as to facts. Testimony that an observed thing looked to the

observer like a known object does not prove conclusively that it was in fact that particular thing; but it is some evidence that it was such, and, taken in connection with other evidence, might wholly satisfy the minds of the jury. The hypothetical question was therefore proper, because it accurately stated the facts which had been proved. If the jury found the facts to exist as they were assumed in the question, then they could be guided by the conclusion of the expert; but they were not, even then, bound by his conclusion.

It was entirely proper to prove that, shortly after the alleged performing of the abortion, the defendant was in possession of instruments for that purpose, and that she tried to hide them, or gave an unreasonable explanation of her possession of them. Such evidence is permissible upon the same principle as possession of burglar's tools near the scene and about the time of a burglary, which has always been deemed proper evidence upon a trial for that crime.

The assistant district attorney in his summing up allowed his zeal to lead him into attempting to make some statements outside the evidence. These were promptly objected to by the defendant's counsel, and he was admonished by the court to confine his remarks to comments upon the evidence before the jury. We are of the opinion that no harm could have resulted to the defendant from what was said. If any prejudice was created in their minds from what took place, it would naturally be against the rebuked prosecution rather than the defendant.

For the purpose of saving to herself whatever point there may have been in the fact that the November term was extended into December, and the place of trial transferred from the Criminal Court building to the County Courthouse, the defendant raises the question upon this appeal. That question was before us in habeas corpus proceedings in *People ex rel. Weick v. Warden of the City Prison, etc.*, 117 App. Div. 154, 102 N. Y. Supp. 374, and this court decided against the defendant's contention.

We find no error requiring a reversal of the conviction, and, there being sufficient evidence to warrant the jury in finding the defendant guilty, it should be affirmed. All concur.

PEOPLE ex rel. DANZIGER v. METZ, Comptroller.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. MUNICIPAL CORPORATIONS—MARKET PERMIT—ASSIGNMENT—OPERATION AND EFFECT.

Market stalls are rented on permits issued by the city comptroller, and are not assignable without his written consent. The rentals are fixed by the commissioners of the sinking fund. Relators' assignor, under his permit, was allowed to sell country produce, including live poultry. The assignment was duly approved by the comptroller and commissioners, and the sum to be paid therefor fixed. *Held*, that the comptroller cannot limit relators' privileges by excepting live poultry; they being entitled to a permit exactly like that which their assignor held.

2. MANDAMUS—SUBJECTS OF RELIEF—MINISTERIAL ACTS IN GENERAL.

Where the permit to a market stand is assigned with the approval of the proper authorities giving the assignee the same privileges as were pos-

sessed by the assignor, and the comptroller refuses to issue the assignee a permit without restricting the privileges, mandamus will lie to compel him so to do; the issuance of the new permit being purely a ministerial act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 83, Mandamus, §§ 180-194.]

Appeal from Special Term.

Mandamus by the people, on the relation of Adolph Danziger, against Herman A. Metz to compel respondent, as comptroller, to issue appellants a certain permit. Motion denied, and relator appeals. Reversed, and relief granted.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Edward W. S. Johnston, for appellants.

Theodore Connolly, for respondent.

McLAUGHLIN, J. The relators are the assignees of certain stalls or stands in West Washington Market in the city of New York. These stalls are rented on permits issued by the comptroller of the city, and are revocable for good cause—not assignable without the written consent of the comptroller. The rentals are fixed by the commissioners of the sinking fund, who, together with the bureau for the collection of city revenue and markets, have the general management and control of the market. Greater New York Charter, Laws 1901, p. 58, c. 466, § 163. The assignment to the relators was duly approved by the comptroller and the commissioners of the sinking fund. The permit under which the assignor of the relators occupied the stand allowed them to sell "country produce"; but the permit issued to the relators contained the provision:

"The above stand to be occupied only as a stand for the sale of country produce. Selling live poultry strictly prohibited."

They objected to the insertion in the permit of the words "selling live poultry strictly prohibited," and requested that the same be taken out. This was refused, and thereupon they moved for a peremptory writ of mandamus directing the respondent to issue to them a permit to use the stalls for the sale of country produce without the restriction, or to amend the permit which they had by striking the same therefrom. Their motion was denied, and they have appealed.

I am of the opinion that when the assignment to the relators was approved by the comptroller and the commissioners of the sinking fund, and the sum to be paid therefor fixed, the relators thereupon became entitled to exactly the same rights which their assignor had previously had under its permit. The assignment, with the consent of the necessary officers, might have been indorsed on the old permit. That being so, the issuance of the new permit was a purely ministerial act, and mandamus will lie to compel its performance (*People ex rel. Harris v. Commissioners of the Land Office*, 149 N. Y. 26, 43 N. E. 418; *People ex rel. McCabe v. Matthies*, 92 App. Div. 16, 87 N. Y. Supp. 196, affirmed 179 N. Y. 242, 72 N. E. 103); otherwise the assignment which they obtained for a valuable consideration, and for which they had obtained the requisite consent, might be partially or wholly de-

stroyed by the arbitrary act of the respondent. No affidavits were presented in behalf of the respondent, so that we must assume the material allegations in the petition to be true, and, if this be done, then the relators were clearly entitled to a permit in the form requested.

What the respondent claims is that the issuance of permits rests entirely in his discretion; and, inasmuch as it does not appear that the discretion was abused, the writ ought not to issue, in the absence of some statute commanding it. This may be true in the first instance; but, inasmuch as that is not the question now before us, we do not pass upon it. The question here is whether the respondent, after having approved of the assignment, can arbitrarily change the permit by issuing one containing greater restrictions than the one held by the assignor. After a permit has once been issued, it cannot be revoked without good and sufficient cause (Greater New York Charter, Laws 1901, p. 53, c. 466, § 151, subd. 1), and no such cause is here shown; on the contrary, the action of the comptroller would seem to be arbitrary and without justification. There are many stalls or stands immediately adjacent to those of the relators, where live poultry is being sold under permits to sell country produce. The relators' assignor sold live poultry at these stalls for a long time, and it is a little significant, in view of these facts, that the respondent should insist on issuing a permit restricting the relators in such sale. But, whether significant or not, what we hold is that the relators, upon obtaining the consent of the comptroller and the commissioners, without reservation, that the permits and stands should be transferred to them, thereupon became absolutely entitled to a permit exactly like that which their assignor held, and its issuance, as already said, was a ministerial act only, the performance of which may be compelled by peremptory writ of mandamus.

The order appealed from, therefore, must be reversed, with \$10 costs and disbursements, the motion granted, and a writ issue commanding the comptroller to strike from the permit issued to the relators the words "selling live poultry strictly prohibited," or to issue another permit with such words omitted, with \$50 costs. All concur.

SINGER v. GARLICK.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

COSTS—PAYMENT—STAY OF SUBSEQUENT ACTION.

Where a plaintiff is unsuccessful in an action, and costs are therein awarded to defendant, another suit to recover upon the same cause of action cannot be maintained until the costs are paid.

Appeal from Special Term.

Action by David L. Singer against Isadore Garlick. From an order denying a motion to stay proceedings until the costs of a former action between the parties are paid, defendant appeals. Reversed, and motion granted.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Louis Cohn, for appellant.
Julius Blumofe, for respondent.

McLAUGHLIN, J. This appeal is from an order denying a motion to stay proceedings in the action until the costs in a prior action brought upon the same cause of action were paid. The plaintiff, on the 14th of April, 1905, brought an action in the County Court of Kings county. Issue was joined therein, and the action thereafter came on for trial, which resulted in a dismissal of the complaint, with \$107.33 costs and disbursements. Copy of the judgment, with notice of entry, was duly served upon plaintiff's attorney. No appeal was taken from the judgment. Subsequently the plaintiff brought this action in the Supreme Court, the venue being laid in the county of New York, to recover upon the same cause of action. A motion was thereupon made to stay the prosecution of this action until the costs of the former action were paid. The motion was denied, and the defendant appeals.

The fact is uncontradicted that this action is brought to recover upon the same cause of action upon which a recovery was sought in the former action, in which the plaintiff was unsuccessful, and in which costs were awarded to the defendant, and that such costs have not been paid. It has many times been held that where a plaintiff is unsuccessful in an action, and costs are therein awarded to the defendant, another action to recover upon the same cause of action cannot be maintained until the costs are paid. *Ingrosso v. Baltimore & Ohio R. R. Co.*, 105 App. Div. 494, 94 N. Y. Supp. 177; *Wilner v. Independent Order Ahawas Israel* (decided at the November term, and not yet officially reported) 107 N. Y. Supp. 497; *Bigelow v. Drummond*, 109 App. Div. 132, 95 N. Y. Supp. 1027; *Muratore v. Pirkel*, 109 App. Div. 146, 95 N. Y. Supp. 855.

The order appealed from, therefore, must be reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs. All concur.

SMETANKA v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. RAILROADS—OPERATION—INJURIES TO LICENSEES—CARE AS TO LICENSEES.

Defendant's railroad tracks ran at the foot of a cliff, and a number of people living on the face of the cliff made a practice of crossing the tracks midway between two highways about 600 feet apart, at which there were flagmen. A fence on the side of the tracks opposite the cliff had become dilapidated, and had been rebuilt with openings at intervals to permit persons to pass through. *Held*, that those living on the cliff were merely licensees to cross the tracks, and did not constitute the crossing such a public thoroughfare as to require defendant to sound a warning at that point.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1228-1237, 1261.]

2. SAME—CONTRIBUTORY NEGLIGENCE OF PERSONS INJURED.

In an action against a railroad company for death of plaintiff's intestate, a finding that decedent was not guilty of contributory negligence *held* against the weight of evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1360.]

Appeal from Trial Term, New York County.

Action by George Smetanka, administrator, against the New York Central & Hudson River Railroad Company. From a judgment for plaintiff and an order denying motion to set it aside, defendant appeals. Reversed, and new trial granted.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Robert A. Kutschbock, for appellant.

Ira B. Wheeler, for respondent.

HOUGHTON, J. Plaintiff's intestate was killed by a train while he was attempting to cross the defendant's track on foot. The accident did not occur at a highway crossing, but midway between two highway crossings, about 600 feet apart, at each of which defendant maintained a flagman. The defendant's two-track railroad runs northerly and southerly at this point, and on the easterly side between these highways is a high cliff, scattered on the face of which are 10 houses, the inhabitants of which, instead of going to either highway, have been in the habit of climbing down the cliff and crossing the tracks at places between the streets. On the west of the tracks there is a highway, and between them and the highway defendant has maintained a fence. Some five or six years ago the fence, being dilapidated, was rebuilt, and an opening between posts in three places was left, through which foot passengers might pass by stepping over the lower board. The record does not disclose whether these openings were left by defendant's carpenters when the fence was built or made shortly thereafter, but they have existed since the new fence was erected. Plaintiff lived on the cliff, and the deceased boarded with him, and both worked in a foundry which was west of defendant's railroad tracks and up the parallel highway. The accident happened about 5 o'clock in the afternoon on the 29th of March, and hence in daylight. Plaintiff and the deceased were coming from work at the foundry, and passed the first highway and came to the middle opening in the fence, and plaintiff testifies that the deceased, who was just ahead of him, looked both ways before stepping through the opening, and waited for a train to pass on the near track, and then crossed that track, and was hit by one coming from an opposite direction and killed. The train which first passed left steam and smoke which enveloped the deceased, and this is given as an excuse why he did not observe the train which hit him, and which except for the smoke could have been seen as it approached from 400 to 600 feet. The theory of the plaintiff upon the trial which resulted in a verdict in his favor was that the defendant had permitted pedestrians to cross the tracks at this place for so long a time that it amounted to a license and permission so to do; and hence that a duty was imposed upon defendant in respect to such persons to exercise care in the movement of its trains at that point, and that the deceased was shown to have used due care because he looked and listened and waited for one train to pass before attempting to cross. The plaintiff predicates defendant's negligence upon proof that no whistle was sounded or bell rung.

We are of the opinion that the crossing was not such a one as made it the duty of the defendant to give any warning of the approach of trains. The crossing place was used only by those persons who dwelt upon the cliff, which was difficult of ascent, and necessarily could not be used as a general route of travel. It was not, therefore, a public thoroughfare for a considerable number of people, but only a way used for convenience by the comparatively few persons living upon the cliff. There was a street on each side of them, and no house was more than 300 feet from one or the other of the streets, and access could be had in going around at a proper crossing by walking a slightly greater distance and taking a few moments more of time. The case is not governed by the decisions of *Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 289, 44 Am. Rep. 377, and *Byrne v. Same*, 104 N. Y. 362, 10 N. E. 539, 58 Am. Rep. 512, and *De Boer v. Brooklyn Wharf Co.*, 51 App. Div. 289, 64 N. Y. Supp. 925, in each of which cases there was dispute either as to whether the crossing was a public highway, or whether it had been used by the general public for a long period of time. Nor is it controlled by the peculiar features existing in *Swift v. Staten Island Rapid Transit R. R. Co.*, 125 N. Y. 645, 25 N. E. 378, if, indeed, the rule laid down in that case can still be deemed to be the law in view of the recent decision of the Court of Appeals in *Keller v. Erie R. R. Co.*, 183 N. Y. 67, 75 N. E. 965. The rule enunciated in *Sutton v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 243, is more applicable to the situation disclosed. In that case it was held that, although a railroad company by permitting people repeatedly to cross its tracks at a point where there is no public right of passage has given an implied license so to do, it owes no duty of active vigilance to those crossing to guard them from accident. It is manifest that this rule is the only practical and reasonable one to apply to the great track line railroads at least, where scores of trains are operated daily and necessarily at a high rate of speed.

It is true that the defendant either made or permitted to exist the openings in the fence, but its reasonable answer to this is that from experience the fence would be torn down by the few people who desired to cross, and hence it was better to leave openings. Even this act of the defendant did not make the footpath a public crossing, and impose upon it the active duty of being on the lookout for pedestrians, such as exists respecting a public highway. There is no claim that the defendant wantonly injured the deceased, or failed to do what it ought when its engineer observed his peril. Nor was the train going at a reckless rate of speed, for it had only got under way after stopping at the Spuyten Duyvil Station. But, if it be said that there was some duty of care which the defendant omitted, still we think the deceased was not shown free from contributory negligence. Smoke and steam had settled down upon him after the first train passed. Notwithstanding this obstruction to his vision, he proceeded to cross the tracks. Under such condition, it was his duty to wait until the smoke had disappeared. *Heaney v. L. I. R. R. Co.*, 112 N. Y. 122, 19 N. E. 422; *Keller v. Erie R. R. Co.*, 183 N. Y. 67, 75 N. E. 965. It is no answer to say that he was only 16 years of age, and unfamiliar with the operation of railroads. He had been living with the plaintiff for two

weeks and had crossed and recrossed the tracks, and must have observed that trains passed and repassed frequently. Had he waited until the smoke cleared, he could have seen the approaching train for several hundred feet. That he did not wait until the smoke cleared is conclusively established by the testimony of plaintiff's witnesses, who observed him from the cliff as he came through the opening in the fence. They saw him then, but, by reason of the smoke, could not see him as he proceeded to cross. Notwithstanding his age and inexperience, it is shown that he did appreciate the danger from passing trains, because it was proved that he looked both ways when he came to the fence, and waited for the first train to pass. Even if it be said that under the circumstances the decedent was not guilty of contributory negligence as matter of law, still the finding of the jury that he was free from negligence is against the weight of evidence, and cannot be upheld.

The judgment and order should be reversed, and a new trial granted, with costs to the appellant to abide the event. All concur.

CONN v. CHAMBERS.

(Supreme Court, Appellate Division, First Department. January 10, 1906.)

1. FACTORS—WHO ARE FACTORS.

Plaintiff, a musical instrument manufacturer, agreed to appoint defendant his exclusive agent in New York, and to advance necessary funds to pay rents for the first six months, to be repaid within three months from the date of the advance, and to consign on sale to defendant the stock necessary to equip the agency. Defendant agreed to rent, at his own expense, a suitable apartment, employ necessary assistance, devote his time to the sale of plaintiff's wares, and to pay plaintiff certain percentages of the advertised price of the merchandise. Defendant also agreed to make monthly settlements and remit for all balances due plaintiff, to keep up the stock of instruments, etc., by reordering as fast as sold and to pay monthly for such instruments and music so reordered, and for all other instruments and music at the rate specified. *Held*, that the contract was for the sale of goods on credit, and did not create a fiduciary relation between the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Factors, § 1.]

2. SAME.

Such construction was not changed by a subsequent writing by which defendant acknowledged his indebtedness to plaintiff in payment for musical instruments, etc., which he promised to pay in specified monthly installments, and authorizing plaintiff, in case of failure, to institute such legal proceedings against him as the circumstances might warrant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Factors, § 1.]

Patterson, P. J., and Scott, J., dissenting.

Appeal from Trial Term.

Action by Charles G. Conn against William P. Chambers. From a judgment on a directed verdict in favor of plaintiff, and from an order denying defendant's motion for a new trial, defendant appeals. Reversed and remanded.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Louis Steckler (Nelson L. Keech, of counsel), for appellant.
Henry J. McCormick, for respondent.

CLARKE, J. The complaint alleges that the defendant was the agent of the plaintiff for the sale at the city of New York of divers musical instruments, accessories, and sheet music consigned and delivered to him by the plaintiff for sale, and as such agent acted in a fiduciary capacity and had and received the money proceeds of said property; that between certain dates the plaintiff consigned and delivered to the defendant as his certain agent and bailee for sale divers goods which it was the duty of said agent to sell at agreed prices, and, after deducting his certain commissions on such sales, to pay over to the plaintiff the proceeds thereof; that the defendant, as the agent and bailee of the plaintiff, did sell to divers persons said goods, and did receive therefor moneys, the property of the plaintiff, and, after deducting all commissions, had in his possession \$2,865.09 money and property of the plaintiff, which it was the defendant's duty to pay over to him; that the plaintiff has frequently demanded said sum, but the said defendant, contrary to his duty as agent and bailee, has neglected and refused such demands, and wrongfully, unlawfully, and fraudulently converted and appropriated to his own use the money and property of this plaintiff, no part of which has been paid. The answer admitted that the defendant sold divers musical instruments, accessories, and sheet music for and on behalf of the plaintiff, and that the defendant received of the plaintiff divers goods, but denies the allegations of the complaint alleging that he acted in a fiduciary capacity, and that it was his duty, after deducting his certain commissions on such sales, to pay over to the plaintiff the proceeds thereof, or that he had received any sums of money for the sale of goods as the property of the plaintiff, or that he had fraudulently converted and appropriated any money or property of the plaintiff. At the time of the commencement of the action an order of arrest was issued. The defendant was arrested and held in bail.

The defendant executed a paper which was as follows:

"I hereby acknowledge my indebtedness to Charles G. Conn of Elkhart, Indiana, in the sum of \$2,865.09 in payment of musical instruments, musical merchandise and music consigned to me on sale, and the amount above is now due from me to Charles G. Conn, and I promise to pay to the said Charles G. Conn \$50 on the 10th of February, 1902, and \$50 on the 10th of each and every month thereafter until the amount is paid in full, and in the event of my failure to make any payment as stipulated, the said Charles G. Conn shall have the right to institute legal proceedings against me, as the circumstances may warrant."

The court denied a motion to dismiss the complaint, denied a motion to go to the jury upon the question whether or not the complaint and the evidence presented was sufficient to say whether or not there was a conversion, and upon motion of the plaintiff directed a verdict for \$3,522.26. From the judgment thereon entered, and the order denying a motion for a new trial, this appeal is taken.

The question submitted is whether the cause of action stated in the complaint, conversion, was sustained. The complaint alleges, and the respondent maintains, that the goods were sent by the plaintiff to the

defendant and received by him as the agent of the plaintiff to sell for the plaintiff, the proceeds thereof to be forwarded to the plaintiff after the deduction of the defendant's commissions, and that thus a fiduciary relation was established between the plaintiff and the defendant, and that, by his failure to pay over the amount received by him for the goods so received and sold, he converted said amounts to his own use, and that the judgment was proper.

The determination of this question is not to be settled by the allegations of the complaint, but by the proof of the relations between the parties as set forth in the written contract in evidence in the case. This agreement began, by its terms, on the 15th of December, 1900, and was for a period of five years. The plaintiff agreed to appoint the defendant the exclusive agent in Greater New York for the sale of the musical instruments manufactured and music published by the plaintiff, and agreed to advance to the defendant, if so required by him, the necessary funds to pay the rent for the apartment occupied by said agency during the first six months of the period described in the agreement, said amount advanced to be paid back within three months from the date of the advance, and agreed to consign on sale to the defendant a stock of sample musical instruments and music of such an extent as the defendant might deem necessary to properly establish and equip said agency. The defendant agreed to rent, at his own expense, a suitable apartment adequate to the needs of said agency, and to employ, at his own expense, such assistance as he might deem necessary for the successful conduct of the agency, and to devote his time and best efforts for its success and to the sale of said musical instruments manufactured and music published by plaintiff. The contract further provided:

"And the said Chambers agrees to pay to said Conn at his office in Elkhart, Indiana, for all musical instruments supplied by said Conn 75 per cent. of the advertised price and for the band and orchestra and solo music 40 per cent. of the advertised price, and for the vocal and piano music 25 per cent. of the advertised price. The said Chambers further agrees that monthly settlements of all accounts with the said Conn in accordance with the agreement shall be made and payments promptly remitted for all balances due the said Conn in such a manner as the said Conn may hereinafter direct. And the said Chambers agrees to keep the aforesaid stock of musical instruments and music consigned by the said Conn to the said Chambers on sale complete by reordering as fast as sold or disposed of, and to pay monthly for such instruments and music so reordered and for all other instruments and music at the rate of discount from advertised prices as aforesaid."

This paper does not support the interpretation put upon it by the allegations of the complaint. The relation created by it between the plaintiff and the defendant was not fiduciary. No obligation was placed upon the defendant to transmit the moneys received by him for the sale of musical instruments which he received from the plaintiff, and no trust for the plaintiff's benefit was impressed upon such moneys in the defendant's hands. It will be noted that there is no provision in this contract for the payments of any commissions to the defendant, or the deduction by him of any commissions from the amounts so received by him. There are no provisions in any way controlling the prices at which he is to sell the goods consigned to him. He may sell them at any price he pleases, either in advance of the

price listed or in advance of the percentage thereon which he has agreed to pay to the plaintiff, or at a price below said amount. There is no provision for the retention or the transmissal of any of the proceeds of the sale of said goods. It seems to me clear that what was intended to be, and was, created by this paper, was an exclusive right in the defendant to sell the plaintiff's goods in the territory of Greater New York; but that he did not receive said goods as the bailee of the plaintiff, but that the plaintiff sold them to him upon a monthly credit. The defendant agreed to pay, by the language of the contract, to the plaintiff for the goods supplied by the plaintiff at certain agreed upon percentages of the advertised price of certain lines of goods, and agreed to make monthly settlements and promptly remit payments for all balances due. What was he to remit? The moneys received by him upon the sale of these goods to his customers after deducting a commission therefrom? If so, the fiduciary relation would be established, and the complaint sustained. It is not so provided. He was to remit payments of the amount due, to wit, due from him to the plaintiff of fixed percentages of the list price of the goods which he bought from him, and these goods could be sold by him at any price he pleased, and no deductions were provided for by way of commissions.

The next clause throws an especially strong light upon the purpose and the intent of this contract. Inasmuch as the plaintiff had agreed to give the defendant the exclusive right to sell its products in the designated territory, it was important to the plaintiff that the stock of goods should be kept up. And so the contract provided:

"And the said Chambers agrees to keep the aforesaid stock * * * complete by reordering as fast as sold or disposed of, and to pay monthly for such instruments and music so reordered and for all other instruments and music at the rate of discount from advertised prices as aforesaid."

That is, he was to pay monthly for the instruments and music ordered, whether sold by him or not.

It is impossible to interpret that paragraph other than as an agreement of purchase and sale upon a monthly credit. The facts support an action to recover for a debt due for goods sold and delivered, and not an action in conversion. Nor does the written acknowledgment of indebtedness affect this conclusion, for that is all that the paper quoted supra is.

It follows, therefore, that the cause of action alleged not having been proved, the complaint should have been dismissed. The judgment and order appealed from should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur, except PATTERSON, P. J., and SCOTT, J., who dissent.

SUNDERLIN v. SUNDERLIN.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

HUSBAND AND WIFE—SEPARATION AGREEMENTS—REQUISITES AND VALIDITY.

While a valid separation agreement between husband and wife through the medium of a trustee may be made, though the parties have not actually separated, if they immediately separate, or may be made without the in-

tervention of a trustee if the parties have actually separated when the agreement is executed, such an agreement made without the intervention of a trustee while the parties are living together, and providing that they shall thereafter live apart, is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 1046.]

Appeal from Trial Term.

Action by Julia S. Sunderlin against Lewis Sunderlin. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed, and new trial granted.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAMBERT, HOUGHTON, and SCOTT, JJ.

Horace McGuire, for appellant.

May & Jacobson, for respondent.

SCOTT, J. The defendant appeals from a judgment entered upon the direction of a verdict in favor of plaintiff. The action is to recover a sum claimed to be due under a separate agreement made by the parties, who are husband and wife. They married on October 27, 1896, and on August 26, 1897, entered into an agreement for a separation. This agreement is made between the parties without the intervention of a trustee, and recites that differences had arisen between them, that the parties had separated and mutually agreed thereafter to live separate and apart. The defendant thereupon agreed to continue to pay, for some time, the rent of the house in which the parties had lived, and during that time that the wife should have the use and enjoyment of the house and the furniture therein. After the expiration of the lease of the house, the husband agreed to allow and pay his wife the sum of \$100 monthly. Although the agreement recites that the parties have separated, the fact is that they were living together as man and wife when the agreement was made. The next day they did separate, and have since lived apart. The defendant complied with the terms of the agreement, and paid plaintiff the agreed monthly allowance until May, 1905. In August, 1905, the plaintiff commenced an action for a separation and applied for alimony and counsel fee, basing her motion upon an affidavit in which she alleged that, when the separation agreement was made, she and her husband were living together, and hence, as she was then advised, the agreement was void. She was awarded \$7 per week alimony and \$75 counsel fee. The action has never been brought to trial. The defendant paid the counsel fee, and has regularly paid the alimony. The present action is for the monthly allowance of \$100 per month from June 1, 1905, less the amount which has been paid as alimony.

The case thus presented is not to be distinguished from *Poillon v. Poillon*, 49 App. Div. 341, 63 N. Y. Supp. 301. In that case, as in the present, the parties were living together when the separation agreement was made. It was recited that insurmountable differences had arisen between the parties which rendered it impossible for them to live together. It was further recited that they had mutually consented and agreed to live separate and apart, and the agreement was made between the parties directly without the intervention of a trustee. It was held by this court that the agreement was invalid and absolutely

void, and that there could be no recovery under it, as it appeared to be an essential part of the agreement that the parties should thereafter separate and live apart. To the same effect is *Whitney v. Whitney*, 4 App. Div. 597, 36 N. Y. Supp. 891, 39 N. Y. Supp. 1136. In *Clark v. Fosdick*, 118 N. Y. 7, 22 N. E. 1111, 6 L. R. A. 132, 16 Am. St. Rep. 733, upon which the court below relied, the agreement had been made with a trustee, who on his part agreed to indemnify the husband against any charge, other than the agreed allowance for the support of his wife and children, and the action was brought by the trustee. In *Effray v. Effray*, 110 App. Div. 545, 97 N. Y. Supp. 286, a separation agreement was upheld where it appeared that when it was made the parties were already living apart, and an action for a legal separation had been begun. The contract did not, therefore, change the existing relations of the parties. It was expressly said, however, that if the parties had been living together when the agreement was made, and it had contemplated and provided for a future separation, it would have been invalid. In *Reardon v. Woerner*, 111 App. Div. 259, 97 N. Y. Supp. 747, wherein a separation was upheld, the parties had already separated when the agreement was made, and there was a trustee who undertook to indemnify the husband. The case of *Clark v. Fosdick*, supra, appears to be authority for the proposition that a valid separation agreement through the medium of a trustee may be made although the parties have not actually separated, if they immediately separate and live apart. *Effray v. Effray*, supra, is authority for the proposition that such an agreement may be validly made between a husband and wife without the intervention of a trustee, if the parties have actually separated and are living apart when the agreement is entered into. But we have been referred to no case of authority in which such an agreement without the intervention of a trustee has been upheld if the husband and wife are actually living together when the agreement is made, and it is a part of the agreement that they shall thereafter change the relative status, and live separate and apart. That is the case made by the present record.

The judgment and order must be reversed, and a new trial granted, with costs to the appellant to abide the event. All concur.

ERIE & J. R. CO. v. BROWN et al.

(Supreme Court, Special Term, Orange County. December 23, 1907.)

EMINENT DOMAIN—PROCEEDINGS—JUDGMENT—ENTRY—REFEREE'S REPORT.

Code Civ. Proc. § 3367, provides that in condemnation proceedings the court may order the same referred to a referee to hear and determine, on which trial the court or referee shall file a decision according to the provisions of the act as to decisions upon the trial of issues of fact by the court or referee. Section 3369 provides that judgment shall be entered pursuant to the direction of the court or referee in the decision filed. *Held*, that a referee, to whom a proceeding to condemn land was referred, had authority, on dismissing the petition, to direct judgment of dismissal, and that the clerk, on the filing of such order, properly entered judgment.

Condemnation proceedings by the Erie & Jersey Railroad Company against Walter H. Brown and others. A judgment for defendants was entered on a referee's report, whereupon defendants moved to vacate the same. Motion denied.

Bacon & Merritt, for plaintiff.

Geo. R. Brewster, for defendants.

TOMPKINS, J. The plaintiff made petition to this court at Special Term to acquire by condemnation lands owned by the defendants. An answer was interposed, and an order made appointing a referee to hear and determine the issues. The report of the referee finds that upon the petitioner's evidence the proceeding was prematurely brought, certain notices required by the statute not having been served, and directs judgment against the plaintiff, dismissing the petition, with costs; and the referee concludes his report as follows: "And I do order judgment to be entered accordingly." After the filing of the referee's report the clerk entered judgment in accordance therewith, and this motion is made by the defendants to vacate said judgment, on the ground that the clerk had no power to enter judgment on the report of the referee without direction by the court.

Section 3367 of the Code of Civil Procedure provides that in condemnation proceedings:

"The court shall try any issue raised by the petition and answer at such time and place as it may direct, or it may order the same to be referred to a referee to hear and determine, and upon such trial the court or referee shall file a decision in writing, or deliver the same to the attorney for the prevailing party, within twenty days after the final submission of the proofs and allegations of the parties, and the provisions of this act relating to the form and contents of decisions upon the trial of issues of fact by the court or a referee, and to making and filing exceptions thereto, * * * and to the powers of the court and referee upon such trial, shall be applicable to a trial and decision under this title."

It seems from this section to have been the intention of the Legislature to confer upon a referee appointed under the condemnation law the same power to hear and determine and direct judgment that a referee has who is appointed to hear and determine the issues in an action; and section 3369 provides that:

"Judgment shall be entered pursuant to the direction of the court or referee in the decision filed."

Here the referee made and filed his decision, in which he directs judgment against the plaintiff, dismissing the petition, with costs. The clerk, then, clearly had power, and it was his duty under the provision of section 3369, above quoted, to enter judgment in accordance therewith. While it is true that it was held in *Potter v. Durfee*, 44 Hun, 197, that no judgment should be entered in a special proceeding without the direction of the court, yet that was a proceeding by petition against an assignee for the benefit of creditors to have determined the petitioner's claim to certain property in the assignee's possession, and upon the report of the referee the clerk entered judgment in favor of the petitioner, and for costs against the assignee. The court, in vacating the judgment, held that the title to the property in question

could not be determined in a special proceeding instituted by petition, and that in any event the clerk could not enter a judgment which included costs without a direction by the court, for the reason that there was no statutory provision for costs, and that the question of costs was discretionary with the court. The condemnation law, however, does provide for costs, where the judgment is in defendant's favor, "at the same rates allowed, of course, to a defendant prevailing in an action in the Supreme Court," so that there is nothing left to the discretion of the court. The act of entering a judgment on the decision of the court or referee dismissing a petition in a condemnation proceeding is therefore purely ministerial.

It is urged in support of this motion that in a special proceeding no judgment can be entered by the clerk upon the report of a referee without some statute authorizing it. That is undoubtedly correct; but the provisions of the condemnation law already referred to, together with section 3382, seem to expressly provide that in condemnation proceedings the decision of the referee shall direct judgment to be entered in accordance therewith, and that the practice thereon shall conform to the ordinary practice in actions in the Supreme Court.

My conclusion is that the clerk was authorized to enter the judgment, and that this motion should be denied, with \$10 costs.

ERIE & J. R. CO. v. BROWN et al.

(Supreme Court, Special Term, Orange County. January 2, 1908.)

1. CORPORATIONS—ACTIONS—INCORPORATION—ADMISSION.

Where a railroad's petition to condemn land alleged plaintiff's due incorporation and the granting to it by the board of railroad commissioners of the certificate of public necessity and convenience required by Railroad Law, Laws 1892, p. 1395, c. 676, § 59, and the answer did not affirmatively allege that plaintiff was not a corporation, as required by Code Civ. Proc. § 1776, to put its corporate capacity in issue, the allegation of incorporation was admitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2059.]

2. RAILROADS—COMPANIES—INCORPORATION.

Proof by a railroad company, petitioning to condemn land for its road, of the granting by the board of railroad commissioners of the certificate of public necessity and convenience required by Railroad Law, Laws 1892, p. 1395, c. 676, § 59, and the certificate itself, establish compliance by plaintiff with all the requirements of the statute relating to its incorporation and the granting of such certificate.

3. EMINENT DOMAIN—CONDITIONS PRECEDENT TO CONDEMNATION—FILING MAP AND PROFILE.

A railroad's map and profile showed just where the railroad crossed defendants' land which it proposed to condemn, and the center and side lines and the exact location of the road with reference to several buildings on the property and the public highway; and the profile showed stations marked thereon corresponding with the stations on the map, from which the height and width of the roadbed and the depth of the cuts across defendants' property could be ascertained. *Held*, that such map and profile constitute a sufficient compliance with the statute providing that, before constructing any part of its road or instituting con-

demnation proceedings, the railroad company must file a map and profile of the route adopted by it within the county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 500-504.]

4. SAME—FORM.

Where a proposed railroad's map and profile were filed together and bore corresponding station numbers, etc., they were not objectionable because made on separate sheets of paper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 501.]

5. SAME—TIME OF COMMENCEMENT OF PROCEEDINGS—STATUTES.

Railroad Law, Laws 1890, p. 1084, c. 565, § 6, provided that no such corporation should institute condemnation proceedings until after the expiration of 15 days from the service of notice required by such section, "nor until after the final determination of all applications that might be made for a change of route." By Laws 1892, p. 1384, c. 676, § 6, the section was amended by eliminating the provision quoted. *Held*, that the giving of the prescribed notice was the only prerequisite to the institution of condemnation proceedings, and that the railroad company was not required to delay the same until determination of applications for a change of route.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 473.]

6. SAME—EFFORT TO AGREE WITH OWNER—EVIDENCE.

In a proceeding to condemn land for a railroad right of way, evidence *held* to establish that plaintiff had been unable to agree with defendants for the purchase of the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 533.]

7. SAME—WATERS.

Railroad Law, Laws 1892, p. 1386, c. 676, § 7, providing that waters commonly used for domestic, agricultural, or manufacturing purposes shall not be taken by condemnation to such an extent as to injuriously interfere with such use in the future, applies only where the railroad company seeks to take waters for its use, and does not restrain the condemnation of lands for a right of way and the construction of its road over a pond in such a manner as not to injuriously interfere with the property owners' use of the waters of the pond.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 95.]

Condemnation proceedings by the Erie & Jersey Railroad Company against Walter H. Brown and others. Judgment for plaintiff.

Bacon & Merritt, for petitioner.

Geo. R. Brewster, for defendants.

TOMPKINS, J. The petitioner, a railroad company organized under the laws of the state of New York, seeks to acquire by condemnation a strip of land across the farm owned by the defendants, to be used as a part of a steam railroad now in process of construction through Orange county. The defendants answer the petition, and urge several reasons for a dismissal thereof.

The first is that the plaintiff has not proven its incorporation in compliance with the provisions of subdivisions 6 and 13 of section 2 of the railroad law (Laws 1892, p. 1383, c. 676). The petition alleges the due incorporation of the plaintiff and the granting to it by the Board of Railroad Commissioners of the state of a certificate

of public necessity and convenience, under section 59 of the railroad law. The answer does not affirmatively allege that the plaintiff is not a corporation, as required by section 1776 of the Code of Civil Procedure, to put the plaintiff to proof in support of the fact and validity of its incorporation. Hence the allegation of the petition as to the incorporation of the plaintiff stands admitted, while the proof of the granting by the Board of Railroad Commissioners of the certificate, under section 59 of the railroad law, and the certificate itself, establish compliance by the plaintiff with all the requirements of the statute relating to its incorporation and the granting of the said certificate.

The statute requires that, before constructing any part of its road or instituting any proceeding for the condemnation of real property, the petitioner shall make a map and profile of the route adopted by it in such county. The defendants deny the sufficiency of the map and profile filed by the petitioner, and claim that it fails to show with sufficient precision or definiteness the proposed route across the defendants' farm. The map and profile do, however, show just where the railroad crosses the defendants' land and what it proposes to take. There is a center line, and there are side lines upon the map showing the exact width of the tract proposed to be taken, and the exact location thereof with reference to several buildings upon the property of the defendants and the public highway, and by reference to the profile and the stations marked thereon, corresponding with the stations upon the map, the defendants could have learned the height and grade of the roadbed and the depth of the cuts across their property. The purpose of the filing of the map and profile is to give the landowner exact information as to the proposed location of the road and an accurate description of the land to be taken. I do not see how the defendants in this case could have been misinformed or misled concerning the location of the proposed railroad, or the precise land to be taken, if careful reference had been had to the map and profile.

The claim is made by defendants' counsel that the map and profile are not in conformity with the statute, because they are not on the same paper. There is nothing in the statute that requires that they should be on the same sheet of paper. It seems to me that it would have been impracticable to put both map and profile on the one sheet of paper, and that they can be more easily handled and more conveniently examined in their present form than if they were on one sheet of paper, and inasmuch as they were filed together, and bear corresponding station numbers, they seem to be as complete and as much in accord with the letter and spirit of the statute as they can well be.

The defendants contend that this proceeding is premature, for the reason that a proceeding was instituted by the Gumaerd Lead & Zinc Company, under section 6 of the railroad law, for an alteration of the plaintiff's proposed route, and that that proceeding is now pending and undecided, on an appeal from the decision of the commissioners appointed under section 6 to the Appellate Division of the Supreme Court. The facts in reference to this proceeding, as

agreed upon the trial, are as follows: The Gumaerd Lead & Zinc Company, within 15 days after receiving notice of the filing of the plaintiff's map and profile, made application to a justice of this court for the appointment of commissioners to examine the plaintiff's proposed route; the proposed alteration affecting less than a mile of the plaintiff's proposed route at a point about 25 miles distant from the lands of the defendants involved in this proceeding. Commissioners were appointed, and subsequent to the commencement of this action, but before the trial of the issues herein, made their report and decision confirming the route as laid out by the plaintiff. Thereafter an appeal was taken from the decision of the commissioners to the Appellate Division of the Supreme Court, and that appeal is undetermined. No other proceeding was commenced by any other landowner for a change of route, and it is admitted that more than 15 days before this proceeding was instituted due written notice was given to the defendants of the time and place the map and profile showing the plaintiff's proposed route were filed.

The defendants' claim that this proceeding was prematurely brought is based upon the decision of this court in the Third Department, in the case of *New York & Albany Railroad Company v. New York, West Shore & Buffalo Railroad Company*, 11 Abb. N. C. 386. That decision was under section 22, c. 140, p. 221, of the Laws of 1850, which section has been repealed and entirely rewritten. The court by that decision held that:

"The route therefore cannot be definitely established until the fifteen days after the notice shall have expired without any application, or until all applications for a change, shall have been decided in the highest appellate tribunal."

I can find nothing in the law of 1850 that warranted the court in holding that a railroad company, after giving the 15 days' notice of the filing of the map, must wait until "all applications for a change of route shall have been decided in the highest appellate tribunal" before instituting proceedings for the condemnation of real property for its proposed route. However, that was the decision, and became the law in 1882. In 1890 the railroad law was enacted, and section 6 provided as follows:

"No such corporation shall institute any proceeding for the condemnation of real property, in any county, until after the expiration of fifteen days from the service by it of the notice required by this section, nor until after the final determination of all applications that may be made for a change of route, in such county." Laws 1890, p. 1084, c. 565, § 6.

This form of legislation seems to have been adopted to conform to the decision of Mr. Justice Learned in the case above referred to. In 1892 that part of section 6 of the railroad law just quoted was amended by striking therefrom the following:

"Nor until after the final determination of all applications that may be made for a change of route in such county." Laws 1892, p. 1384, c. 676, § 6.

It must be perfectly plain that the Legislature, in striking out the words last above quoted, intended that the railroad company should not be required to wait before commencing its condemnation pro-

ceeding until after the final determination of all applications that may be made for a change of route, and the statute ever since has provided, and now provides:

"No such corporation shall institute any proceeding for the condemnation of real property in any county, until after the expiration of fifteen days from the service by it of the notice required by this section."

It is conceded that the notice to all actual occupants of the lands over which the route of the proposed road is designated was duly given to these defendants and to all other occupants or owners. The giving of such notice was the only prerequisite to the institution of this proceeding. Besides the alteration proposed by the Gumaerd Lead & Zinc Company involves less than a mile of the plaintiff's proposed route, and is 25 miles away from the defendants' property, and can in no wise affect it; and if the Gumaerd Lead & Zinc Company should be successful on its appeal, and the proposed alterations of the plaintiff's route should be made, it could in no event affect the defendants' lands or the plaintiff's proposed route over the defendants' lands.

The evidence is ample to establish the allegation of the petition that the plaintiff herein has been unable to agree with the defendants for the purchase of the lands in question. The testimony shows that the plaintiff has offered the defendants the sum of \$5,000 for the lands to be taken and that the defendants demanded the sum of \$25,000. It appears, also, that nearly two years ago the plaintiff negotiated with the defendants for the purchase of substantially the lands in question, which consist of about 6 acres out of a farm of about 300 acres. At that time the plaintiff's offer was \$4,000; but it was rejected by the defendants, who demanded \$25,000. Thereafter, and before this proceeding was commenced, the plaintiff made a slight change in its proposed route across the defendants' farm, for the purpose of excluding a spring from which water is carried to the defendants' house, and thereafter offered the sum of \$5,000, which was rejected; and thereafter the defendants made a proposition to sell the lands, with certain reservations, to the plaintiff for the sum of \$15,000, which proposition the plaintiff rejected. I fail to see how the plaintiff could have done much more in the way of a bona fide offer to acquire the property of the defendants by purchase.

The next point made by the defendants in opposition to this proceeding is that the plaintiff's proposed route across the defendants' lands will destroy his water supply. Section 7 of the railroad law provides:

"Waters commonly used for domestic, agricultural or manufacturing purposes shall not be taken by condemnation, to such an extent as to injuriously interfere with such use in future."

I find as a matter of fact from the testimony that the taking and use by the plaintiff of the defendants' lands in the manner proposed will not injuriously interfere with the defendants' water supply or their sources. The spring from which water is piped to the defendants' house is not included in the lands to be taken, and will not be injuriously or materially affected thereby. While the pond from

which water is carried to other parts of the defendants' premises is included in the plaintiff's proposed right of way, yet it appears that the use by the defendants of the waters of the pond will not be injuriously interfered with, for the reason that the proposed railroad track is to be elevated on a trestle or bridge many feet above the pond in question. But in my opinion the provisions of section 7 of the railroad law just quoted, providing that waters commonly used for domestic, agricultural, or manufacturing purposes shall not be taken by condemnation to such an extent as to injuriously interfere with their use, does not apply to this case, and only applies where the railroad company seeks to take waters for its use, and not where lands for its right of way only are sought to be acquired.

The first legislative enactment on this subject was by chapter 237, p. 441, of the Laws of 1869, which amended section 21 of the railroad law of 1850, and gave to a railroad company the right to take and convey water from any spring, pond, creek, or river to such railroad for the uses and purposes thereof, and prohibited the taking of such waters to such an extent as to injuriously interfere with their use. Prior to this enactment there was no authority for the taking by condemnation of water by a railroad company for its use. This section 21 was repealed by the general railroad law in 1890, and was substantially rewritten into section 7 of the present railroad law (Laws 1892, p. 1386, c. 676). Section 7 of the railroad law as it stands to-day gives the railroad company the right to acquire lands "for any right to take and convey water from any spring, pond, creek or river to such railroad for the uses and purposes thereof, together with the right to build or lay aqueducts or pipes, for the purpose of conveying such water," etc. This right, however, is qualified by the provision upon which the defendants rely, contained in the same section and following that part last above quoted, and which reads as follows:

"Waters commonly used for domestic, agricultural or manufacturing purposes shall not be taken by condemnation to such an extent as to injuriously interfere with such use in future."

From the foregoing it seems to me perfectly clear that the intention of the Legislature was, in the first place, to authorize the taking by condemnation of water by a railroad company for the uses and purposes of its railroad, and at the same time prohibiting the taking of water for such purposes to such an extent as to injuriously interfere with their use for domestic and agricultural purposes. In this case the plaintiff is not seeking to take by condemnation any water under subdivision 4 of section 7 of the railroad law, and I therefore hold that the provisions of that section have no application to this case.

The foregoing are the only claims urged by the defendants which I deem it necessary to consider in this opinion. I have given careful attention to every question presented by the learned counsel for the defendants, both on the oral argument and by their very exhaustive brief; but I am unable to find that there is any merit in the defendants' opposition to the plaintiff's application to acquire the lands necessary for the completion of its railroad.

The plaintiff is entitled to judgment for the condemnation of the property described in the petition and for the appointment of commissioners of appraisal to ascertain the compensation to be made to the owners of said property.

ERIE & J. R. CO. v. BROWN et al.

(Supreme Court, Appellate Division, Second Department. January 10, 1908.)

COSTS—EMINENT DOMAIN—DISMISSAL—EXTRA ALLOWANCE.

Code Civ. Proc. § 3369, relating to condemnation proceedings, provides that, if judgment be rendered for defendant, costs shall be taxed at the same rates as are allowed of course to the defendant prevailing in an action in the Supreme Court, including the "allowances for proceedings before and after notice of trial"; and section 3367 declares that the court shall try the issues in such a proceeding at such time and place as it may direct, or may order a reference. Section 3372 declares that if an award shall exceed the amount of the offer, with interest, or if no offer was made, the clerk shall tax costs, including allowance before and after notice of trial, and the court may also grant an additional allowance of costs, not exceeding 5 per cent. on the amount awarded. *Held*, that the word "allowances" in section 3369 did not mean "additional allowances," and, there being no provision for notice of trial in such proceedings, the court had no power to award an additional allowance of costs to a successful defendant therein.

Appeal from Special Term, Orange County.

Condemnation proceeding by the Erie & Jersey Railroad Company against Walter H. Brown and others. From an order denying defendants' motion for an extra allowance of costs, defendants Walter H. Brown, Henrietta B. Brown, and Charles M. Brown, as executor of the will of Franklin Brown, deceased, appeal. Affirmed.

Argued before WOODWARD, JENKS, HOOKER, MILLER, and GAYNOR, JJ.

George R. Brewster, for appellants.

Henry Bacon, for respondent.

MILLER, J. This is an appeal from an order denying a motion for an extra allowance in a condemnation proceeding in which the defendants were successful on the trial of the issues raised by the answer to the petition. The application for an additional allowance was denied by the court at Special Term for want of power. The appellants, conceding that only such costs as are expressly allowed by statute are recoverable, rely upon the provisions of section 3369 of the Code of Civil Procedure for such statutory authority. The provision thus relied upon is as follows:

"Judgment shall be entered pursuant to the direction of the court or referee in the decision filed. If in favor of the defendant, the petition shall be dismissed, with costs to be taxed by the clerk, at the same rates as are allowed, of course, to a defendant prevailing in an action in the Supreme Court, including the allowances for proceedings before and after notice of trial."

The appellants contend that the word "allowances" means "additional allowances." We do not so read the section. There is no provision for notice of trial in condemnation proceedings; section 3367 of the Code of Civil Procedure providing that the court shall try the

issues at such time and place as it may direct or that it may order the same to be referred to a referee to hear and determine. The words italicized were therefore intended to reinforce the words immediately preceding, and to make clear the intention that the defendants should have all of the allowances specified in section 3251 of the Code of Civil Procedure. If there could otherwise be any doubt about the meaning of the language used, that doubt would be removed by comparing it with the language of section 3372, regulating the costs in case of an award. I quote from said section:

"If the compensation awarded shall exceed the amount of the offer with interest from the time it was made, or if no offer was made, the court shall, in the final order, direct that the defendant recover of the plaintiff the costs of the proceeding, to be taxed by the clerk at the same rate as is allowed, of course, to the defendant when he is the prevailing party in an action in the Supreme Court, including the allowances for proceedings, before and after notice of trial, and the court may also grant an additional allowance of costs, not exceeding five per centum upon the amount awarded."

The order should be affirmed.

Order affirmed, with \$10 costs and disbursements. All concur.

TOHER et al. v. CROUNSE et al.

(Supreme Court, Special Term, Madison County. December 27, 1907.)

1. PERPETUITIES—SUSPENSION OF POWER OF ALIENATION.

Where a will gives one-third of the residue of testator's estate, both real and personal, to the children of each of his three children, respectively, the shares not to be paid till the youngest of the three families becomes 21 years old, and gives the executors power to sell any part of the real estate and invest the proceeds, and directs them to pay to the parents of the children the net proceeds or interest each year, constituting the executors trustees for the purpose of the will, a valid trust is created in both the realty and personalty, suspending the power of alienation during its continuance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, §§ 49, 52-54.]

2. SAME.

Under Real Property Law, Laws 1896, p. 565, c. 547, § 32, providing that a minority is deemed a part of a life, and not an absolute term equal to the possible duration of the minority, where a testator leaves one-third of the residue of his estate in trust for the children of each of his three children, respectively, their shares not to be paid to them till the youngest of the three families of children becomes 21 years old, the power of alienation is suspended only till the majority or earlier death of the youngest child, and not for a definite period, till he would become 21 years old if he lived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, § 50.]

3. SAME.

The trust continues during the minority of the youngest child living at testator's death, and not of all the children of the three families living at that time; and hence does not violate the rule against perpetuities.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, § 45.]

4. SAME.

The suspension of the power of alienation during the minority of a child born after testator's death is void, since it is for a longer period than two lives in being.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, § 45.]

5. COURTS—PREVIOUS DECISIONS AS CONTROLLING—DICTA.

Dicta in an opinion of the Court of Appeals, though entitled to respectful consideration in the Supreme Court, are not entitled to the same consideration as points actually decided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 335.]

6. WILLS—CONSTRUCTION—LEGATEES—AFTER-BORN CHILDREN.

Where a testator leaves property in trust for the children of his three children, their shares not to be paid to them till the youngest of the three families becomes 21 years old, provided that, if either of his children have no children at testator's death, the shares should be paid in the usual course of distribution, after-born children are not entitled to a share of the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1116-1127.]

7. SAME.

Where a testator's daughter has one child living at the date of the will, that the will makes a devise to "her child or children" does not indicate that children born after testator's death are included in the devise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1116-1127.]

8. CONVERSION—DIRECTIONS IN WILL.

Where a will directs the executors to divide the residue of the estate, real and personal, into three shares, and speaks of these shares being "paid" to the beneficiaries, and gives a power of sale, though not in imperative terms, there is an equitable conversion of the realty into personalty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Conversion, §§ 28-43.]

Action by Rhody Toher and another, executors of the will of James W. Marshall, against Melva M. Crounse and others. Findings for plaintiffs.

This action is brought to obtain a judicial construction of certain provisions of the will of James W. Marshall, deceased. The will bears date April 4, 1903, and the decedent died February 8, 1907. The will has been duly admitted to probate by a decree of the Surrogate's Court of Madison county. At the date of the will and at the date of the decedent's death he had three children, the defendants Melva M. Crounse, Frederick W. Marshall, and Charles B. Marshall. The defendant Melva M. Crounse has one child, the defendant Frederick M. Crounse, now of the age of five years. The defendant Frederick W. Marshall has three children, Frank J., aged 16 years, Fred G., aged 15 years, and Otis P., aged 11 years. The defendant Charles B. Marshall has three children, Harold G., aged 15 years, Miles P., aged 10 years, and James S., aged 8 years. The greater part of the personal and real estate left by the decedent was disposed of by the sixth or residuary clause of the testator's will. This clause is attacked by the children of the decedent upon the ground that the power of alienation of the real property and the absolute ownership of the personal property are suspended for an unlawful period.

C. Carskaddan, for plaintiffs.

Lewis E. Carr, for defendant Melva M. Crounse.

Coville & Moore, for defendant Frederick W. Marshall.

Joseph Beal, for special guardian for infant defendants.

COMAN, J. The sixth clause of the will, by which the decedent attempts to dispose of his entire residuary estate, reads as follows: For convenience in referring to the different provisions of this clause, I have divided it into three parts as follows:

First subdivision:

"I hereby direct my executors, hereinafter named, to divide all the rest, residue and remainder of my estate, both real and personal, into three equal shares and I give, bequeath and devise one of said shares to the child or children of my said daughter. One share to the children of my said son Frederick W., and one share to the children of my said son Charles B., but said shares are not to be paid to the said children or any of them until the youngest of said three families of children becomes twenty-one years of age."

Second subdivision:

"In case there shall be no children surviving of either my said daughter or my said sons respectively at the time of my decease, then I hereby give, bequeath and devise the said one-third of my residuary estate as follows: To my daughter, Mrs. Crounse, if she has no child living at the time of my decease, to my son Frederick W., if he has no child living at the time of my decease, to my son Charles B., if he has no child living at the time of my death but in such case the share so given to the parent to be paid or distributed in the usual course of administration."

Third subdivision:

"I hereby give and grant unto my executors hereinafter named full power and authority to sell and convey any part of my real estate included in said residuary clause and invest the proceeds in interest bearing securities or deposits in savings banks, for the purpose of carrying out the provisions of this will, hereby directing my said executors to pay to the parents of such children the net proceeds or interest of said shares in each year, hereby making and constituting my executors hereinafter named trustees for the purposes of this will."

It is the contention of the children of the decedent that these provisions of the will suspend the power of alienation of the real property and the absolute ownership of the personal property either, first, during a definite period, to wit, the period of the minority of the youngest grandchild of the decedent, or, in case of his earlier death, the period of his minority if he had lived to attain the age of 21; or, secondly, during the minority of each of the seven grandchildren of the decedent. It is hardly necessary to say that, if this contention is correct, the will suspends the absolute ownership of the property for an unlawful period, and is void. The difficulties which arise over the construction of this will relate almost entirely to discovering the purpose and intent of the testator. When that is ascertained, it is a comparatively simple matter to determine whether such intent was a lawful or an unlawful one.

The first question over which counsel differ is as to whether or not the decedent created or attempted to create a trust. It is the contention of counsel for the defendant children that the testator attempted to vest the entire residuary estate in the trustees during the period in question; while the attorneys for the special guardian and for the executors contend that there was no trust created or attempted, or, if so, it was a mere passive trust, void under the provisions of section 73 of the real property law. Laws 1896, p. 570, c. 547. It is mani-

fest that, if a valid trust was created, the absolute power of alienation was suspended during the period of the trust, and it is therefore important to determine this question at the outset of our examination. By the provisions of the first subdivision of the residuary clause above quoted, the testator gave his entire residuary estate per stirpes to his grandchildren, subject only to the provision that the same was not to be paid to them until the youngest of said three families of children becomes 21 years of age. The contingency provided for in the second subdivision above quoted has not arisen, and cannot arise, and it is of no consequence in this case, excepting as it throws light upon the testator's intention with respect to the opening of the alleged trust to let in after-born grandchildren, and this question will be considered later. By the third subdivision the executors are authorized and empowered to sell and convey any part of the decedent's real estate, and invest the proceeds in interest-bearing securities, or deposit the same in savings banks, for the purpose of carrying out the provisions of the will; and then follows this significant provision:

"Hereby directing my said executors to pay to the parents of said children the net proceeds or interest of said shares in each year, hereby making and constituting my executors hereinafter named trustees for the purposes of this will."

It will be seen that there are no express words of gift to the executors or trustees; and, if the residuary estate was vested in them at all, it is by implication, and not by express words. But the intention of the testator is to be derived from a consideration of all the provisions of his will when taken together, and, when all the provisions of this residuary clause are read together and due effect given to each, it seems to me very clear that the testator's intention was that his entire residuary estate should be held and invested by the trustees during a certain period, and that during that period the income arising therefrom should be paid over in equal parts or shares to his three children. It has been suggested by counsel for the special guardian that the provisions of the third subdivision relate wholly and exclusively to the real property, but such is not my conclusion. It is "the net proceeds or interest of said shares" which the executors are to pay over each year to the testator's children, and the words, "said shares," clearly refer not to the real property which the testator has not directed to be divided into shares at all, but to the three shares into which, by the first subdivision, he directs his entire residuary estate to be divided. If I am correct in this conclusion, a valid trust was created and the entire residuary estate is vested in the trustees, unless the period provided for the continuance of the trust is repugnant to some provision of law.

Having reached the conclusion that a trust was created and that the power of alienation is suspended, the next vital question for consideration in this case is: What is the term or period during which said trust was to continue, and during which the power of alienation is suspended? It is the contention of the testator's children, first, that the power of alienation is suspended during the minority of the youngest grandchild, and until the time when the youngest grandchild would attain his majority, if living. I find nothing in the will which indi-

cates such an intention. The numerous authorities which have been called to my attention by counsel do not in my judgment bear out such a contention. For instance, in the case of *Smith v. Edwards*, 88 N. Y. 92, the will provided that the fund in question should be kept invested until his "youngest grandchild now born or that may hereafter be born before the final distribution of my estate, shall be of full age." At the time of the testator's death he had four living grandchildren, all of whom were minors. In the case of *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938, the trust created was to continue until the "youngest child now living shall arrive at the age of twenty-one years, or would arrive at that age if living." That was manifestly an illegal provision, as it suspended absolute ownership for a fixed period of time. In the case of *Thompson v. Carmichael's Ex'rs*, 1 Sandf. Ch. 387, the trust estate was not to terminate when the youngest grandchild should arrive at lawful age; but "when the youngest of my children then living shall arrive at lawful age." In the case of *Hawley v. James*, 16 Wend. 61, the language of the will was "until the youngest of the testator's children and grandchildren attaining the age of twenty-one years shall have attained that age." There being more than two grandchildren in existence at the time of the testator's death, it is manifest that the power of alienation was suspended during at least the minority of three persons; and this suspension was clearly invalid. In the case of *Coston v. Coston*, 118 App. Div. 1, 103 N. Y. Supp. 307, the language was "until such time as the youngest if living should attain the age of twenty-five years." This was another instance in which the absolute ownership was suspended during a fixed period of time. In short, in every case to which my attention has been called by counsel for the defendants there has been a clear and manifest purpose upon the part of the testator to suspend the absolute ownership of his property either during a fixed period of time as until the time when a child would, if living, arrive at the age of 21 years, or during the minority of more than two children. In this case, if I have arrived at the true intention of the testator, the absolute ownership and power of alienation cannot be suspended during a longer period than the single lifetime of Frederick M. Crounse. It is provided by section 32 of the real property law (Laws 1896, p. 565, c. 547) that, for the purposes of this section, a minority is deemed a part of a life, and not an absolute term equal to the possible duration of such minority, and this rule is applicable to personal property as well as to real estate; so, unless there is something in the language of this will which clearly indicates an intention on the part of the testator that the trust should continue during a fixed period—that is, until the date when the youngest grandchild would have arrived at the age of 21 years—this provision must be treated as meaning during the period of his minority or until his earlier death. *Jacoby v. Jacoby*, 188 N. Y. 124, 80 N. E. 676; *Roe v. Vingut*, 117 N. Y. 204, 22 N. E. 933. The period fixed by the testator was "until the youngest of said three families of children becomes twenty-one years of age." Similar language, language identical with this in meaning and purport, has been construed by the highest court in the cases cited, and held to create a trust for a lawful

period of time, to wit, during the minority of the child referred to or until his earlier death.

It seems to me that the case of *Jacoby v. Jacoby*, 188 N. Y. 124, 80 N. E. 676, is decisive of this question. It is true that in the *Jacoby Case* the court held that the trust was void under the provisions of our statute; but it also and necessarily gave its construction to the provision of the will fixing the time during which the absolute ownership was suspended, and that language cannot in essential elements be distinguished from the language under consideration in this case. In the *Jacoby Case* the residuary legatees named in the sixth clause were the testator's wife and four children, and the property was directed "to be equally divided and equally shared among them after the youngest child of them shall have attained the age of twenty-one years and until such time and during his minority I desire that my said wife shall receive and have the sole use of the rent and income from said estate." After considering the question whether the attempted trust was valid, Judge Werner, writing the opinion of the court, at page 129 of 188 N. Y., at page 677 of 80 N. E., says:

"The next question to be considered is whether there is anything in the will which offends against the statute forbidding the absolute power of alienation of real property by any limitation or condition for a longer period than during the continuance of not more than two lives in being at the creation of the estate."

It will thus be seen that the exact question which is presented in this case was before the court and considered and decided in the *Jacoby Case*. The argument there was, as it is here, that the will was void, first, because it suspended the power of alienation during a fixed period not measured by two lives, and also because the same power is suspended during the existence of more than two lives in being. The language of the court in considering these two propositions is exactly applicable to the facts in this case, and is as follows:

"We cannot subscribe to the view that there is anything in the will to indicate that it was the testator's intention to suspend the power of alienation for a fixed period of time. On the contrary, the term used, when given its usual, legal meaning, imports simply a suspension during the 'minority' and that expression as defined by the statute is deemed to signify 'a part of a life and not an absolute term equal to the possible duration of such minority.' Real Property Law, Laws 1896, p. 565, c. 547, § 32. Neither is the second contention of the parties to the effect that the power of alienation is suspended for more than two lives in being, any more admissible than the first. If we should assume that the phraseology of the will were ambiguous, so that it might be given either of two meanings, it would be our duty to adopt that which will uphold the will. *Hopkins v. Kent*, 145 N. Y. 387, 40 N. E. 4. Thus, if we were in doubt as to whether the division of the testator's property is directed to be made when the youngest of his children shall have arrived at the age of twenty-one years, or upon the majority of the youngest of his children who shall reach that age, we should have to interpret the will as directing the former disposition, because it is valid as against the latter direction, which is invalid. It is not necessary, however, to go to that extremity, for we think that the testator's language is reasonably clear and unambiguous. He directs that his property 'be equally divided and equally shared' among his wife and children 'after the youngest child of them shall have attained the age of twenty-one years.' If we apply to this language the rule that the will speaks as of the time of the testator's death, it plainly refers to the youngest of his children then living, who was, in fact, the testator's youngest child,

and a suspension of the power of alienation during 'his minority' is unquestionably valid. Chaplin on Suspensions, etc., § 100; Van Cott v. Prentice, 104 N. Y. 56, 10 N. E. 257."

Stress is also laid by counsel upon the language "the youngest of said three families"; and counsel have argued that the language thus employed creates a trust during the minority of all of the seven grandchildren of the decedent, but I do not think that such is the natural interpretation of the language employed. What the testator evidently intended to say was "until the youngest member of said three families of children" becomes 21 years of age. Families, as such, do not become 21 years of age, but there is a fixed and definite date when a child becomes 21 years of age, and for the purpose of making the intention of the testator clear it is the duty of the court in a proper case to supply a word which the testator may have inadvertently omitted.

It is also contended by the defendant children that, under the provisions of the residuary clause, grandchildren born after the death of the testator may take under its provisions, and that the absolute ownership will be suspended during the minority of such after-born grandchildren. If this contention be well founded, then the trust is clearly void. The suspension of the absolute ownership of the property during the minority of a child born after the testator's death is clearly a suspension for a longer period than that of two lives in being, and contravenes the statute. The argument of counsel upon this point is ingenious, and proceeds upon the theory that the gift is to three classes of grandchildren, and that where a gift is to a class in general terms, and the distribution is by the terms of the will to be made some time subsequent to the death of the testator, the gift will embrace, not only all children living at the death of the testator, but also those who should subsequently come into existence before the date of distribution. This is doubtless the ordinary rule in such cases, but, like all rules of construction, it must yield to the contrary intent of the testator in a case where that purpose is apparent and plainly expressed. The principal authority relied upon by counsel in support of this contention is the case of Tucker v. Bishop, 16 N. Y. 402. In that case, however, the will was upheld upon the ground that by its terms the shares were made payable to each child when he became 21 years of age. The excerpts from the opinion in this case to which my attention is called by counsel are therefore purely dicta, nevertheless they are entitled to respectful consideration as the expression of the highest court pertinent to the discussion of the case in hand, but they are not entitled to the same consideration as though the points under discussion were actually decided in the case. In subsequent cases the Court of Appeals has distinguished and explained the case of Tucker v. Bishop, *supra*. In the case of Everitt v. Everitt, 29 N. Y. 39, at page 75, Denio, C. J., says:

"The leading inquiry upon which the question of vesting or not vesting turns is whether the gift is immediate and the time of payment or of enjoyment only postponed or is future and contingent, depending upon the beneficiary arriving at age, or surviving some other person, or the like. If futurity is annexed to the substance of the gift, the vesting is suspended; but, if it appear to relate to the time of payment only, the legacy vests instant.

1 Jarman on Wills, 760; Gilman v. Reddington, 24 N. Y. 9. The words directing a division or distribution between two or more objects at a future time are equivalent to a direction to pay."

In the case at bar there are words of immediate gift. The language is:

"I give, bequeath and devise one of said shares to the child or children of my said daughter," etc.

It is true that this language is accompanied by a provision postponing the time of payment, and that, reading the whole of the sixth subdivision together, the estate of the grandchildren is under certain conditions subject to an intermediate estate in the trustees. But the language employed is such as to indicate a clear intention on the part of the testator that, subject to the trust estate, the title should vest immediately upon his death in his then living grandchildren. If, however, there be any doubt as to the proper construction of the provisions of the first subdivision to which I have just referred, the testator has completely negatived the idea that after-born children could come in and share in the distribution by the provisions of the second subdivision. In that subdivision he provided that, in case his children shall have no children living at the time of the testator's death, the estate shall be immediately paid over to them and distributed in the usual course of administration. Reading this provision in connection with all the provisions of the sixth clause, the conclusion is inevitable that the testator did not intend that grandchildren born after his decease should share in the distribution. Counsel seek to attach significance to the use by the testator of the expression "to the child or children of my said daughter." Concededly the testator's daughter had but one child at the time when the will was made and at the time of the testator's death; and it is argued from this that no effect can be given to the words "or children," except upon the assumption that they refer to children born after his death. It seems to me, however, that full effect is given to these words if we conclude that by their use the testator intended merely to provide for children born after the making of the will and prior to his death. In any event, the use of this expression cannot prevail against the express provisions of the second subdivisions to which I have referred.

I feel very clear that the will worked an equitable conversion of the real property of the decedent into personalty. It is true that the power of sale is not in terms imperative; but the reading of the whole will makes it manifest that the testator intended such conversion. At the commencement of the sixth clause he says:

"I hereby direct my executors hereinafter named to divide all the rest, residue and remainder of my estate, both real and personal, into three equal shares."

And at other places in his will he speaks of those shares being "paid" to the beneficiaries. Manifestly they could not be paid unless there were a conversion of the real property into money. Under such circumstances, it has been uniformly held that the doctrine of equitable conversion applies, although the power of sale is not in terms imperative.

My conclusion, therefore, is that the sixth or residuary clause of the testator's will contains a valid disposition of all his residuary estate; that the intent and purpose of the testator, as therein expressed, was to give to his executors and trustees the entire residue of his real and personal estate in trust, to invest the same and keep the same invested during the minority of his grandchild Frederick M. Crounse, or until his death before reaching his majority; that the trust estate thus created will terminate upon the arrival of said Frederick M. Crounse at the age of 21 years, or upon his death before arriving at that age; that during the continuance of the trust the estate is to be held and invested by the trustees named, and the income derived from the same is to be paid by the trustees to the three children of the testator in equal shares; that, upon the termination of said trust estate, the body of the residuary estate will be paid to the grandchildren of decedent living at the time of his death per stirpes, or to the representatives of such as are then dead; that the body or corpus of the residuary estate upon the death of the testator vested immediately in the grandchildren one-third part thereof in the child of Melva M. Crounse, one-third part thereof in the three children of the defendant Frederick W. Marshall as tenants in common, and one-third part thereof in the three children of Charles B. Marshall as tenants in common, and that the will worked an equitable conversion of the testator's real estate into personalty.

Findings of fact and conclusions of law may be prepared in accordance with this opinion.

GANSEVOORT BANK v. EMPIRE STATE SURETY CO.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

GUARANTY—DISCHARGE OF GUARANTOR—ALTERATION OF TERMS OF GUARANTY.

A bank, on the offer of a note for discount, demanding security, a surety company executed an undertaking to pay such part of the debt as the maker of the note did not, whereupon the amount of the note, less the discount, was placed to the maker's credit. Immediately the bank demanded of the maker that he give it his check for a part of the loan to insure a balance of that amount remaining with it, which the maker did, though protesting, thereby reducing the amount available to his use. The bank also required a check to be drawn to its attorney for a comparatively large sum for services in supervising the loan. *Held*, that there was no variance from the terms of the guaranty, releasing the surety company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, §§ 64-68.]

Patterson, P. J., dissenting.

Appeal from Trial Term, New York County.

Action by the Gansevoort Bank against the Empire State Surety Company. Judgment for plaintiff, and defendant appeals. Affirmed. See 102 N. Y. Supp. 544.

Argued before PATTERSON, P. J., and McLAUGHLIN, HOUGHTON, SCOTT, and LAMBERT, JJ.

Benjamin Reass, for appellant.

J. Campbell Thompson, for respondent.

HOUGHTON, J. One Randolph M. Newman applied to the plaintiff for the discount of his note for \$5,000, and, the plaintiff demanding additional security, this defendant executed an undertaking conditioned that if such discount was made it would pay such part of the indebtedness as Newman failed to discharge. Newman presented his note, with the defendant's undertaking, to plaintiff, and the \$5,000, less the discount, was placed to his credit. Immediately upon this being done, the plaintiff insisted that Newman give to it his check for \$1,500, in order to insure a balance of that amount remaining on deposit with it. Newman protested against this, saying he wished to draw upon the whole amount; but plaintiff insisted that he should not, and certified his check, thus preventing him from drawing against his discount beyond \$3,500. In addition to this action on the part of plaintiff, Newman was told he must draw his check to the plaintiff's attorney for a comparatively large sum for services in supervising the loan. The note not having been paid, plaintiff credits the \$1,500, and brings action against the defendant for the balance. The defendant interposed the defense that by its undertaking it was agreed that Newman should have a discount of \$5,000 available for his use, and that by the act of plaintiff he was only permitted to have a discount of \$3,500, and hence there was a variance of the terms of guaranty, which released defendant from its bond.

It is true that the discounting of the note and the demanding and certifying of the check for \$1,500 was all done at practically the same time. Nevertheless the plaintiff did discount Newman's note for \$5,000, and opened an account with him, and credited that amount to him, less the discount of the note. Having this amount to his credit in plaintiff's bank, plaintiff demanded that the \$1,500 check be given. Although protesting that it was wrong, still Newman voluntarily gave it, as well as the check to plaintiff's attorney. So far as the legal aspect is concerned, Newman's note for \$5,000 was discounted and all of the money put to his credit. That he at the same time, or subsequently, voluntarily chose to draw checks against it in favor of plaintiff, or any body else, in our view, does not change the legal liability of the defendant. The situation discloses some quite extraordinary banking operations on the part of plaintiff, but we find nothing which releases the defendant from its legal obligation.

It follows, therefore, that the judgment in favor of plaintiff must be affirmed.

Judgment affirmed, with costs.

McLAUGHLIN, SCOTT, and LAMBERT, JJ., concur.

PATTERSON, P. J. (dissenting). I cannot concur in the affirmation of this judgment. It is very plain, I think, that the surety was discharged by an alteration in the terms of the agreement between the bank and the borrower of the money. The surety became responsible for the performance of the particular contract mentioned in the bond, and only for the repayment of a loan to be made by the bank to Newman of \$5,000 upon his promissory note payable

four months after date. This bond was given after an arrangement had been made between the bank and Newman by which the bank undertook to make a loan of \$5,000, upon being furnished with a bond of some surety company. That contemplated the actual advance of the full sum, and there can be no doubt of that fact; for the vice president of the bank so states in his testimony. He says that Newman agreed to that, and brought back to the bank the bond upon which this action is founded. After that was done, and the bond was furnished and presented to the bank, an entirely different arrangement was made—not to put the borrower in possession of the full sum of \$5,000, but, as the vice president testifies:

"When he [Newman] brought this bond to the bank, I did not at once give him the money or anything. We made certain conditions upon which the loan would be put through. They were that he should carry with us a proportionate balance. He asked what balance would be required. I stated \$1,500. He agreed to do so, and give us his check, in order that the balance might be assured us."

This witness also testifies that this \$1,500 was placed in such a position that Newman never could draw it or use it, and thus there was a conditional and new arrangement made by which Newman was to receive only \$3,500, instead of \$5,000. The shallow device by which this was effected and sought to be made the equivalent of a loan of the full sum cannot alter the real situation. It is entirely immaterial whether this change in the terms of the contract was injurious or beneficial to the surety. As was said in the case of *Walrath v. Thompson*, 6 Hill, 540, affirmed 2 N. Y. 185, where there has not been a compliance with the terms of the contract, "the objection cannot be got over." That was a case in which a guaranty was given by the defendant to pay for goods supplied to a third party. They were to be paid for on January 1, 1840. The seller took the purchaser's note payable December 25, 1839, and the court held that the defendant was not bound by the guaranty, although the plaintiff did not require payment until after the 1st of January, 1840.

In *Page v. Krekey*, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409, 33 Am. St. Rep. 731, the court says that, where the obligation of the principal is different from that under which the surety became bound, the surety is released, and "this question seems to have been disposed of in the court below on the ground that the change was not material. But the answer to that is that the defendant's obligation is strictissimi juris, and he is discharged by any alteration of the contract to which his guaranty applied, whether material or not, and the courts will not inquire whether it is or is not to his injury"—citing *Paine v. Jones*, 76 N. Y. 278; *Grant v. Smith*, 46 N. Y. 98; *National M. Bank v. Conkling*, 90 N. Y. 116, 43 Am. Rep. 146; *Bangs v. Strong*, 7 Hill, 250, 42 Am. Dec. 64; *Henderson v. Marvin*, 31 Barb. 297.

In *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669, the court says that when the terms of the contract of guaranty have been changed, and the contract as finally made is not the one upon which the surety agreed to become bound, he will be released. Here, by the statement of the vice president of the bank who conducted the transaction for

the plaintiff, it is admitted that a new contract was made—one that did not put Newman in possession of \$5,000, but only of \$3,500. They might as well have agreed to retain \$4,000 as \$1,500. It is not a case of a departure in the performance of a contract from a requirement thereof, in which case, in order to defeat an action upon the surety bond, it would be necessary for the defendant to show that he had suffered some detriment; but it is a clear case of the substitution of another contract, viz., for a conditional loan of money for that absolute loan to protect which the bond was given.

I am of the opinion that the judgment should be reversed, and a new trial ordered.

BOVI v. HESS et al.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. MASTER AND SERVANT—INJURY TO SERVANT—NOTICE OF INJURY—SUFFICIENCY.

A notice of injury to an employé by a letter reciting that, while at work in the employer's factory, he was injured through the negligence of a foreman, and requesting a life position, is insufficient under the employer's liability act (Laws 1902, p. 1748, c. 600), providing that no action for injury shall be maintained, unless notice of the time, place, and cause of the injury is given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 806.]

2. SAME—"SUPERINTENDENT."

An employé operating a machine with the assistance of other employés, with incidental power to supervise the work of his assistants, but without authority to exercise superintendence conferred on another, is not a superintendent within the employer's liability act (Laws 1902, p. 1748, c. 600), making an employer liable for injury to an employé caused by the negligence of any person in the service of the employer intrusted with superintendence; a "superintendent" being one whose principal duty is that of superintendence, and mere incidental authority to exercise a minor supervision over others is not sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 422-448.

For other definitions, see Words and Phrases, vol. 7, pp. 6792-6793.]

3. SAME—FELLOW SERVANTS.

An employé operating a machine with the assistance of co-employés, with incidental authority to supervise the work of the assistants, is a fellow servant with the assistants, and the employer is not liable for injuries to the assistants resulting from the employé's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 486-492.

For other definitions, see Words and Phrases, vol. 3, pp. 2716-2730; vol. 8, p. 7662.]

4. SAME—FAILURE TO WARN EMPLOYÉ—NEGLIGENCE.

Where the danger of injury to an employé is obvious, the failure of the employer to instruct as to the danger is not negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 310-316½.]

Appeal from Trial Term.

Action by Joseph Bovi against Max Hess and another. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and HOUGHTON, McLAUGHLIN, SCOTT, and LAMBERT, JJ.

Frank V. Johnson, for appellants.

Martin T. Manton, for respondent.

LAMBERT, J. The plaintiff brings this action to recover damages of his employer for personal injuries sustained while engaged in cleaning out a certain mixing machine used in the defendants' confectionery factory. The action was commenced by the service of a summons and complaint on the 12th day of November, 1903. In the complaint served at that time there was no suggestion of any liability under the provisions of the employer's liability act (Laws 1902, p. 1748, c. 600); but shortly before the case came on for trial plaintiff secured a change of attorneys, and an amended complaint was served, in which it was alleged, in addition to the common-law averments in the original complaint, that the injuries were "caused by reason of certain defects in the condition of the ways, works, and machinery connected with and used in the business of the defendants which arose from and had not been discovered or remedied, owing to the neglect of the defendants or of some person in their service and intrusted by them to see that the ways, works, and machinery were in proper condition, and by reason of the neglect of some person in the service of the defendants, intrusted with the exercise of superintendency, whose sole or principal duty was that of superintendent, or of some person acting as superintendent with the authority and consent of the defendants, and also by reason of the carelessness and negligence, faults and omissions of the defendants, their servants, and employes." It was then averred that "heretofore, and on or about the 25th day of October, 1903, plaintiff served upon the defendants a notice in writing stating the time, place, and cause of the accident."

The purpose of the pleader was to bring his action within the provisions of the employer's liability act, and this was the theory on which the case was submitted to the jury, although the pleadings were broad enough to state a cause of action at common law, and there were some suggestions in the charge to the jury which would indicate that the learned court recognized that there was room for finding a verdict under the common-law duty of the master to give proper instructions to a green hand in the operation of the machine which produced the injury. It is important at the outset to determine whether the plaintiff has fulfilled the requirements of the statute in reference to employer's liability for the negligence of one intrusted with superintendence; for upon this must depend in a large measure the disposition to be made of this case on appeal. Chapter 600, p. 1748, Laws 1902, is entitled, "An act to extend and regulate the liability of employers," and, while the title is not controlling, it is important to be kept in mind in construing the statute. It is "to extend * * * the liability of employers"; it is to enlarge the common-law obligations of those who become employers, and under well-established rules a change in the common law, taking away rights, is to be strictly construed. It may be said that it gives rights to the employé, and is therefore to be liberally construed to effect that result; but, where it is necessary to

take from one man to give to another, it would seem that the common law, the growth of ages of careful development of the rights of man, should not be changed farther than is required to meet the letter of the statute. Section 1 of the act provides in its second subdivision that if the accident is due to "the negligence of any person in the service of the employer entrusted with and exercising superintendence whose sole or principal duty is that of superintendence, or in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer," he shall have the same rights as though he were not an employé. This is clearly imposing a burden upon employers in addition to those recognized by the common law, and the Legislature in giving this additional right of action imposed a condition precedent which it is the duty of courts to preserve in its integrity. The provision is that no "action for recovery of compensation for injury or death under this act shall be maintained unless notice of the time, place, and cause of the injury is given to the employer within one hundred and twenty days and the action is commenced within one year after the occurrence of the accident causing the injury or death. The notice required by this section shall be in writing and signed by the person injured, or by some one in his behalf," etc. It will be noticed the limitation of time within which the action may be brought under the act is fixed at one year, while in the action authorized by section 1902 of the Code of Civil Procedure the limitation is two years, and the general limitation in actions of this character is fixed by section 383 of the Code of Civil Procedure at three years; thus indicating that the Legislature did not intend to merge this action with the common-law right of action, and that persons who sought to charge employers with liability beyond the scope of the common law must act promptly, that the rights of employers might be conserved and their liabilities kept within bounds. The necessity of such a rule is made manifest in the case now before us, where the person who is alleged to have produced the injury, and who is claimed to have been the superintendent, has gone without the jurisdiction, and his whereabouts is unknown, thus exposing the defendants to the danger of being called upon to answer for a negligence which might be disproved if the witness could be found.

What has the plaintiff done toward complying with this provision requiring notice of the time, place, and cause of the injury? No such written notice, and no copy of such notice, is contained in the record. Both of the defendants, who were in a position to know, testify without qualification that they never received any such notice, and the plaintiff's case rests upon the testimony of one Caridi, who was permitted to state the contents of a letter alleged to have been written by him, at the request of the plaintiff, three years before. According to this witness he wrote a letter about as follows:

"Dear Sir: While working on the 20th of September, 1903, in your factory, being in the employ of your factory, and working at the mixing machine, I was injured, and through the injury I had sufferings and an operation at the hospital, where they took my finger off. Therefore I ask for a life position where I can earn an honest living."

Under leading questions the witness said that in this letter (which was not addressed to either of the defendants individually, but to Hess Bros.) stated that while he, plaintiff, was working under this employment, "he was hurted with a mixing machine, or something of that kind, while working at it, and the blame was of the foreman. Therefore he asked them for a life position, without going to any more trouble, something on this subject. That is the best of my recollection." Clearly the plaintiff did not write this letter for the purpose of giving the notice required by the statute, but for the purpose of asking for a position. There is no statement in the letter, as given, which tells the place where the accident occurred, except that it was stated to be in the defendants' factory, and, perhaps, that it was located on West Thirtieth street, wherever that might be. The defendants may have had a dozen factories, and the notice that "the blame was of the foreman" was not a notice of the cause of the injury through the negligent act of a person "intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence." "Cause," in the sense it is used in the statute, does not mean the conclusion of the injured person, but a statement of the facts out of which the injury arose. "Cause" is that which produces or effects a result; that from which anything proceeds, and without which it would not exist. 5 Am. & Eng. Ency. of Law, 773. The fair intent of the statute is that the person giving the notice required as a condition precedent to the maintenance of the action shall state the facts showing the cause of the injury, not his conclusion as to who was to blame for the same; and, while it would not be reasonable to require that this notice should have all the technical accuracy of good pleading, we are persuaded that no one would think of holding, under ordinary circumstances, that a man had notice of the cause of an accident from anything that is alleged to have been stated in this letter. The statute itself provides that:

"No notice under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury if it be shown that there was no intention to mislead and that the party entitled to notice was not in fact misled thereby."

But this does not go to the extent of nullifying the requirement that the notice shall give the cause of the injury, which clearly means something more than the vague suggestion that "the blame was of the foreman." The notice should, to comply with the statute, at least give some idea of how the foreman was to blame, if we may assume that the negligence of a foreman would be equivalent to the negligence of the superintendent described in the statute. It should tell, in some way, how the accident happened, what was done, who did it, and the result, that the employer may determine his liability and preserve the evidence necessary to the proper defense, if he have a defense. This court, in considering a notice less open to criticism than the one now under review, say that:

"It must be regarded as now well settled that a notice to constitute the basis for an action under the employer's liability act must fairly apprise the employer that the claim is made under the statute, and point out the negligence from which the injury arose. The notice in question gave the defendant no information with respect to the manner in which the plaintiff sustained the injury."

This case, with its sustaining authorities cited, seems to us conclusive of the question involved, in so far as the notice is concerned. There was no evidence of the service of such a notice as the statute requires, and, as the case was submitted to the jury upon the theory that it might find that there was a cause of action under the employer's liability act, the verdict cannot stand. The court said to plaintiff's counsel:

"You have made out no common-law liability in my opinion."

And, upon counsel objecting to special findings, the court said:

"We will go to the jury then, and I will exercise my discretion."

The defendant excepted to the denial of his motion to dismiss, upon the ground, among others, that "the proof is insufficient to establish a cause of action within the provisions of the employer's liability act; that no sufficient proof of service of the notice required under that act has been adduced," and to the determination of the court to submit the case to the jury at all, so that the question was fairly up for review, and to now say that there was a common-law cause of action proved and found by the jury, when the only question left open to that body was the liability of the defendants under the employer's liability act, would be to permit the defendants, in effect, to be deprived of their property without the benefit of a trial by jury, for that body could not have had that issue under consideration.

The suggestion of counsel, on the authority of *Sheehy v. City*, 160 N. Y. 139, 54 N. E. 749, that a substantial compliance with the statute, requiring notice, is sufficient, would be pertinent if this was an action in which the Legislature had attempted to limit the common-law rights of the plaintiff by requiring a notice as a condition precedent to the assertion of a common-law right. In such a case it is proper to give the plaintiff the benefit of a liberal construction, but where the plaintiff's rights have been enlarged on condition that he shall comply with certain regulations prescribed by the statute, and the rights of the defendant must have been encroached upon, there is no occasion for such a concession, and the books are full of cases in which the requirement even of these limiting statutes that notice of the cause shall be given is not satisfied without telling the facts substantially as they have occurred.

The judgment and order appealed from should be reversed.

McLAUGHLIN, J. (concurring). I concur in the opinion of Mr. Justice LAMBERT in so far as he holds that the notice claimed to have been served by the plaintiff was defective and wholly insufficient to enable him to maintain the action under the employer's liability act. Chapter 600, p. 1748, Laws 1902.

I am also of the opinion that, even if it be held that the notice was sufficient, then the evidence did not establish that the plaintiff's injury was caused "by reason of the negligence of any person in the service of the employer entrusted with and exercising superintendence whose sole or principal duty is that of superintendence." *Sommers*, the person whose negligent act is alleged to have caused the accident, was em-

ployed by the defendants, not as a superintendent, but as a servant. His duties were to operate the machine called the "dough mixer" and rollers used in the manufacture of lozenges, with the assistance of three or four other employes, among whom was the plaintiff. He had nothing whatever to do with the other workmen in the factory, and had no authority to employ or discharge men working with him. The defendants at the time did have in their employ a superintendent, one Hausrath, whose sole or principal duty was superintending or supervising the work of other employes. Hausrath was in the factory at the time the accident occurred, and was then engaged in the performance of his duties as superintendent. Sommers was in no sense a superintendent. He was engaged in the defendants' business, together with other employes, with incidental authority to supervise the work of his assistants, one of whom was the plaintiff. A superintendent, within the meaning of the employer's liability act, must be one "whose sole or principal duty is that of superintendence"; and mere incidental authority to exercise some minor supervision over others is not enough to render the employer liable under the act. *McConnell v. Morse I. W. & D. D. Co.*, 187 N. Y. 341, 80 N. E. 190, 10 L. R. A. (N. S.) 419; *Abrahamson v. General Supply & Construction Co.*, 112 App. Div. 318, 98 N. Y. Supp. 596; *Quinlan v. Lackawanna Steel Co.*, 107 App. Div. 176, 94 N. Y. Supp. 942; *Hughes v. Russell*, 104 App. Div. 144, 93 N. Y. Supp. 307.

Nor do I think a cause of action was established at common law. Sommers was a co-servant of the plaintiff. They were both engaged in a common employment, which was the manufacture of candy, and for his negligence defendants were not liable. The fact that Sommers had been designated as the foreman of the persons working with him did not change this relation. *Lynch v. Shanley Co.*, 112 App. Div. 305, 98 N. Y. Supp. 406; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905. The danger of injury in case the machine should be started while the plaintiff's hand was in a position where it could be caught by the knives of the mixing machine was so obvious and apparent that instruction was unnecessary. This being so, negligence could not be based on a failure to give instructions with reference to it. *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648; *White v. Wittemann Lith. Co.*, 131 N. Y. 631, 30 N. E. 236.

The judgment and order appealed from should be reversed, and a new trial ordered, with costs to appellants to abide event.

Judgment and order reversed, and new trial ordered, costs to appellants to abide event. All concur.

BERNREITHER v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. APPEAL—SCOPE OF REVIEW—APPEAL FROM JUDGMENT.

On appeal from the judgment alone, and not from the order denying a new trial, the appellate court is confined to a consideration of alleged errors of law.

2. MUNICIPAL CORPORATION—ACTIONS FOR INJURIES—NOTICE OF CLAIM.

New York City Charter, Laws 1901, p. 114, c. 466, § 261, provides that no action shall be maintained against the city unless 30 days have elapsed

since presentment of the claim to the comptroller. Laws 1886, p. 801, c. 572, provides that no action shall be maintained against a city * * * for personal injuries unless notice of intention to commence the action shall have been filed with the corporation counsel within 6 months after the "cause of action" shall have "accrued." Held that, where no notice of intention to sue for personal injuries was presented to the corporation counsel of New York City within 6 months from the time the injuries were received, no action could be maintained, though such notice was presented within 6 months after presentment of a claim to the comptroller pursuant to the charter.

Appeal from Trial Term.

Action by Martin Bernreither against the city of New York. Judgment in favor of plaintiff, and defendant appeals. Reversed, and new trial ordered.

See 106 N. Y. Supp. 286.

Argued before PATTERSON, P. J. and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Theodore Connoly and Royal E. T. Riggs (Francis K. Pendleton, Corp. Counsel, on the brief), for appellant.

Andrew C. Morgan, for respondent

CLARKE, J. The plaintiff fell upon an icy sidewalk and was injured. Alleging that the condition of the sidewalk was due to the negligence of the city in maintaining a leaking hydrant, he has recovered a judgment for his damages. The city appeals from the judgment, but not from the order denying its motion for a new trial. We are therefore confined to a consideration of the alleged errors of law.

The accident occurred on March 5, 1904. On September 2, 1904, there was served upon the comptroller a verified claim, describing the time, place, cause, and consequences of the accident, and concluding:

"Wherefore your claimant prays that the said city of New York audit, adjust, and allow said claim for the sum of \$2,000 damages hereby presented."

This notice of claim conforms to the provisions of and was served in compliance with section 261 of the Revised Charter (chapter 466, p. 114, Laws 1901), which provides that:

"No action or special proceeding for any cause whatever shall be prosecuted or maintained against the city of New York unless it shall appear by and as an allegation in the complaint or necessary moving papers that at least thirty days have elapsed since the demand, claim or claims upon which such action or special proceeding is founded were presented to the comptroller of said city for adjustment and that he has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment."

This provision is not confined to any class of claims, but embraces all. There is no limitation put upon the time of filing. It is not in any sense a statute of limitations. It does not create a cause of action. The presentment of the demand presupposes a legal claim. Its object is to give the city authorities time to investigate and, if the claim is good, pay without suit. It is part of the procedure which the Legislature has provided shall be taken in enforcing claims against the city. It is a condition precedent to the right to sue. It

is therefore necessary to allege and prove the demand, and the neglect or refusal to adjust or pay, and the expiration of the 30 days. Similar provisions have been inserted in former charters of the city of New York (section 2, c. 379, p. 645, Laws 1860 [Comp. 1370]; section 105, c. 335, p. 511, Laws 1873 [Comp. 97]; Consolidation Act [chapter 410, p. 305, Laws 1882] § 1104), and in those of many other municipalities of the state. Chapter 572, p. 801, Laws 1886, provides that:

"No action against the mayor, aldermen and commonalty of any city in this state, having fifty thousand inhabitants or over, for damages for personal injuries, alleged to have been sustained by reason of the negligence of such mayor, aldermen and commonalty, or of any department, board, officer, agent or employé of said corporation, shall be maintained unless the same shall be commenced within one year after the cause of action therefor shall have accrued, nor unless notice of the intention to commence such action, and of the time and place at which the injuries were received, shall have been filed with the counsel to the corporation, or other proper law officer thereof, within six months after such cause of action shall have accrued."

This statute is a statute of limitations, in that it limits the time within which an action for negligence can be maintained against a city to one year after the cause of action therefor shall have accrued. It also requires as a condition precedent that notice of intention to sue shall have been filed with the law officer of the city within 6 months after such cause of action shall have accrued. Therefore an additional condition precedent was created. Under the charter provision a claim had to be filed with the fiscal officer, the comptroller, and 30 days allowed to elapse for adjustment or payment before suit. Under this act a notice of intention to sue was required to be filed with the law officer, and within 6 months after the cause of action shall have accrued. Compliance with each provision had to be alleged and proved. They were independent provisions, designed to conserve different objects.

In *Curry v. City of Buffalo*, 57 Hun, 25, 10 N. Y. Supp. 392, the General Term, in considering a similar provision in the charter of Buffalo and the act of 1886, said:

"The object of the charter was to enable the city, through its common council, to have 40 days to determine whether a claim should be audited before an action should be brought; but the act of 1886 required the notice specified in it to be delivered to the corporation counsel or the law officer of the city. The provisions of the charter in no way conflict with the act of 1886. * * * The provision of the charter was to prevent the bringing of an action until the common council had 40 days to examine it. The act of 1886 makes it a condition precedent that notice that an action will be brought must be served on the corporation counsel within 6 months, and the action must be brought within a year, after the accident. * * * Both of these requisites must be complied with to enable the injured party to maintain the action."

When this case reached the Court of Appeals (135 N. Y. 366, 32 N. E. 80), that court expressly approved of the opinion below. Chief Judge Earl said:

"The provisions of that section [of the Buffalo charter] are not inconsistent with the provisions of section 1, c. 572, of the Laws of 1886, and both sections can stand together and have full operation. * * * The section is imperative. The action cannot be maintained unless notice of the intention to commence it, and of the time and place of the injury 'shall have been filed with the counsel to the corporation,' and a failure to file the notice furnishes a

defense to the action. The filing of the notice is a condition precedent to the maintenance of the action. * * * The whole matter of the maintenance of this class of actions was within the control of the Legislature. It could refuse a right of action against municipalities for such injuries, and it could impose any conditions precedent to the maintenance of such actions. It could require notice of the intention to commence them to be served both upon the common council and upon the corporation counsel, and an act requiring the one notice would not be inconsistent with an act requiring the other. Here the Legislature required the presentation of the claim to the common council for its action thereon, and the notice to the corporation counsel for his information and to govern and influence his official conduct. These actions against cities are numerous, and the Legislature seems to have been solicitous to protect them so far as possible against unjust or excessive claims, and also against the improvident or collusive allowance of such claims by municipal officers."

In *MacMullen v. City of Middletown*, 187 N. Y. 37, 79 N. E. 863, Judge Gray quoted from the *Curry Case* and said:

"This statement of the rule was deliberate, and in my opinion it is correct, when the nature and functions of municipal corporations are considered."

It follows, therefore, in the case at bar, that, in addition to presenting his claim to the comptroller, the plaintiff was required to file a notice of intention to sue with the corporation counsel within 6 months after his cause of action had accrued. The accident occurred on March 5th. He presented his claim to the comptroller on September 2d. That was within 6 months of the accident. But that claim contained no notice of intention to sue. The comptroller forwarded the claim to the corporation counsel, and it was received by that officer on September 7th, 2 days after the expiration of the 6 months. The respondent does not contend that to have been a compliance with the statute. On December 28, 1904, 9 months and 23 days after the happening of the accident, he filed a proper notice of intention to sue with the corporation counsel. His claim is that his cause of action did not accrue until 30 days after filing his claim with the comptroller; that, as he filed his claim with that officer on September 2d, his cause of action did not accrue until October 2d; that he had 6 months from that date to file his notice of intention to sue; and that, as December 28th was only 2 months and 26 days thereafter, although 9 months and 23 days after the accident, he was in time—that is, he could delay filing his claim for 10 months and 29 days, serve his notice of intention to sue, and bring his action on the day before the year of limitation expired, and yet be within the statute, as having served his notice of intention to sue within "six months after his cause of action shall have accrued." In a snow and ice case such a construction would cause the notice to be of inappreciable assistance to the city in preparing its defense to the action. We cannot agree with this claim. The cause of action accrued when plaintiff slipped and fell on the icy pavement. His cause of action was the negligence of the city in permitting the pavement to be and remain in that condition. The injuries were then received. The basis of his right to damages then came into existence. His cause of action then accrued.

In *Taylor v. Mayor, etc., of New York*, 82 N. Y. 10, in considering the effect of this provision as to presentation of claims to the comptroller, it was held that the failure to present a claim to the comp-

troller before suit affects the remedy only. The presentation does not in any way determine the existence of or create the debt. Folger, C. J., said:

"There is a cause of action, and there is a remedy by action. They are different things. * * * A rule of law or a statute may affect the remedy without affecting the cause of action. * * * The rule that one under disability may not bring an action affects his remedy, but does not touch the cause of action. * * * So it must be when it is a statute that suspends the remedy by action, but does not touch the cause of action."

In *Dickinson v. Mayor*, 92 N. Y. 584, it was urged that the right of action did not accrue until the demand upon the comptroller was made, and that therefore the statute of limitations did not commence to run until such demand. This was a similar action to the case at bar, to recover for injuries sustained by a fall on an icy pavement. The court, in deciding against the contention, said:

"The intent and purpose of section 105 of the charter was mainly to enable the comptroller to settle claims against the city and thereby save unnecessary costs and expenses in the litigation which must ensue. We think that it was not intended to indefinitely extend the time in all cases within which an action might be brought against the city, and thus put in the power of the claimant to delay without any limitation whatever, and thereby in some instances to deprive the corporation of the benefit of testimony which otherwise might have been adduced in defense against an action brought. The statute was for the benefit of the city, and not for the benefit of the claimant. * * * In the case at bar the cause of action arose upon the principles of the common law, and was perfect and complete when the injury occurred to the plaintiff by reason of the negligence of the defendant."

"The filing of the notice was required by the statute in the interest and for the benefit of the defendant, and, while made a condition of the right to maintain the action, the intent was to furnish to the corporation a defense by way of bar to the action when not complied with. The provision affected, not the cause of action, but the remedy, by regulating the procedure." *Misano v. Mayor*, 160 N. Y., at page 133, 54 N. E., at page 746.

"The claim that the service of a proper notice under the statute constituted a part of the plaintiff's cause of action is not quite correct. The absence or presence of such a notice relates to and affects the procedure, rather than the cause of action. It relates to the remedy, and not to the right." *Sheehy v. City of New York*, 160 N. Y., at page 143, 54 N. E., at page 750.

The respondent relies upon *Werner v. City of Rochester*, 77 Hun, 33, 28 N. Y. Supp. 226. In that case the learned justice who wrote the opinion held that the cause of action accrued 40 days after the presentation of the claim to the common council. To do this he was forced to give a different meaning to the same words used in the same statute. He held that the year within which the action must be brought must be computed from the happening of the accident, but that the 6 months within which the notice of intention to sue must be served must be computed from the expiration of 40 days after filing the claim with the common council, although the statute in each instance was set running "after such cause of action accrued." One of his associates concurred in the opinion, and the other two in the result only. When the case reached the Court of Appeals in 149 N. Y. 563, 44 N. E. 300, that court declined to pass upon that question, because not raised by any proper exception in the record. We are not bound by that decision, and, with the greatest respect to the ability

and learning of the writer of that opinion, we think it not in harmony with the trend of the cases upon this subject.

Respondent cites *Crapo v. City of Syracuse*, 183 N. Y. 395, 76 N. E. 465. In that case a bare majority of the court, over a most vigorous dissent, held that in a death case the notice to sue need not be served until six months after the appointment of an administrator. The decision was specifically put upon the ground, as an action to recover damages for death caused by negligence was purely statutory and was given expressly to the executor or administrator of a decedent, such cause of action did not accrue until there was an executor or administrator in existence capable of bringing and maintaining the action. It has no application here. So in *McKnight v. City*, 186 N. Y. 35, 78 N. E. 576, where an action was brought to recover damages for an injury to an infant under the age of 14 years, it was held that the running of the period of limitation of 1 year provided in chapter 572, p. 801, of the Laws of 1886 was suspended by reason of the exception contained in section 396 of the Code of Civil Procedure. That case does not here apply. In the *Missano Case*, 160 N. Y. 123, 54 N. E. 744, and the *Sheehy Case*, 160 N. Y. 139, 54 N. E. 749, there was an attempted compliance with the statute, and notice was actually received by the corporation counsel within the 6 months. In the case at bar the notice to the comptroller contained no statement of intention to sue and was not filed with the corporation counsel until after the expiration of 6 months.

We are therefore of the opinion, as this plaintiff was not an administrator, nor an infant, nor suffering from any other disability, his cause of action accrued when he received the injury complained of, and he was therefore within the express conditions and limitations of the statute governing his right to maintain the action, and, as his notice of intention to sue was not filed within the time limited, that the complaint should have been dismissed.

The judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

(57 Misc. Rep. 66.)

GOW v. BINGHAM et al.

(Supreme Court, Special Term, Kings County. December 10, 1907.)

1. CONSTITUTIONAL LAW—PERSONAL RIGHTS—PERSONAL LIBERTY.

The right to personal liberty, which exists independent of any express provision of law, includes not only absolute freedom of travel, but the preservation of the person inviolate against attack or compulsory stripping or exposure.

2. SAME.

Const. N. Y. art. 1, § 1, providing that no person shall be deprived of any of his rights except by the law of the land or judgment of his peers, and section 6, providing that he shall not be deprived of his liberty without due process of law, are not the sources of the right, but constitute a shield against unwarranted interference with such right by any department of the government, whether executive, legislative, or judicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 149.]

3. SAME—POWERS OF GOVERNMENT.

The act of declaring what temporary invasions of natural rights of liberty and personal immunity are necessary in the exercise of police power for the common welfare is solely a legislative prerogative, and is not within the authority of a city police force exercising a portion of the executive power of the state.

4. SAME—MEASUREMENT OF OFFENDERS—BERTILLON SYSTEM.

Pen. Code, § 379a, and Greater New York Charter, Laws 1901, p. 136, c. 466, § 315, make it the duty of the police to "specially preserve the public peace, prevent crime, and detect and arrest offenders." Charter, § 272, authorizes the police commissioner to make such rules, orders, and regulations as may be reasonably necessary to effect a prompt and efficient exercise of the powers conferred on him by law. Laws 1901, p. 143, c. 466, § 338, makes it the duty of every member of the police force of the city of New York, immediately on the arrest of a prisoner, to convey him before the nearest sitting magistrate, to be dealt with according to law; and Pen. Code, § 379a (Laws 1907, p. 1469, c. 626), provides that "on the determination of a criminal action in favor of accused, photographs, plates," etc., taken of him by any police officers, shall be returned on demand. Code Cr. Proc. §§ 165, 172, 303, provide that, when a prisoner is arrested for a bailable offense, he shall be taken without unnecessary delay before a magistrate, and may give bail at any hour of the day or night, and shall not be subjected to any more restraint than is necessary for his arrest and detention until produced before the court or magistrate. *Held*, that the police department of the city of New York had no authority to take a person accused of an offense into custody after he had been arraigned and admitted to bail, and take his photograph and measurements for the records of the police department under the Bertillon system.

5. CRIMINAL LAW—PRESUMPTION OF INNOCENCE—EXTENT.

Under Code Cr. Proc. § 389, providing that every person is presumed innocent until the contrary is proved beyond a reasonable doubt, the presumption of innocence survives all proceedings until the rendition of a verdict of guilty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 731-737.]

6. CONSTITUTIONAL LAW—INFRINGEMENT ON JUDICIARY—MEASUREMENT OF OFFENDERS—POLICE DEPARTMENT RULES.

A rule of a police department to photograph and measure such persons suspected of offenses as the officials of the department determine shall be so treated is invalid, as an exercise of judicial functions by executive and administrative officers.

7. SAME—PERSONAL SECURITY—VIOLATION—CIVIL ACTION.

Where members of a city police department seized relator after he had been bailed for an offense and before trial, and carried him to the police station, and there compelled him to submit to be photographed, measured, etc., for the Bertillon system, such conduct constituted a gross violation of relator's right to personal security, and entitled him to sue every person concerned therein for damages.

8. ASSAULT—ELEMENTS OF OFFENSE.

Arrest of a person accused of an offense by police officers, after he had been admitted to bail, and the taking of his photograph and measurements by the Bertillon system, constituted an assault, for which those participating therein might be prosecuted under Pen. Code, § 219, defining such offense.

9. LIBEL—CRIMINAL LIBEL—ELEMENTS OF OFFENSE.

Where, after relator had been admitted to bail, he was seized by police officers and compelled to submit to have his photograph and measurements taken under the Bertillon system, such acts constituted criminal libel, as defined by Pen. Code, §§ 242, 244, 245, for which those participating therein might properly be prosecuted.

10. MANDAMUS—RIGHT TO WRIT.

Where police officers illegally seized relator, after he had been admitted to bail, and subjected him to the taking of his photograph and measurements under the Bertillon system, he could not compel the destruction of such photographs, impressions, and records by mandamus, under the rule that such writ lies only to compel the discharge of a public duty, and not to undo what has been improperly done, though under color of the performance of a public duty.

Application by William Gow for a peremptory writ of mandamus against Theodore Bingham and others to compel them to destroy certain photographs, measurements, imprints, etc., taken of his person without authority. Application denied.

Martin W. Littleton, for relator.

Edward J. Lazansky, Asst. Corp. Counsel, for respondents.

BURR, J. The undisputed facts in this case are these: On the 21st of November, 1907, William Gow had been indicted by a grand jury in the County Court of Kings county, charged with the crimes of grand larceny and forgery. So far as appears, he had never before been accused, nor even suspected, of any crime. He appeared at the courthouse where the County Court was in session on the day named, and went to the office of the district attorney of the county, and there acknowledged his readiness to appear and plead to the said indictments and arrange for the giving of bail necessary to secure his release from custody pending trial. While waiting in the district attorney's office to permit arrangements between the district attorney and the County Court for his arraignment and release on bail to be perfected, one August Kuhne, a member of the police force of the city of New York, came into the office of the district attorney, and notified the said Gow that he must accompany him to police headquarters in the borough of Brooklyn, which was in a building several blocks distant from the courthouse. At that place a record is kept of photographs, measurements, and imprints taken under the Bertillon system of persons convicted of crime and also of some persons who are charged with criminal offenses, which record is familiarly known as the "Rogues' Gallery." In obedience to the command of the said Kuhne, said Gow went to police headquarters, and while there, in obedience to the command and under the authority of the police department, he submitted to having his photograph taken, and also certain measurements and imprints made under the system above referred to, which are now in the custody and control of the respondents, or some of them, as officers of the police department of the city of New York. Thereafter the said Gow was brought back by the said Kuhne to the district attorney's office, and shortly thereafter he was arraigned in the County Court, pleaded "not guilty," the amount of bail was fixed, bail given and accepted, and the prisoner discharged. This application is made for a peremptory writ of mandamus to compel the officials constituting the police department of the city of New York and those persons having the custody and control of the said photographs, records, and impressions to destroy the same as having been unlawfully taken, and as being retained without authority of law.

Two questions present themselves upon this application: First.

Was the act of the officers of the police department in compelling the petitioner to submit to having his photograph taken and these measurements and imprints made a lawful or an unlawful act? Second. If unlawful, has the petitioner redress in this form of proceeding?

There are certain rights pertaining to mankind which have their origin independent of any express provision of law, and which are termed "natural rights." One of these is the right of personal liberty. This includes not only absolute freedom to every one to go where and when he pleases, but the right to preserve his person inviolate from attack by any other person. This right to one's person may be said to be a right of complete immunity, to be let alone. *Cooley on Torts* (3d Ed.) 33. The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. *Union Pacific R. R. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734; *McQuigan v. D. & W. R. R. Co.*, 129 N. Y. 50, 29 N. E. 235, 14 L. R. A. 466, 26 Am. St. Rep. 507. So sacred is this right in its character that the people of the state, speaking in the most solemn form, namely, through the state Constitution, have declared that no person shall be deprived of any of his rights unless by the law of the land or the judgment of his peers. Const. N. Y. art. 1, § 1. Nor shall he be deprived of his liberty without due process of law. Id. art. 1, § 6. These constitutional provisions are not the sources of the right. They are in the nature of a shield against any unwarrantable interference with such rights by any department of the government—executive, legislative, or judicial. But, when one becomes a member of a community, this absolute right confirmed by constitutional provisions of necessity yields to another and higher right. The absolute freedom from restraint which the individual has as a natural right yields to the necessities of the public welfare, when such public welfare demands that, for its sake, this right be temporarily impaired. It is in accordance with the demand of this necessity that temporary restraint of a person accused of crime until such time as the accusation can be determined to be false or well founded finds the authority for its existence. But this right of temporary restraint is zealously guarded and restricted. While a person indicted for a felony may be arrested, the statute makes it the duty of the court issuing the warrant for his arrest to provide that, when the arrest is made, he shall be brought before the court, and not taken elsewhere, provided the court is then in session. Code Cr. Proc. § 301. If the offense is bailable, the court upon directing the warrant to issue may fix the amount of bail (Id. § 303), and the person so arrested is entitled to be taken before a magistrate without unnecessary delay, and may give bail at any hour of the day or night (Id. § 165). A person so arrested is not to be subjected to any more restraint than is necessary for his arrest and detention until produced before the court or magistrate. Id. § 172. These temporary invasions of natural right are what is known as the "exercise of the police power." The act of declaring what temporary invasions of the natural rights of liberty and personal immunity are necessary in the exercise of police power for the common welfare of the community is solely a legislative act. 1 Tiedeman's State and Federal Control of

Persons, § 2. It is necessary, therefore, for the respondents in this case to show, in the first place, legislative authority for the acts complained of. If such authority is shown, a further question will arise, whether that act was in violation of constitutional provisions, and a legitimate exercise of the police power. If no such authority is shown, the latter inquiry need not be pursued. No statute has been found which in express terms authorizes any member of the police force of this city to deprive any person of his liberty of action, or invade his right of personal immunity to the extent of requiring him to submit to having his photograph taken, and measurements and impressions of his body made, for the purpose of preserving them in the criminal records of that department simply because such person has been indicted charged with a criminal offense. The police department claim that implied authority for this startling invasion of personal liberty may be found in two provisions of the charter of the city, and in an amendment to the Penal Code, adopted at the last session of the Legislature, and which became operative on the 1st day of September last. Laws 1901, pp. 116, 136, c. 466, §§ 272, 315; Pen. Code, § 379a. By section 315 of the charter it is made the duty of the police to "especially preserve the public peace, prevent crime, and detect and arrest offenders." To subject a citizen, never before accused, to such indignities, is certainly unnecessary in order to "detect and arrest" him; for he must have been detected and arrested before he can be so dealt with. It is unnecessary to "prevent crime," for the acts for which indictment has been found, if criminal, have already been committed. The "public peace" cannot readily be disturbed by a man in the custody of the law, and his arrest will be all sufficient to accomplish that end, without imposing upon him further attack upon the inviolability of his person.

By section 272 of the charter the police commissioner is required "to make such rules, orders, and regulations" as may be reasonably necessary to effect a prompt and efficient exercise of all powers conferred upon him by law. But, if no power is conferred upon him by law in this regard, any rule which he may promulgate respecting the same is utterly void. The exercise of any such extreme police power as is here contended for is contrary to the spirit of Anglo-Saxon liberty. It is a principle of the common law which has been reinforced by statutory provisions (Code Cr. Proc. § 389), that every person is presumed to be innocent until the contrary be proved beyond a reasonable doubt. That presumption survives the finding of an indictment, arrest, arraignment, and the impaneling of a petit jury for the trial of the issue. It continues during the introduction of evidence upon the trial, the summing up of counsel, the charge of the court, and until the jury by its verdict of "guilty" has said that the presumption is overcome, or, by its verdict of "not guilty," that the presumption has become an established fact. To hold that the vague and indefinite provisions of the charter above referred to authorize the conduct of the police department which is here criticised would require us to hold that the express provisions of the Code of Criminal Procedure above referred to with regard to the arrest and detention of a prisoner (Code Cr. Proc. §§ 303, 165, 172) were repealed by implication. The

law does not favor repeal by implication of the express provisions of a statute. 1 Lewis' Sutherland Statutory Construction, 465. It is only when there is such manifest and total repugnance between the earlier and later statutes that the two enactments cannot stand together that such repeal will be inferred. Not only does such repugnance not exist in this case, but the construction contended for by the police department is in direct conflict with the provisions of the charter itself, which makes it the duty of every member of the police force under the penalty of a fine or dismissal from the force, immediately upon an arrest, to convey the offender, not to police headquarters to be photographed and measured, but "before the nearest sitting magistrate that he may be dealt with according to law." Laws 1901, p. 143, c. 466, § 338.

The remaining statute above referred to which has been cited in support of the contention of the respondents provides that:

"Upon the determination of a criminal action or proceeding against a person in favor of such person, every photograph of such person and photographic plate or proof taken or made of such person while such action or proceeding is pending, by direction or authority of any police officer, peace officer or any member of any police department, and all duplicates and copies thereof, shall be returned on demand to such person by the police officer, peace officer, or member of any police department having any such photograph, photographic plate or duplicate in his possession or under his control." Pen. Code, § 379a; Laws 1907, p. 1469, c. 626.

The reason which induced the Legislature to pass this act may undoubtedly be found in the determination of the Court of Appeals in the Molineux Case. In the Matter of Molineux v. Collins, 177 N. Y. 395, 69 N. E. 727, 65 L. R. A. 104. In that case the relator had been convicted of the crime of murder in the first degree, and sentenced to death. Thereafter, in pursuance of an express statute, he had been photographed and measured. Subsequently it was determined that the judgment of conviction was erroneous, and it was reversed, and upon a new trial he was acquitted. In the proceeding above referred to he sought to compel the return to him or the destruction of the photographs and plates. The court held that inasmuch as at the time that the photograph was taken it was taken in pursuance of an express authority of statute relating to persons who had been convicted of crime, and inasmuch as the statute provided no relief for those whose conviction might subsequently be adjudged erroneous, the appeal for relief must be made to the Legislature, and not to the court. The act in question went further than the necessities of the case demanded. It would have been entirely sufficient to have provided that where such a photograph had been taken in pursuance of any express provision of law, and a criminal action against the subject of the picture, although he might have been at one time and before the picture was taken convicted of crime, was ultimately determined in his favor, such photograph should be destroyed. It could hardly be deemed possible that the Legislature intended to make that which was unlawful when it was done a lawful act by simply providing that the result of that unlawful act should under certain contingencies be destroyed. In the case of persons actually convicted of crime and sentenced to the state prisons or the penitentiaries of the state, or to the New York State Reformatory at Elmira, the Legislature have in express and cer-

tain language provided for the taking of such pictures and the making of such measurements. Laws 1889, p. 511, c. 382, § 40; Laws 1896, p. 401, c. 440.

It is not conceivable that the lawmaking power, which proceeded so carefully and by express enactments with reference to the cases of persons convicted of crime, should have intended by vague and indefinite provisions, such as the one last above referred to, to affect the sacred rights of persons presumed to be entirely innocent of any crime. No case has been cited in this state attempting to sustain the action of the police authorities in this regard. Only two have been called to my attention where the question has been considered, and I have been unable to find any others. *People ex rel. Joyce v. York*, 27 Misc. Rep. 658, 59 N. Y. Supp. 418; *Owen v. Partridge*, 40 Misc. Rep. 415, 82 N. Y. Supp. 248. In the first of these the relator had been actually convicted. In the second the court carefully refrained from passing on the question of the right of the police department in cases where conviction had not been had. It is perfectly clear, therefore, that there is no statutory authority justifying the acts of the police department which are here attacked. The real ground for their action, as it appears from the moving papers herein, is a custom of the police department which has existed for a considerable period of time of adding to the photographs and measurements of convicted criminals taken under the statutes above referred to the photographs and measurements, not of every person arrested, but only of those particular persons that in the wisdom of the police officials they deemed desirable to have in their collection, and this custom is indirectly countenanced by a rule of the department to the effect that "likenesses of persons collected for the use of the detective bureau shall be privately kept in a gallery for the official use of the police force as an aid to the prevention and detection of crime, and shall not be exhibited to any person unless such person is accompanied by an officer of the department," and that "the Bertillon system in use by the department shall be in charge of the detective bureau." Such a custom and such a rule would not of itself be sufficient to justify the conduct of the respondents here. The officers of the police department are purely executive and administrative officers. The act of determining whether the liberty of a citizen shall be infringed in the manner above referred to belongs solely to the Legislature. Inasmuch as even under the rule of the department only such suspected persons are photographed and measured as the officials of the department determine shall be so treated, the act of determining what conduct on the part of a citizen justifies such infringement upon his natural rights is an act judicial in character. To sustain a mere rule of the police department under such circumstances would be to confer upon the officials of that department not only executive, but legislative and judicial, powers. The founders of our government were exceedingly careful to distribute the sovereign power of the state between the executive, legislative, and judicial branches thereof, and to provide that neither should trespass upon the domain of the other. The time has not yet come when

the entire sovereign power of the people of the state, executive, legislative, and judicial, is united in a member of the police force. The acts of the police department here criticised were not only a gross outrage, not only perfectly lawless, but they were criminal in character. Every person concerned therein is not only liable to a civil action for damages, but to criminal prosecution for assault (Pen. Code, § 219), and also for criminal libel (Pen. Code, §§ 242, 244, 245; *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 557, 64 N. E., on page 442, 59 L. R. A. 478, 89 Am. St. Rep. 828).

Notwithstanding this, after careful examination, I am convinced that the relator has mistaken his remedy. In the absence of special statutory authority, a writ of mandamus only lies to compel one to do what ought to be done in the discharge of a public duty, and not to undo what is improperly done, even though it may have been done under the color of performance of public duty. *Merrill on Mandamus*, § 42; *Ex parte Nash*, 15 Queen's Bench, 92; In the *Matter of Dental Society v. Jacobs*, 103 App. Div. 86, 92 N. Y. Supp. 590; *People ex rel. Joyce v. York*, 27 Misc. Rep. 658, 59 N. Y. Supp. 418. In the *Nash Case* it appeared that the seal of a corporation had been improperly affixed to the register of shareholders, and an application was made for a writ of mandamus to compel the removal of said seal. Lord Campbell said:

"We grant it [mandamus] when that has not been done which the statute orders to be done, but not for the purpose of undoing what has been done."

It might be urged that it was the duty of the police department to keep a correct record of persons convicted of crime, and not to confuse and embarrass that record with the pictures and measurements of persons presumed to be innocent. The answer to such argument is that there is no express statutory duty imposed upon the police department in this city to keep a record even of those persons convicted of crime. But, if there had been and by inadvertence or design there had been included in that record the picture and history or the impressions of persons not properly included therein, in the absence of express statutory authority, the court could not by mandamus compel the correction of such error. A register of deeds may be compelled to record a deed which has been properly executed and acknowledged, if he refuses so to do. I apprehend, however, that if through inadvertence or design he recorded a deed improperly acknowledged, or one upon which the signature was forged, he could not be compelled by mandamus to cancel such record, although the instrument was improperly recorded.

The case of *Dental Society v. Jacobs*, above referred to, seems to be precisely in point. In that case it appeared that by Public Health Law, Laws 1893, pp. 1548, 1549, c. 661, §§ 161, 162, as amended by Laws 1895, pp. 419, 420, c. 626, it was the duty of every person practicing dentistry in this state to register in the office of the clerk of the county where his place of business is located. One of the conditions which would entitle him to such registration was to present to the county clerk a license issued from the regents of the University of the State of New York. Upon the presentation of such

license, and an affidavit stating his name, age, birthplace, number of license, date of issue, and other particulars in the act specified, it was the duty of the county clerk to preserve such affidavit as part of the records of his office, and to issue to such licentiate a certificate of his registration, and a transcript thereof, which transcript and license were made presumptive evidence in all courts of the facts stated therein. Subsequently to the passage of the act, and on the 19th of August, 1895, one William E. Walker presented an affidavit, in which he stated that his legal authority for practicing dentistry within this state was conferred upon him by diploma from the Wisconsin Dental College. It appeared that the Wisconsin Dental College was not a registered dental school; and it was claimed that the said college sold its diplomas, and that the said Walker had purchased the diploma from said college for the sum of \$50. The State Dental Society took the matter up, and sought by mandamus to compel the county clerk to cancel, erase, and expunge from the records in his office the name of the said Walker on the book of registry of dentists, and to remove said affidavit from the files. The argument was there made that public interests demand that a true register of dentists be kept, and that in discharging this public duty the county clerk could be compelled to remove from said register the names of all persons improperly there. The court held that, notwithstanding the act of the county clerk in receiving Walker's affidavit and entering his name on the register was wholly without authority of law, yet there was no statutory duty imposed upon the county clerk or his successors, at the request of any one, to cancel and erase such registration. If there was no duty upon the clerk to make such cancellation and erasure, the court would not by mandamus compel him so to do. The failure of the county clerk to cancel and expunge the name of Walker from the register of dentists, and to remove from the files of his office the affidavit made by him, was not a failure to perform a clearly ministerial public duty, because the act of the county clerk in accepting such registration was a completed act wholly outside of public duty.

The fact that in the civil service law the Legislature have deemed it necessary to expressly provide that in the provisions relating to the rights of preference to appointment conferred upon veterans, and the provisions relating to the removal of veterans from positions in the public service, the injured party should have a remedy by mandamus for refusing to allow a preference, or to undo an unlawful act of removal (Laws 1899, pp. 808, 809, c. 370, §§ 20, 21), would seem to indicate that, but for such express statutory authority, the right to this remedy would not exist. Under the same law it was held with regard to a person claiming a privilege against removal by reason of being an exempt fireman at a time when the remedy by mandamus had not been extended to them that such relief was unavailable. *People ex rel. Cochran v. Tracy*, 35 App. Div. 265, 54 N. Y. Supp. 1070.

It is with great regret that I have been compelled to come to the conclusion that I cannot afford the relator relief in this form of proceeding. It seems highly probable, however, that by voluntary action

the police department will gladly undo the wrong that has been done. It is scarcely conceivable that a department of the city government whose acts are not only unlawful, but criminal in character, should hesitate to undo such acts when their attention is called to the character of them. It is made the duty of the police department under the charter to prevent crime. It remains to be seen whether under pretense of doing that they shall persistently commit crime.

The application must be denied, but without costs.

(57 Misc. Rep. 30.)

PEOPLE ex rel. JENKINS v. KUHNE.

(Supreme Court, Special Term, Kings County. December 17, 1907.)

1. HABEAS CORPUS—REQUISITES—SEAL.

Though a writ of habeas corpus is required, by Code Civ. Proc. § 1992, to be issued under the seal of the Supreme Court, section 24 also declares that the omission of the seal does not render the writ void or voidable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 58.]

2. SAME—RIGHT TO WRIT—ORDER OF COURT.

Under Code Civ. Proc. § 2020, giving an absolute right to the writ of habeas corpus, no special order of court is necessary for its issuance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 55.]

3. PROCESS—WRITS—ALTERATION.

Under the express provisions of Code Civ. Proc. § 727, a writ or order of court when once signed should not be changed in the slightest degree by any person into whose hands it comes, without the court's express authority.

4. HABEAS CORPUS—ALTERATION OF WRIT—EFFECT.

Where, after the issuance of a writ of habeas corpus, relator's counsel changed the name intended for relator in two places in the writ to correct a mistake, and make the writ consistent throughout, such change did not invalidate the writ; since it was either within the implied authority of counsel to make the writ conform to the intent of the justice issuing it, or, if it was a material alteration made without authority, it was the act of a stranger to the writ, and therefore did not affect the writ as originally issued.

5. ALTERATION OF INSTRUMENTS—IMMATERIAL CHANGE—CHANGE BY PARTIES—EFFECT.

If a change is made by one of the parties to an instrument after its execution, but its legal import remains the same, the alteration is not fatal, in the absence of a statute declaring such to be the effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Alteration of Instruments, § 4.]

6. HABEAS CORPUS—WRIT—FORM—OBJECTIONS—WAIVER.

Failure of relator to incorporate in a petition for a writ of habeas corpus all the matters specified in Code Civ. Proc. § 2019, was waived by respondent's appearing and filing a return to the writ, instead of moving to quash.

7. SAME—FEES—UNDERTAKING.

Where no objection was made when a writ of habeas corpus was served that no fees were tendered to respondent, and no undertaking was given as required by Code Civ. Proc. § 2000, and respondent finally obeyed the writ without production of either fees or undertaking, he could not object that the writ was invalid for that reason.

8. SAME—WAIVER.

Code Civ. Proc. § 2000, requiring relator in a writ of habeas corpus to pay certain fees and give an undertaking to the respondent, is for the sole benefit of the latter, and may therefore be waived by him.

9. SAME—PRODUCTION OF PRISONER—TIME.

Code Civ. Proc. § 2004, makes it the duty of the person on whom a writ of habeas corpus is served to obey, and make return to it according to the "exigency thereof." Section 2006 declares that when the writ is returnable forthwith, at a place within 20 miles of the place of service, the prisoner must be produced within 24 hours; and section 2027 declares that the person on whom the writ is served must bring up the body of the prisoner in his custody according to the "command" of the writ. *Held*, that the time specified in section 2006 was the maximum time only, and hence, where a writ required the production of the prisoner "forthwith and immediately," it was no excuse for the respondent's delay to afford an opportunity to photograph and measure the prisoner that he was produced within 24 hours.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 74.]

10. SAME—DISOBEDIENCE—PUNISHMENT—STATUTES.

Code Civ. Proc. § 2028, provides that, where a person who has been duly served with a writ of habeas corpus neglects without sufficient cause fully to obey it, the court or judge before whom it was made returnable, must forthwith issue a warrant of attachment for the delinquent, and commit him to custody until he makes return to the writ and complies with the order, etc. *Held*, that such section referred to a case where the respondent failed to make any return to the writ, and did not apply to one in which the default consisted in the method and manner of making the return.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, §§ 72, 73.]

11. SAME—EFFECT.

Code Civ. Proc. § 2028, providing for punishment of a respondent disobeying a writ of habeas corpus, is not exclusive, and does not preclude the court from punishing respondent as for a contempt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 72.]

12. SAME—NATURE OF WRIT.

A writ of habeas corpus is a common-law writ, existing independent of statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 1.]

13. SAME—AUTHORITY TO ISSUE—JUDGE IN CHAMBERS—CRIMINAL CONTEMPT.

Under the habeas corpus act, a justice of the Supreme Court who issues the writ in chambers returnable before him at chambers being a branch of the Supreme Court, the disobedience of the writ may be punished as a criminal contempt, as though it had been issued at Special Term.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, §§ 72, 73.]

14. SAME—CIVIL CONTEMPT.

Where, after relator had been admitted to bail before conviction, he was arrested by police officers and taken to police headquarters to be photographed and measured without authority, and, in order to prevent this, obtained a writ of habeas corpus which was served on respondent, in charge at police headquarters, requiring production of relator forthwith before he had been photographed and measured, but respondent delayed compliance with the writ until such proceedings had been completed, the writ constituted a special proceeding to preserve relator's personal liberty and immunity of his person, and hence respondent was punishable as for a civil contempt under Code Civ. Proc. § 14, subd. 8, providing that a court

of record has power to punish, by fine and imprisonment, or either, a neglect or violation or other misconduct by which a right or remedy of a party to a civil action or a special proceeding has been defeated, in any other case than those specified, where an attachment or other proceeding to punish for a contempt has been usually adopted in a court of record to enforce a civil remedy or to protect the right of a party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 74.]

Proceedings to punish August Kuhne for contempt for disobeying a writ of habeas corpus issued on the relation of Frank Jenkins. Defendant convicted.

Stephen C. Baldwin, for relator.

Edward J. Lazansky, Asst. Corp. Counsel, William Rand, and Howard S. Gans, for respondent.

BURR, J. Upon the hearing of this application, the respondent seemed to be more concerned to discover alleged technical defects in the writ and the proceedings to punish him for disobedience of it than to meet the questions involved upon the merits. The technical questions will be first considered.

The respondent claims the writ to be void for two reasons: First, that it was not issued under seal; and, second, that material alterations had been made in it after the writ had been signed by the justice issuing the same. While the statute provides that such a writ must be issued under the seal of the Supreme Court (Code Civ. Proc. § 1992), the same statute also provides that the omission of the seal does not make the writ either void or voidable (Id. § 24). A writ of habeas corpus is a writ to which the petitioner has an absolute right. Code Civ. Proc. § 2020. It does not rest in discretion, as does a writ of mandamus, and no special order of the court is required before it issues.

The facts with regard to the alterations in the writ are undisputed, and are substantially as follows: Counsel for the petitioner in these proceedings, anticipating that earlier in the day one John G. Jenkins, Jr., might be indicted by the County Court, and anticipating that an effort might be made to photograph and measure him while in the custody of the County Court and waiting the adjustment of bail, prepared a typewritten petition for a writ of habeas corpus, and also a writ requiring the persons having the custody of the body of John G. Jenkins, Jr., to produce him forthwith and immediately upon the receipt of the writ before the justice issuing the same. The said John G. Jenkins, Jr., was arraigned, admitted to bail, and discharged, and no attempt was made to interfere with him. When the person of Frank Jenkins was seized under the circumstances hereinafter set forth, his counsel took the typewritten paper previously prepared, and in the petition struck out the words, "John G.," before the word, "Jenkins," and wrote in the word, "Frank," with a pen, and struck out the word, "Jr.," after the word "Jenkins." This petition was then verified. In the writ in the mandatory part thereof he struck out the words, "John G.," before the word "Jenkins," and inserted the word, "Frank," struck out the word, "Jr.," after the word "Jenkins,"

and in the closing part of the writ again struck out the same words and inserted the word "Frank." All this was done before the writ was submitted to the justice for signature. When signed, the writ read as follows:

"People of the State of New York. To the Police Officers or Other Persons in Charge of John G. Jenkins, Jr.: We command you that you have the body of Frank Jenkins by you imprisoned and detained as it is said, together with the time and cause of such imprisonment and detention by whatsoever name the said John G. Jenkins, Jr., is called or charged, before me, a justice of the Supreme Court, forthwith, and immediately upon the receipt of this writ at my chambers in the courthouse, in the borough of Brooklyn, city of New York, to do and receive what shall then and there be considered concerning the said Frank Jenkins, and have you then and there this writ."

At the police headquarters one of the counsel for Frank Jenkins observed the failure to change the words, "John G.," to "Frank," in the salutation clause of the writ, and also in the middle of the writ following the words, "by whatsoever name the said," and preceding the words, "is called or charged." Taking a pen in the presence of the respondent, he changed these words in the writ so as to make the language of the writ consistent throughout. These latter changes in the writ were not necessary. If the salutation clause of the writ had read simply "People of the State of New York. To the Police Officers," it would have been quite sufficient. The person upon whom the writ is served is deemed to be the person to whom it is directed, although directed to him by a wrong name or description, or to another person. Code Civ. Proc. § 2024. The mandatory clause of the writ commanded the person upon whom it was served to have the body of Frank Jenkins before the justice issuing the writ, to do and receive what should then and there be considered concerning the said Frank Jenkins. If the words, "by whatsoever name the said John G. Jenkins, Jr., is called or charged," had been entirely omitted, the writ would have been a good writ for the production of Frank Jenkins. If the person directed to be produced is described in any way so as to be identified as the person intended, the writ shall not be disobeyed for any defect of form. Id. 2024. While the act of counsel in making the changes above referred to was indiscreet and injudicious, it is manifest that it was not done with evil intent. A writ or an order of the court when it has once been signed should never be changed in the slightest degree by any person into whose hands it comes without the express authority of the court. Code Civ. Proc. § 727. But, if the changes were material, the respondent must choose one horn of the dilemma or the other. Either it was within the implied authority of counsel who had obtained the writ to change it so as to make it conform to the intent of the justice issuing the writ and to correct a palpable mistake therein, or such change was made entirely without authority and by a stranger to the instrument. If the former is the case, then the writ was not vitiated. 2 Cyc. 148; Clute v. Small, 17 Wend. 238; Hale v. Russ, 1 Me. 334. But, if the change was made without authority and by a stranger, such change has no effect upon the original writ. The paper then has no other or different meaning than it had before such change was made. 2 Cyc. 154; Martin v. Tradesmen's Ins. Co., 101 N. Y. 498, 5 N. E. 338. If a change

is made by one of the parties to an instrument, still, if the legal import and effect of the instrument remains the same after the alteration, such alteration does not vitiate it in the absence of a statute declaring such to be the effect. *Prudden v. Nester*, 103 Mich. 540, 61 N. W. 777; *Krouskop v. Shontz*, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817; *Clapp v. Collins* (City Ct.) 7 N. Y. Supp. 98; *Leonard v. Phillips*, 39 Mich. 182, 33 Am. Rep. 370; *Derby v. Thrall*, 44 Vt. 413, 8 Am. Rep. 389; *Arnold v. Jones*, 2 R. I. 345; *Rudesill v. Jefferson Co.*, 85 Ill. 446. In this case from the petition and the mandatory portions of the writ, it is perfectly apparent that the person to be produced was Frank Jenkins. Any changes in the other portions of the writ to conform to the principal parts thereof and effect that intention were immaterial changes, and did not make the writ void.

It was also claimed that the writ was defective for failure to incorporate in the petition the various matters and things specified in section 2019 of the Code of Civil Procedure. Without determining whether the expression of one alleged cause of detention is an exclusion of all others, it is sufficient to say that this objection was waived by appearing and filing a return to the writ, instead of moving to quash the same. 21 Cyc. 314; *McGlennan v. Margowski*, 90 Ind. 150.

Objection was also made that the writ was not properly served because no fees were tendered to the respondent nor any undertaking given, as provided by section 2000 of the Code of Civil Procedure. Without deciding whether the provisions of that section apply to the respondent, and without deciding whether any such restrictions upon the power of the court to issue this writ are valid or invalid, it is sufficient to say that no objection was made when the writ was served to obeying the same upon that ground, and it was finally obeyed without the production of either fees or undertaking. This provision of the statute was solely for the protection of the person upon whom the writ was served, and like any other provision for his benefit might be waived. In the *Matter of Clark*, 168 N. Y. 437, 61 N. E. 769; *People ex rel. McLaughlin v. Police Com'rs*, 174 N. Y. 456, 67 N. E. 78, 95 Am. St. Rep. 596.

The respondent further contends that, even although the writ did require the production of the body of Frank Jenkins forthwith and immediately upon the receipt of the writ, the writ was obeyed, because, within a period of 24 hours after the writ was served, the prisoner was produced. Code Civ. Proc. § 2006. This provision of the statute must be read in connection with section 2004 of the Code of Civil Procedure, which makes it the duty of the person on whom the writ is served to obey and make return to it "according to the exigency thereof," and with section 2027 of the Code of Civil Procedure, which provides that the person upon whom a writ of habeas corpus is served must bring up the body of the prisoner in his custody according to the command of the writ. Where the writ requires an immediate production, and it is possible for the person to obey the writ before deliberately proceeding to do something else which it was the purpose of the writ to prevent, it cannot be said that this was making a return according to the exigency of the writ.

Further than that the section of the Code upon which the respondent relies was intended to specify only a maximum time beyond which an excuse for delay in obedience to the writ would not be considered. This is apparent if we consider the history of legislation, and the source from which the present words of the statute are derived. The codifiers took that provision of the Code from a provision of the Revised Statutes (2 Rev. St. p. 575, pt. 3, c. 9, tit. 1, § 85), and this, in turn, through the Revision of 1813, may be traced to an act passed on the 21st of February, 1787 (Laws 1787, c. 39). The preamble to that act recites that:

"Great delays have been used by sheriffs, gaolers and other officers to whose custody persons have been committed for criminal or supposed criminal matters, in making returns of writs of habeas corpus to them directly and by other shifts to avoid their yielding obedience to such writ contrary to their duty and the known laws of the land."

The act then provides that for the prevention of such abuses the prisoner shall be produced "according to the command of the writ," unless the commitment of the party be in a place beyond the distance of 20 miles from the place or places where such court shall be. If beyond the distance of 20 miles and not above 100, then within the space of 10 days. If beyond the distance of 100 miles, then within the space of 20 days, and not longer. When one considers the difficulties of transportation at that time and the language of the statute, it is clear that it was not intended to do anything more than fix a maximum limit for obedience, and not to confer on the person to whom the writ was delivered a "shift for delay" to the extreme of the time specified. A writ of habeas corpus "tolerates no delay except of necessity, and is hindered by no obstacle except the limitations set by the laws of its creation." *People ex rel. Duryee v. Duryee*, 188 N. Y. 445, 81 N. E. 315. But, even though the writ was a valid writ, although all defects in connection with it were waived, although it was properly served, and although it has not been obeyed in its letter, yet, if the disobedience was unintentional and not willful, and the respondent was actually misled as to the person that the writ called upon him to produce, the court might hesitate to punish him for such technical disobedience. That the respondent knew precisely the person that the writ called upon him to produce and knew the purpose and object of the writ does not admit of dispute.

The testimony as to the circumstances attendant upon the issuing of the writ is uncontradicted, and is as follows: On the 26th day of November, 1907, the said Frank Jenkins, accompanied by his counsel, appeared before the County Court of Kings county, which was then in session, and through his counsel stated that he understood that an indictment had been found in that court charging him with the crime of forgery in the third degree. He surrendered himself to the custody of the court, and desired that bail be fixed. Bail was fixed, a bail bond prepared, the bail offered justified, and was approved by the court, and the prisoner was discharged. He left the courtroom in company with his wife, and, as soon as he reached the street and when he was immediately in front of the courthouse, he was seized by two police officers connected with the central office in the borough

of Brooklyn. Although counsel protested, and informed these men that Mr. Jenkins had been released on bail by the County Court, he was dragged through the street to the police headquarters, a distance of five or six blocks from the courthouse. The writ of habeas corpus above referred to was then obtained from a justice of the Supreme Court, requiring the police officials having Mr. Jenkins in custody to immediately produce him before the justice who issued the writ at the courthouse in Brooklyn. At the police headquarters the respondent, August Kuhne, was in charge. In the presence of Mr. Jenkins, the writ was served upon him, and, after examining it, he directed his subordinates to take Mr. Jenkins upstairs and take his photograph. This was done, and certain measurements and impressions of his person were taken, with the admitted purpose of making them a part of the criminal records of the police department. After that had been done, and about an hour subsequent to the time when the writ was served, the said Kuhne produced Frank Jenkins at the courthouse before the justice who issued the writ. There is a dispute of fact as to what occurred at police headquarters when the writ was served. Mr. Baldwin, of counsel for the petitioner, states that when the writ was served upon Kuhne, he asked who made the alterations in the paper, and that he replied that they were made before the writ was signed; that he then stated (pointing to the prisoner then in the presence of respondent), "This is Frank Jenkins, the man whom the writ requires to be produced forthwith"; that he then asked Kuhne if he proposed to obey the writ, and that Kuhne violently threw the papers down on the desk, and said to his subordinates, "Take him upstairs and photograph him." Mr. Baldwin testifies that he then asked him if he knew what he was doing, and if he understood the responsibility which he was assuming, and he said, "Yes." This testimony of Mr. Baldwin is corroborated substantially by four reputable witnesses. The respondent says that, when the writ was served upon him, the statement was made, "Here is the writ of habeas corpus for this man"; and, when he asked who made the changes, that Mr. Baldwin said "he knew nothing about it." He denies that he threw the papers down upon the desk, denies that Mr. Baldwin pointed out the prisoner, and said, "This is Frank Jenkins, the man that you are to produce"; but testifies that, after Mr. Baldwin said he knew nothing about the changes in the writ, he turned and went out. The statement is so inherently incredible under the circumstances of the case that, if the overwhelming weight of evidence were not against accepting the truth of it, I should hesitate to do so. It is not corroborated by a single witness, although several members of the police force and a large number of other persons were present at the time. I am perfectly convinced that the respondent in this case in his endeavor to extricate himself from the difficulty in which he found himself committed willful and deliberate perjury on the witness stand in the examination held before me. That he was not misled is apparent from the fact that he did produce the body of Frank Jenkins after the purpose which he had sought to accomplish, and which he admits that he knew it was the design of the writ to prevent had been accomplished. That the conduct of the respondent in disobeying this writ was delib-

erate and intentional was also conclusively established out of his own mouth upon the witness stand. The said Kuhne admitted that he knew that the right of the police department to take the photograph and measurements of persons who had not been convicted of crime had been questioned. He knew that the counsel for Jenkins were trying to prevent this from being done until the right of the police department so to do had been determined. He was determined to defeat the purpose of counsel in this regard. He made no effort to ascertain about the validity of the writ, or whether he should produce Frank Jenkins or any one else in obedience to it, until after he had directed the said Jenkins to be taken upstairs at police headquarters, and photographed and measured. For the sake of defeating the purpose of the writ, and accomplishing his own purpose, he deliberately disregarded its mandate, in the hope that in some manner he might afterwards find an excuse for so doing.

While the respondent may not be charged for the conduct of any of the officers under his control prior to the time when the prisoner was delivered into his custody at police headquarters, the character of his conduct on that occasion may be considered in connection with his subsequent conduct in the same proceeding. After he had produced the body of Frank Jenkins in court, and after the court had insisted that he should make a written return to the writ, he signed a return entitled, "In the Matter of the People of the State of New York ex rel. John G. Jenkins, Jr.," against the police officials, in which he stated that at the time that the writ of habeas corpus was served upon him he did not have the relator in his custody, and that at no time whatever has he had the said relator in his custody. A more deliberate insult to the intelligence of the court could hardly be conceived. When objection was made to the receipt of such a return to the writ, he then signed another return, to the effect that he held Frank Jenkins then in court by virtue of a bench warrant issued by the district attorney of Kings county, which warrant he attached to his return. While it may be true that at the time that Frank Jenkins was brought before respondent at police headquarters he did not know that he had been arraigned, pleaded, given bail, and been discharged, and that the bench warrant which he referred to in his return had ceased to have any validity, he did know that such was the case at the time that he filed the return, for the statement had been made in open court in his hearing and assented to by the district attorney before any return was filed, and he immediately consented to the discharge of the prisoner. This second return was false and untrue, and known to him to be so at the time that he made it, and of itself was such disorderly, contemptuous, and insolent behavior in the presence of the court as would constitute criminal contempt. In *re Stacy*, 10 Johns. 328.

The respondent finally asserts that, even although he had deliberately and willfully disobeyed the writ served upon him, there is no power in the court before this application is pending to punish him therefor as for a contempt; and he bases this contention upon the grounds: First. That the habeas corpus statute provides other proceedings for the disobedience of such a writ. Code Civ. Proc. § 2028. It is

sufficient to say in this regard that the section cited has reference to a case where the respondent fails to make any return to the writ, and does not relate to a case where in the time, the method and manner of making the return the writ has been disobeyed. Moreover, even if the section might be deemed to cover the situation here presented, it is not exclusive, nor could the Legislature make it so, for the court has inherent power to vindicate its own dignity and punish defiance to its mandates, which is immune from legislative attack or control. Second. The respondent objects that he may not be punished as for a criminal contempt because the writ in question was not a lawful mandate of a court of record, but a mandate of a justice of the Supreme Court. A writ of habeas corpus is a common-law writ, and not a statutory one. If every provision of statute respecting it were repealed, it would still exist, and could be enforced. *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211. The entire dignity and power of the sovereign people of the state of New York are behind it to compel obedience to its provisions both in spirit and in letter. But under the provisions of the habeas corpus act a justice of the Supreme Court who issues the writ, even although he issues it at chambers and makes it returnable before him at chambers, is a branch of the Supreme Court within the meaning of the section of the statute above referred to precisely as much as in a regularly constituted Special Term of said court. It is a state writ issued in behalf of the people of the state. The seal of the Supreme Court is to be attached to it. Unless the justice of the Supreme Court issuing the writ of habeas corpus is in effect a branch of the Supreme Court for the purposes of this proceeding, then the writ becomes entirely inefficient at every season of the year, except when a Special Term or a Term of the Appellate Division of the Supreme Court within the judicial district where the prisoner is detained is actually in session. In the rural districts of the state this would suspend the writ of habeas corpus for the greater portion of the year, since to confer the power upon a justice of the Supreme Court to issue a writ, when he cannot compel obedience to its terms, is making a mockery of a most solemn and important proceeding.

I have great doubt whether it lies within the province of the Legislature, in view of the nature of the writ and the provisions both of the federal and state Constitutions, that a writ of habeas corpus shall not be suspended, except when, in cases of rebellion or invasion, the public safety requires it (Const. U. S. art. 1, § 9, cl. 2; Const. N. Y. art. 1, § 4) to put any restriction upon the power of the court either to issue or enforce obedience to the writ (*In re Leggat*, 47 App. Div. 381, 62 N. Y. Supp. 208; *People ex rel. Bungart v. Wells*, 57 App. Div. 140, 68 N. Y. Supp. 59). As Lord Esher says:

"It is not necessary to constitute a contempt of court that the contempt should be in court, or that it should be a contempt of a judge sitting in court. All that is necessary is that it should be a contemptuous interference with judicial proceedings in which the judge is acting as a judicial officer." *In re Johnson*, Law Reports 20 Q. B. p. 71.

But, if there was any question about the power of the court to punish as for a criminal contempt, clearly it exists to punish for a

civil contempt. In this case the right of the relator in this special proceeding to personal liberty and immunity of person and his remedy to preserve this have been defeated and impaired by the conduct of the respondent. The power of the court in such case to punish has been preserved by statute in every case where prior to the passage of the statute it had been usually adopted and protected. Code Civ. Proc. § 14, subd. 8.

It only remains to determine what punishment shall be inflicted upon the respondent in this case. The writ of habeas corpus is the most venerable of the state writs known to the law. Its origin is lost in antiquity, but it antedated Magna Charta. It is a writ so sacred that it alone of the great state writs is especially protected by provisions both of federal and state Constitutions. It is a writ so important that it alone of the state writs is by special provision of statute permitted to be issued on Sunday. The right to it is so absolute that a severe penalty is imposed upon any court or judge who refuses to grant the writ upon application of any person entitled thereto. A punishment in this case must be inflicted sufficiently severe to vindicate the dignity of this writ, and to impress upon the respondent and others the serious consequences of disobedience to it.

For the contempt of which the respondent has been guilty, I direct that he be committed to the county jail of Kings county, and there imprisoned for a period of 30 days, and that he be fined in the sum of \$250, and that he be committed to the same jail and there imprisoned until such fine is paid, not exceeding an additional period of 30 days.

(56 Misc. Rep. 417.)

IN RE DROWNE'S ESTATE.

(Surrogate's Court, New York County. November, 1907.)

GUARDIAN—APPOINTMENT—NOTICE.

Under Domestic Relations Law, Laws 1896, p. 223, c. 272, § 51, vesting in the mother a right to the custody of a child equally with the father, a guardian cannot be appointed for a minor on the father's petition without notice to the mother.

In the matter of the estate of Henry Russell Drowne, Jr. Application for revocation of letters of guardianship.

Hays & Hershfeld, for petitioner.

Hamilton & Beckett, for respondent.

THOMAS, S. The provisions of procedure for the appointment of a guardian of an infant under 14, on the petition of the father, the mother being alive, did not require notice to the mother, though it permitted such notice in the discretion of the surrogate. Code Civ. Proc. §§ 2823, 2827. At the time of the enactment of the Code the father's right of custody and control of his infant children was superior to that of the mother, and the omission of the requirement of notice to the mother is in harmony with that rule of law. By the domestic relations law it was enacted that:

"A married woman is the joint guardian of her children with her husband, with equal powers, rights and duties in regard to them." Laws 1896, p. 223, c. 272, § 51.

This effected a change in the law, and vested in the mother a substantial legal right to the custody of the person of her child coequal with that of her husband. This right could not be taken away from her or cut down in any degree by the order or decree of any court without notice to her and opportunity for making defense. From that time the discretion of the surrogate on an application for guardianship of the person of an infant child to give or not to the mother due notice of such application became a duty, and a necessary condition for acquiring jurisdiction.

In the present case no such notice was given, and on that ground alone, and without any determination as to any other issue between the parties the decree, so far as it awards guardianship of the person of the infant to the respondent, is vacated, without prejudice to the right of either party to apply for such guardianship on proper notice to the other.

456 Misc. Rep. 421.)

In re JONES' ESTATE.

(Surrogate's Court, Oneida County. November, 1907.)

WILLS—RIGHTS OF LEGATEES—PAYMENT OF LEGACIES.

Testatrix made a bequest to a sister, and gave her husband the use of certain property for life, with power of sale; the legacy to the sister in the event of sale to be paid from the proceeds. The real estate was not sold by the husband, but after his death was sold by the executor for a sum sufficient to pay the debts of testatrix and the legacy. There was no personal estate out of which the legacy could be paid. *Held*, that the executor could not divert the proceeds to pay expenses of administration and other legacies, nor would the proceeds fall into the residuary estate, leaving such legacy unpaid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 2113-2119.]

In the matter of the estate of Jane Jones. Proceedings on final settlement of executor's account. Decree rendered.

E. Willard Jones, for executor.

J. W. Rayhill, for Elizabeth Owens, legatee.

SEXTON, S. The executor in this estate has filed his final account, and asks for a final decree distributing the estate. In the first clause of the will the testatrix directed that all lawful debts be paid and then bequeathed \$200 to her sister, Elizabeth Owens. By the second clause she devised to her husband absolutely the blacksmith shop property and the life use of their home in Trenton Village and then further provided:

"Also, I give and bequeath unto my aforesaid husband the use of my lot on street leading from aforesaid Trenton Village towards Steuben, for and during the life of my aforesaid husband, and I hereby empower and authorize my aforesaid husband to sell, convey, transfer, deed, and deliver in my name and stead the aforesaid vacant lot on street leading from aforesaid Trenton Vil-

lage toward Steuben, to pay and cancel my unpaid debts and the bequest of \$200 to my aforesaid sister, and of the balance, after such payment of the sum arising from the aforesaid sale, publicly or privately held, I give and bequeath the use to my aforesaid husband for and during his life."

The testator then bequeathed \$600 to a daughter of said Elizabeth Owens, and \$200 equally to nephews, to be paid after the death of her said husband, and "all the residue, rest, and remainder of property, both real and personal," she then gave absolutely to her adopted daughter, Ann Griffith, and appointed Ellis W. Griffith executor, with power to sell and convey "real estate or any part thereof, as he, my said executor, thinks advisable." The husband never sold the lot, and upon his death all the real estate in which he had a life use was sold by the executor. The lot described in the second clause of the will brought \$260. The homestead sold for \$1,200. There was no personal property. The debts of the testator amounted to \$45.50. All legacies and debts of administration have been paid, except a balance of \$190 on the Elizabeth Owens legacy. There remains in the executor's hands \$339.75 for distribution.

It is contended that this balance should go into the residuum, because it cannot be legally used to pay the Elizabeth Owens legacy, for the reason that said legacy and debts of testator were expressly charged on the vacant lot under the second clause of the will, and that the husband was directed to sell it to pay said legacy and debts, and, not having sold it, the legacy cannot be paid out of the general estate. This contention is untenable, for the reason that the husband was not directed to sell, but "empowered and authorized" only. The language used by the testator creates a naked power, which in law is not above the dignity of a permission. The property in question was a vacant lot of about four acres. It seems reasonable that the power of sale was given to the husband to enable him to dispose of the lot, in case it should prove unremunerative. If he sold, he was directed to pay said legacy and debts, and have the life use of any balance then remaining. He could sell the lot clear of the legacy and debts. They were not made a charge or lien thereon, and only in the event of a sale were they at all involved. The lot was sold by the executor after the death of the husband, under a discretionary power of sale, for \$260. This amount would more than pay the legacy of \$200 and the debts of \$45.50. If the lot was charged with the payment of said sums, as contended, it was the duty of the executor to have so applied the said proceeds. Instead, he used the money, all but \$10, toward debts and expenses of administration. He afterward sold the balance of the real estate, under the power given him, for \$1,200, and paid \$800 in discharge of general legacies. The executor's construction of the will evidently was that, there being no personal property, the real estate should pay the legacies, except that the husband should have sold the vacant lot and paid the Owens legacy. He having failed to sell and pay, the proceeds of the sale thereof, the executor contends, must go to the residuary legatee. The testator showed more concern about the security of the Owens legacy than of any other. It is absolute, and first given in the will, and protected in case of the sale of the lot by the husband. If the husband had exercised his power of sale, he would

have been obliged to pay this legacy and the debts out of the proceeds; and the only portion of the proceeds that would fall into the residuum would be the amount realized in excess of \$245.50, which amount would pass to the executor as such on the death of the husband. Can it be possible, because of the failure of the husband to sell, all the proceeds of the lot fall into the residuum? I think not. The fact that the executor was empowered to sell the lot in question is evidence of the fact that the testator did not give, or intend to give, the husband a mandatory and exclusive power of sale. Nor did she intend that the legacy should lapse or her debts go unpaid, in the event of failure on the part of the husband to sell.

The will was made October 11, 1903, and testator died November 21, 1903, and must have had the amount of her property in mind, and must have known that she had no personal property with which to discharge legacies, and must have known that, if they were to be paid at all, the money must come from a sale of the real estate, of which she had sufficient for that purpose. It is hard to believe that a rational person would provide for her sister in her will, in the amount of \$200, intending that it should not be paid to her. The testator had no children. She had adopted Ann Griffith, the residuary legatee. It is plain that the testator was sincere in the gift of all the legacies. The claims of blood are remembered and considered. She gave her sister, Elizabeth Owens, \$200. The household effects, upon the death of her husband, she gave to said sister and to a niece equally. She gave \$600 to a daughter of Elizabeth Owens, and to two nephews \$200 to be divided equally. To her husband she devised the blacksmith shop property and the use of all household effects and real estate while he lived. Upon his death the executor was authorized to sell all real estate. There was real estate more than sufficient to pay all debts and legacies, and no personal property applicable to the payment thereof. These legacies were not meant to be nugatory or unavailing. They were general legacies and gifts, made with knowledge in the testator that she had nothing but real estate out of which they could be paid. The testator undoubtedly intended to charge the legacy to Elizabeth Owens upon the real estate, within the established rules applicable to the question, as settled by many adjudications. *Lefevre v. Toole*, 84 N. Y. 95; *Hoyt v. Hoyt*, 85 N. Y. 142; *Scott v. Stebbins*, 91 N. Y. 605; *McCorn v. McCorn*, 100 N. Y. 511, 3 N. E. 480; *Morris v. Sickley*, 133 N. Y. 456, 31 N. E. 332; *Hogan v. Kavanaugh*, 138 N. Y. 417, 34 N. E. 292.

The residuary clause of the will gives "all the residue, rest, and remainder of property, both real and personal, of every name and nature," etc., to said adopted daughter, Ann Griffith. There being no personal property, it must be held that the intention of the testator was to have the three money legacies, aggregating \$1,000, paid from the proceeds of all the real estate. In this state, when the language of the will blends the entire estate, both real and personal, into one residue, after giving legacies, and indicates the intention of the testator to be to give, by the residuary clause, only such residue as shall be found to remain after the satisfaction of the previous dispositions of the will, the legacies are a charge upon the real estate. *Forster v. Civil*,

20 Hun, 284; Hall v. Thompson, 23 Hun, 335; Lefevre v. Toole, supra.

I hold that the balance of the legacy to Elizabeth Owens of \$190 must be paid out of the proceeds of the real estate, and the residue to the residuary legatee. A decree will be entered accordingly.

Decreed accordingly.

(56 Misc. Rep. 418.)

IN RE DEL GENOVESE'S WILL.

(Surrogate's Court, Kings County. November, 1907.)

1. MARRIAGE—VALIDITY—DISAPPEARANCE OF FIRST HUSBAND.

Where a husband disappeared and was absent for five years, and his wife had reason to believe that he was dead, her second marriage in good faith was valid as to all the world, unless the first husband reappears and institutes an action to annul the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, § 80.]

2. WILLS—REVOCATION.

A marriage of a woman five years after the disappearance of her first husband and the birth of a child accomplishes the revocation of the will of the second husband previously executed.

In the matter of the probate of the last will of Vergilio Del Genovese. Probate denied.

Alexander C. Young (Theodore G. Lewis, of counsel), for proponent.

Charles Forster (Harry E. Lewis, of counsel), for contestants.

Moses J. Harris, special guardian, for Francesca Del Genovese.

John Oscar Ball, for Eusebio Ghelardi and others.

CHURCH, S. The contestants resist the probate of the will on the ground that subsequent to its execution the decedent married the contestant, Fidelma Del Genovese, and that, therefore, under the statute the will is revoked. It appears, without question, that Fidelma Del Genovese, at the time she claims to have been married to the deceased, had and at the present time has a husband living to whom she had been married previous to her marriage to the deceased, known as Eduardo Lopez. She alleges, however, that said Eduardo Lopez disappeared and she was absolutely unable to get any trace of him; but, ascertaining that one Eduardo Lopez had died out West and believing that this was possibly her husband, she, at the expiration of five years, contracted the marriage relation with the deceased. The statute provides that, where one of the parties to a marriage has disappeared for over five years and no trace of his whereabouts can be obtained, the survivor may marry again, and such marriage is not necessarily void. The first question to be considered, therefore, is whether the disappearance of Lopez was such as in good faith to justify the contestant in believing that she had the right to remarry.

Without reviewing the testimony in detail, it abundantly appears, irrespective of the testimony of the wife of Lopez and the deceased, that Lopez had disappeared and that the marriage with the deceased was contracted by her in good faith. That being so, it follows as a matter of law that such marriage is not absolutely void, as is the

case ordinarily where a person marries, having a husband or wife living, but is good as to all the world unless the first husband reappears and institutes an action to annul the same. *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106. This right is personal to him, and, not having exercised it, the marriage is to be treated as in all respects valid and binding. The only case which is offered by the proponent as disputing this doctrine is that of *Spicer v. Spicer*, 18 Abb. Prac. (N. S.) 112. The reasoning of that case is clearly in defiance of the statute, and it seems to have been very generally ignored by the higher courts in this state. It cannot, therefore, be regarded as a precedent which the courts should be obliged to follow.

The remaining question is whether the child of Fidelma Del Genovese is to be recognized as the legitimate child of the deceased. The evidence establishes that the deceased was the father of this child, and that she was born before the marriage between the deceased and Fidelma Lopez, and before the expiration of the five-year period in which she would have been justified in assuming that Lopez was dead. The general doctrine that a child born during lawful wedlock is to be presumed the child of such parents is unquestioned, but nonaccess of the husband may be shown as any other fact; and, if it is proved by competent evidence, then such presumption fails. In this case the proof shows beyond doubt that such child could not have been the child of Eduardo Lopez, but is the child of the deceased. In fact, the proponents do not seriously dispute this, but allege that the testimony of its mother is incompetent to prove it. In my judgment her evidence did not offend against the rule prohibiting the husband or wife from testifying as to nonaccess. But, if we reject her evidence entirely, it appears from the overwhelming weight of other evidence in the case that this child could not have been the child of Eduardo Lopez, but must have been the child of the deceased. That being so, the statutes provide that, if the parents of a child who would otherwise be illegitimate subsequently marry, then the birth of such child is legitimized. As it is shown in this case beyond question that Fidelma Lopez and the deceased, at a period subsequent to the birth of this child and at a period when, as has been proved, they had a right to contract marriage, did marry, it follows that the child became the legitimate child of the deceased.

The execution of the will under review was completely revoked by the marriage of the deceased and the birth of lawful issue. Upon a proper application made by the widow, she is entitled to letters of administration. In the present proceeding, however, the decree should simply refuse probate.

Probate denied.

ACKERMAN v. LIVINGSTON.

(City Court of New York, Trial Term. December, 1907.)

MUNICIPAL CORPORATIONS—STREETS—INJURIES TO TRAVELERS—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to plaintiff by being struck by a wagon driven rapidly along a street, evidence *held* to require submission of plaintiff's contributory negligence to the jury.

Action by Sebastian W. Ackerman against Johnston Livingston. On motion to set aside a verdict for plaintiff and for a new trial. Denied.

Feltenstein & Rosenstein, for plaintiff.

Carter, Ledyard & Milburn, for defendant.

WADHAMS, J. The motion is to set aside the verdict rendered in favor of the plaintiff and for a new trial. In the cases cited by the defendant the injured party failed to look after placing himself in a position of obvious danger. The approaching object in those cases was a car moving upon tracks in a certain direction, from which the car in its natural course would not deviate and pursuing which the car must necessarily come in contact with the party injured. In the case at bar the approaching object was a wagon. There is evidence to sustain a conclusion by the jury that, had the wagon pursued the course in which it was going when first observed by the plaintiff, some 40 or 50 feet away, it would not have come in contact with him. There is evidence that the wagon was approaching upon or between the tracks in West Broadway going downtown, and that the plaintiff when struck was west of the westerly track, from 3 to 5 feet away from the track.

The plaintiff testified that he backed up his horse and wagon against the curb, with the horse turned slightly downtown, toward the south. He looked around to see if there were any cars or trucks near him, and saw the express wagon about 40 or 50 feet away on the other side of the street. There were two tracks, the northerly track being on the east side of the street. When he first saw the truck it was on the northerly track, going in a southwesterly direction, coming slowly. He got off his wagon and put a blanket over his horse's head. He did not look again until the truck was from 2 to 4 feet away, coming faster. He dove underneath the horse's head to get away, but the pole of the truck came toward him, struck him in the side, and knocked him down.

There is evidence that it was a bright, clear day, that plaintiff's eyesight and hearing were both good, and that there was nothing between the plaintiff and the approaching truck. There is also evidence that the truck was coming towards him. Although the truck was coming in his general direction, and he was able to see it, had he looked, there is evidence upon which the jury were at liberty to find that he was in a position of safety and would not have been struck, had not the truck changed its direction. The plaintiff upon cross-examination testified:

"Q. Had it changed its direction any? Had the wagon changed its direction any? A. The truck? Q. Yes. A. Coming more toward me; more on the outside."

A witness testified:

"The wagon was coming down. It was between the two tracks. He wanted to swing further west as he swung around. He swung too short, and hit the man as he was standing at the horse's head. The pole hit him. Q. He turned west? A. Yes, sir; he had to get off the track. Q. In turning west, what occurred? A. He swung short, and as he swung he hit the man."

Another witness testified:

"I see a man standing there fixing up something about his horse's head. He wanted to get away from there; so the wagon came, and the horses turned toward him, and the pole hit the man, and he fell down, and the wheels ran over his arm. Q. As it got near the man, what did it do? A. The horses turned around toward the man, to the right, and the pole hit the man."

Upon this evidence the court is unable to hold that plaintiff was guilty of contributory negligence as a matter of law. The question was properly submitted to the jury for determination.

Motion denied.

(56 Misc. Rep. 426.)

STRAIGHT v. SHAW.

(Chautauqua County Court. November, 1907.)

1. PARTIES—REAL PARTY IN INTEREST—MODE OF OBJECTION.

Defendant may not avail himself of the defense that plaintiff is not the real party in interest, unless he pleads such fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 118.]

2. TROVER AND CONVERSION—WHEN MAINTAINABLE.

Defendant had a contract to furnish butter to a hotel company. Plaintiff agreed to meet defendant's checks, the proceeds of the sales to be deposited in bank to meet the same, and a part thereof to remain plaintiff's property. Held, that where the money was deposited to meet a certain check sent plaintiff by defendant, and payment of the check was stopped by defendant, who drew out the money and applied it to his own use, plaintiff may maintain conversion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 51-57, 84-94.]

3. BANKS AND BANKING—DEPOSITS—TITLE.

Where, in a business transaction, plaintiff agreed to meet defendant's checks drawn in advance of the deposit of the proceeds of the business, a part of the proceeds to become the property of plaintiff, and defendant drew the money and converted it to his own use, as to such money defendant was merely plaintiff's agent, and it belonged to plaintiff, though deposited in the name of defendant.

Appeal from Justice Court.

Action by Eugene C. Straight against Frank E. Shaw. Judgment for plaintiff, and defendant appeals. Affirmed.

Stearns, Thrasher & Sullivan, for appellant.

Warner & Farnham, for respondent.

OTTAWAY, J. This is an appeal from a judgment of a Justice's Court entered upon a verdict of a jury. By its verdict the jury have

determined the facts in favor of the plaintiff. The allegations and proofs of the plaintiff are in effect that the plaintiff, the manager of a co-operative factory manufacturing dairy products at Cassadaga, N. Y., at the instigation of the defendant, entered into an arrangement with the defendant whereby certain of the butter products of the factory were to be forwarded to Manhattan Hotel Company, of New York City, with whom the defendant had a contract. It was agreed that a portion of the proceeds of this butter was to be and remain the property of the plaintiff. These proceeds were to be deposited in the name of the defendant for the plaintiff in the Lincoln National Bank, of New York City, and should be transmitted to the plaintiff by the check of the defendant. It was agreed that this check should be given in advance of the deposit of the money at or about the time the butter was shipped to the hotel. Pursuant to this arrangement the plaintiff furnished butter to the Manhattan Hotel Company for some months. The money was deposited in the Lincoln National Bank and transmitted to the plaintiff by checks as provided by the agreement. Finally a check of \$200 was drawn upon the Lincoln National Bank, payable February 2, 1904, to transmit the money which under the agreement of plaintiff and defendant would be deposited February 1, 1904. Prior to February 2, 1904, the Manhattan Hotel Company deposited proceeds of the butter shipped by the plaintiff in the Lincoln National Bank. Before this check was presented the defendant went to the bank and directed the bank to refuse payment upon the check, drew the money from the bank, and used it for his own purposes. The plaintiff brings an action for conversion. From the judgment rendered the defendant appeals, contending that said judgment ought to be reversed for three reasons: First. The plaintiff is not the real party of interest. Second. No conversion was proven. Third. The admission of improper testimony.

The defendant is not in position to urge his first objection. The answer to plaintiff's complaint was a general denial. There is no allegation in the answer that the plaintiff was not the proper person to bring the action, and the defendant must be deemed to have waived that defense, if it existed. *Coffin v. Grand Rapids H. Co.*, 136 N. Y. 655, 32 N. E. 1076; *Duncan v. China Mut. Ins. Co.*, 129 N. Y. 237, 29 N. E. 76; *Meinhardt v. Excelsior Brewing Co.*, 98 App. Div. 308, 90 N. Y. Supp. 642. If there had been no waiver, section 449 of the Code of Civil Procedure, providing that the trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted, and providing that a person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust, furnishes ample authority to the plaintiff to maintain his action.

Under the evidence of the plaintiff an action of conversion will lie. Every authorized taking of personal property and all intermeddling with it beyond the extent of the authority conferred, in case a limited authority has been given, with intent so to apply and dispose of it as to alter its condition or interfere with the owner's dominion, is a conversion. *Laverty v. Sneath*, 68 N. Y. 524, 23 Am. Rep. 184. In this case the plaintiff retained a portion of the proceeds of the butter as his own property. This he had a right to do. The defendant acquired

only such interest and right as the contract gave him. So far as the proceeds of the butter which form the basis of this action are concerned, the defendant was acting as the agent of the plaintiff. He had no right to use this money for his own purposes. He admits that this money was deposited in this bank and that this money was the proceeds of the butter of the plaintiff. He admits that he appropriated it to his own use. These admissions, coupled with the plaintiff's evidence as to the agreement, make out a case of conversion.

There are no questions as to the rights of creditors in this case, and the rights of the parties are to be determined by the agreement made between them. The fact that this money was to be deposited in a bank to the credit of the defendant, to be by him transmitted to the plaintiff by means of a check, makes no difference as to the ownership of the money. It was a method chosen to accomplish a purpose. There is no mystery or sanctity respecting the bank's connection with this matter. It simply served as a depository of funds for the convenience of the parties. The relation of the parties and the rights to the proceeds remain the same, and were governed by their agreement. *Hurd v. Cook*, 75 N. Y. 454; *Roca v. Byrne*, 145 N. Y. 182, 39 N. E. 812, 45 Am. St. Rep. 599.

It is the uniform practice of courts, in reviewing proceedings had before a justice of the peace, to view them with indulgence and to sustain them by every reasonable and warrantable intendment; and section 3063 of the Code of Civil Procedure expressly provides that the appellate court must render judgment according to the justice of the case, without regard to technical errors or defects which do not affect the merits. The record in this case fails to disclose the admission of any improper testimony going to the merits of the controversy. Judgment is affirmed, with costs to respondent.

Judgment affirmed, with costs to respondent.

(56 Misc. Rep. 429.)

PEOPLE v. DE GRAFF.

(Rensselaer County Court. November, 1907.)

1. CRIMINAL LAW—PUNISHMENT—FINES—JURISDICTION.

Under Code Cr. Proc. § 717, providing that, when defendant pleads guilty or is convicted, the Court of Special Sessions must render judgment of fine or imprisonment, but the fine cannot exceed \$50, a fine of \$100 for operating an automobile at an illegal rate of speed is beyond the jurisdiction of the court, though the statute provides such a fine for violation of the law fixing the time limit at which automobiles may be run.

2. SAME—APPEAL—VOID JUDGMENT—DECISION.

Where the Court of Special Sessions imposes a fine in excess of its jurisdiction, the County Court on appeal cannot remit the record to the court below for the correction of the judgment by imposing a fine within the jurisdiction of the court, but must reverse the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 8223.]

Howard A. De Graff was convicted of running an automobile at an illegal rate of speed, and appeals. Reversed.

Chester G. Wager, Asst. Dist. Atty., for the People.
Bender & Hinman, for defendant.

TIERNEY, J. This is an appeal from the Justice's Court of the town of East Greenbush, Rensselaer county, from a judgment of conviction entered in that court on the 1st day of November, 1906, at which time the defendant was adjudged guilty of operating an automobile on the 28th day of October, 1906, on the Columbia turnpike, a highway of said town, at a rate of speed greater than one mile in three minutes of time, to wit, at the rate of one mile in one minute and thirty seconds; the same being in excess of the speed limit as provided by law. The defendant was arrested on the afternoon of October 28, 1906, and brought before the justice and some preliminary talk was had, and a memorandum was made by the justice which contained the name of the defendant, his residence, his occupation, the number of his automobile, the number of his badge, the time alleged by the complainant in which he had run one mile in violation of the law, "fined \$25, refused to pay fine," deposited \$100 to appear before Jesse P. Van Ness, justice of the peace, Tuesday, November 1, 1906, at 2 o'clock in the afternoon, and pleads not guilty. From such report and return of the proceedings had at that time before the justice as are now before me, I must reach the conclusion that no trial was then had and no proper or legal conviction or judgment entered, and in fact it is not contended on the part of the people that any trial or conviction was had at this time, October 28, 1906.

There are numerous grounds set forth by the defendant for setting aside the judgment of conviction of November 1, 1906, principally among them that the court erred in its judgment and certificate of conviction in imposing a fine of \$100, for the reason that the court had no jurisdiction to impose a fine exceeding \$50, and therefore that the certificate and judgment of conviction were wholly void. A careful review of the statutes and the authorities submitted in support of this contention leads me to the conclusion that it is entirely correct, and that the judgment and certificate of conviction herein must be set aside. Section 717 of the Code of Criminal Procedure reads as follows:

"When the defendant pleads guilty, or is convicted either by the court or by a jury, the court must render judgment thereon of fine or imprisonment or both, as the case may require; but the fine cannot exceed fifty dollars, nor the imprisonment six months."

This section of the Criminal Code limits the jurisdiction of a Court of Special Sessions to a fine exceeding \$50 or an imprisonment exceeding six months; and notwithstanding the fact that the statute provides that a fine of \$100 may be imposed for a violation of the law fixing the time limit in which automobiles may be run upon a public highway, yet nowhere in that law is it provided that the jurisdiction of a Court of Special Sessions is extended, so as to make it possible for such court to impose a fine in excess of the provisions of section 717 of the Criminal Code. A fine of \$100 might be imposed by a court of record; but a Court of Special Sessions is a court of limited jurisdiction, and the limit of its power to punish is prescribed by section 717.

The further question naturally presents itself for consideration whether this court has power to modify the fine imposed by the justice of the peace, or whether it can send this case back to the Court of Special Sessions to pass a proper judgment. The judgment entered in this case was one which the court did not have power to make. It was therefore void, and the fine imposed thereunder was illegal; and this court has no right to enforce in whole or in part a void judgment. The appellate court is given the power to remit the record to the trial court in a case provided upon a judgment rendered upon an indictment, but the statute does not include Courts of Special Sessions; those courts not being courts of record, nor having jurisdiction to find indictments or to give judgment thereon. Therefore there is no power vested in this court to remit this case to the Court of Special Sessions for the purpose of correction or for imposing a penalty within the limit of the trial court's jurisdiction. See *People v. Carter*, 48 Hun, 165; *People ex rel. Stokes v. Riseley*, 38 Hun, 280; *People v. Nash*, 12 N. Y. Wkly. Dig. 545; *Lattimore v. People*, 10 How. Prac. 336; *People ex rel. Kane v. Sloane*, 98 App. Div. 450, 455, 90 N. Y. Supp. 762.

These cases are authority for the proposition that, the fine being for a larger sum than the Court of Special Sessions was authorized to impose, the sentence was absolutely void and the judgment entered thereon unauthorized. Having reached this conclusion, it is unnecessary for me to review in detail the several other grounds upon which this appeal is based. The judgment of conviction herein should be reversed and declared null and void.

An order may be entered accordingly.

GOFF v. O'ROURKE et al.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

PARTIES—NEW DEFENDANT—INTEREST—SUFFICIENCY OF SHOWING.

One does not show himself entitled to be made a party defendant where the moving papers do not disclose the nature of the action, excepting affiant's statement that he is informed it is brought to set aside deeds, and to recover land described in the complaint, and that plaintiff alleges that he is the only heir of M. and entitled to possession, though affiant, who claims to be movant's attorney in fact, without presenting his power of attorney, states that he is informed and believes that M. left no heirs, and movant is the only one entitled to possession of the land which was held at M.'s death in trust for E., her husband; affiant not giving the source of his information or stating what relation movant bears to E.

Appeal from Special Term.

Action by Patrick F. Goff against Ignatius F. X. O'Rourke and others. From an order granting Christien Petersen leave to be made a party defendant, plaintiff appeals. Reversed, and motion denied.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Nelson L. Keach, for appellant.

Robert A. Sherlock, for respondents.

SCOTT, J. Plaintiff appeals from an order directing that Christien Petersen be brought in as a party defendant. The moving papers are extremely meager. The complaint is not printed, and no information is given as to what the action is about, except that the affiant states that he is informed that the action is brought "to set aside various deeds and to obtain possession of the various parcels of land mentioned and described in the complaint, [the plaintiff] alleging that he is the only heir of Mary Petersen, and entitled to said possession of said premises." The affiant, who claims to be the attorney in fact of Christien Petersen, although he does not present his power of attorney, alleges:

"That he is informed and believes that said Mary Petersen left no heirs at law or next of kin her surviving, and that the said Christien Petersen is the only one entitled to the possession of said premises which was held at the time of her death in trust for Ebbe Petersen, her husband."

He does not give the source of his information, or state what relation, if any, Christien Petersen bore to Ebbe Petersen. Unless we are prepared to say that any one who wishes may be made a party to an action, whether he shows any interest or not, this order must be reversed. So long as Christien Petersen is not a party to the action, he will not be bound by the result, and can institute any action with relation to the subject-matter thereto that he chooses. If there is any reason why he should be brought into this action, he should show what that reason is.

The order must be reversed, with \$10 costs and disbursements, and the motion denied, with leave to renew upon proper papers. All concur.

KOEWING v. THALMAN et al.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

ARBITRATION AND AWARD—PLEADING—SUFFICIENCY.

Where an answer alleges as a separate defense that plaintiff requested defendant to submit to arbitration the cause of action set out in the complaint, that defendant accepted, and the question was submitted to K. and decided by the arbitrator in favor of defendant, but there is no allegation of formal agreement to arbitrate, or appointment of the arbitrator, or that plaintiff appeared and took part in the arbitration, or of the matter submitted, or of any formal decision that would bind plaintiff, the separate defense was insufficient on demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arbitration and Award, § 506.]

Appeal from Special Term.

Action by Frank Koewing against Ernst Thalman and others. From an interlocutory judgment overruling a demurrer to a separate defense of arbitration and award, plaintiff appeals. Reversed, and demurrer sustained.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

E. C. Crowley, for appellant.

J. M. Marshall, for respondents.

INGRAHAM, J. The action is brought to recover the damages sustained by the plaintiff caused by the negligence of defendant in relation to the exchange of stock of the National Salt Company owned by the plaintiff for stock and bonds of the International Salt Company. The answer, after denying certain allegations of the complaint, for a separate defense to the cause of action, alleges that in the month of February the defendant requested the plaintiff to submit to arbitration the question as to defendants' liability on account of the cause of action set out in the complaint; that the defendants accepted in writing the plaintiff's suggestion, and, in pursuance of said suggestion, the question was submitted to Mr. Rudolph Keppler, president of the New York Stock Exchange, and decided by the arbitrator in favor of the defendants. To this separate defense the defendants demurred, which demurrer was overruled.

It seems to me that this defense is insufficient. There is no allegation of a formal agreement to arbitrate or of the appointment of the arbitrator and his award. Nothing is alleged as to the appointment of an arbitrator and that the parties would be bound by his decision. The allegation is that there was a request by the plaintiff to submit to arbitration the question as to the defendants' liability on account of the cause of action set up in the complaint; that defendants accepted in writing the plaintiff's suggestion, and that the question of their liability on account of the cause of action set out in the complaint be submitted to arbitration; that, in pursuance of said suggestion, the question was in fact submitted to Mr. Rudolph Keppler, president of the New York Stock Exchange, and decided by said arbitrator in favor of the defendants. There was here no allegation

of an actual agreement to arbitrate; no allegation that Mr. Rudolph Keppler was appointed by the parties either under the statute or as upon a common-law submission as their arbitrator, or that the plaintiff appeared before Mr. Keppler or took part in the determination of the question, no allegation of anything having been submitted, but "the cause of action set up in the complaint," and no allegation of any formal decision that would bind the plaintiff by the arbitration. It seems to me that this is entirely insufficient. *Gihon v. Levy*, 2 Duer, 180, 181.

The judgment must be reversed, with costs, and the demurrer sustained, with costs, with leave to the defendants to amend the separate defense in their answer within 20 days on payment of costs in this court and in the court below. All concur.

SHATTUCK v. GUARDIAN TRUST CO. OF NEW YORK.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

ACTIONS—STAY—ANOTHER ACTION PENDING—INTERPLEADER.

In an action by the receiver of a corporation to recover from a trust company a deposit, defendant claimed that it paid out the money on checks drawn by the corporation. Plaintiff claimed that the checks were forged. It was alleged that the president of the corporation received the money and appropriated it. Subsequently he delivered to the secretary of the corporation life insurance policies, directing the secretary to pay defendant out of the proceeds of the policies a certain amount for account of the corporation. After the president's death, the secretary collected the policies and filed a bill in equity, making plaintiff and defendant parties, and asking that the rights of the parties to the money be determined. Held that, if the checks were forgeries, plaintiff was entitled to recover, that his right to recovery in no way depended on the disposition made of the proceeds of the policies, and hence that an order staying the trial of plaintiff's action until the determination of the interpleader action in relation to the insurance moneys was not justified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 744.]

Appeal from Special Term.

Action by Edwin P. Shattuck, as receiver of the New York Investment & Improvement Company, against the Guardian Trust Company of New York. From an order granting a stay of all proceedings in the action until the final determination of another action, plaintiff appeals. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Julian C. Harrison, for appellant.

Clarence P. Moser, for respondent.

INGRAHAM, J. The plaintiff in this case is suing as receiver of the New York Investment & Improvement Company to recover from the defendant a deposit, the amount in which he alleged the defendant is indebted to the corporation. The defendant claims that it paid out this deposit upon certain checks drawn by the corporation; the plaintiff claiming that one of the signatures to these checks was forged.

The question at issue in this action is simply as to whether or not the checks upon which this deposit was paid out were or were not forged. It is alleged that Spier, the president of the corporation, received the money and appropriated it, or the greater part of it, to his own use. Subsequently Spier delivered to Alfred Lauterbach, secretary of the corporation, life insurance policies calling for the payment upon his death of \$75,000, with a direction to Lauterbach that, upon receipt of the sums due on the policies, he should pay to the defendant, the Guardian Trust Company, for account of the New York Investment & Improvement Company, \$68,067.09. Shortly after Spier died Lauterbach collected from the insurance companies \$75,999 and filed a bill in equity, making the plaintiff and the defendant parties, asking that the rights to this money of the various parties to the action should be determined. The court below has stayed the trial of this action until the determination of the interpleader action in relation to the insurance moneys.

I do not think such an order was justified. The plaintiff as receiver is suing for an amount claimed to be owing from the defendant. The plaintiff has no connection with the proceeds of these policies of life insurance, and, if he can establish the fact that the checks drawn on the defendants were forgeries, he will be entitled to recover the amount of the deposit remaining to the credit of the corporation, disaffirming the payment on account of the forged checks. The right of the plaintiff to recover cannot in any event depend upon the disposition that is made of the proceeds of the life insurance policies. If the checks are forged, he would be entitled to recover the amount on deposit, whether the defendant could collect the insurance money or not. If it should appear that the checks were not forged and that Spier appropriated the money of the corporation, then the corporation might have a claim against Spier and a right to enforce this trust, or whatever it may be said to be, as to the proceeds of the life insurance policies. But, irrespective of the provision as to what shall be done with the insurance money, if the checks are forgeries, the plaintiff is entitled to recover in this action.

It follows that the order should be reversed, with \$10 costs and disbursements, and the motion for a stay denied, with \$10 costs. All concur.

MOSSA v. MOSSA.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. DIVORCE—SEPARATION—GROUNDS—ABANDONMENT.

In an action by a wife for a separation, it appeared from plaintiff's affidavit that on her marriage to defendant he took her home to live with his parents; that there was constant dispute between plaintiff and her mother-in-law; that defendant refused to give plaintiff any money, and objected to her visiting her own mother; that, on plaintiff becoming pregnant, defendant refused to give her money to prepare for the birth of their child, on the ground that plaintiff's cousin had died before her child was born; that defendant's mother accused plaintiff of consorting with other men, and that, when defendant was appealed to, to protect plaintiff, he stated that he preferred to believe his mother; that defendant refused to

provide a separate home for plaintiff, or to devote to that purpose money given plaintiff by her mother to start a home with; that, when plaintiff went to live with her mother, defendant refused to let her have her clothes and wearing apparel; and that subsequently defendant removed from the state and failed to contribute in any way to plaintiff's support. *Held* that, if the facts alleged were true, plaintiff was justified in leaving defendant's parents' house, and that defendant, in refusing to provide her with a home or support her, was guilty of abandonment, justifying a judgment of separation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 180-182.]

2. SAME—ALIMONY.

Where, in an action by a wife for a separation, it appeared that defendant had required her to live with him in his parents' house, that the treatment she received from defendant and his parents justified plaintiff in leaving, and that defendant had refused to provide a separate home for plaintiff or support her, the court should have allowed a reasonable sum for the support of plaintiff and her child until the action could be tried, and it was error to deny plaintiff's motion for alimony and counsel fees on condition that defendant within 10 days serve on plaintiff a written offer to provide a suitable home for her and her child.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 614-618.]

Clarke, J., dissenting.

Appeal from Special Term.

Action by Mary P. Mossa against Rudolph Mossa. From an order denying her motion for alimony and counsel fee, plaintiff appeals. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Waldo G. Morse, for appellant.

Frank Walling, for respondent.

INGRAHAM, J. The action was for a judicial separation; the parties being husband and wife. It appears from the affidavit of the plaintiff that the parties were married on the 14th of July, 1906, and the defendant took the plaintiff home to live with his parents; that there was constant dispute between the plaintiff and her mother-in-law; that the defendant refused to give to the plaintiff any money, and objected to her visiting her own mother; that, the plaintiff having become pregnant, she requested that the defendant would give her sufficient money to enable her to prepare for the birth of their child, which he refused to do upon the ground that the plaintiff's cousin had died before their child was born; that during this time the defendant's mother accused the plaintiff of going out with other men, and, when the defendant was appealed to, to protect his wife, he stated that he would believe his mother in preference to the plaintiff. The plaintiff then demanded that the defendant provide a separate home for her, to which the defendant replied that "in Italy the man was the master and the wife must live where the husband wishes," and that plaintiff would have to live with his parents, and he would not provide any separate home; that the plaintiff's mother had given her \$2,000 as a wedding present, which she had placed in the defendant's custody in order to start a home for them, but the defendant refused to apply

it to that purpose; that the plaintiff then went to her mother, leaving her clothes and wearing apparel with the defendant, and when they were sent for the defendant replied: "You [plaintiff] have a home with my parents; the door is open, but you cannot take any clothes from here; I am master;" that subsequently the defendant, accompanied by his parents, removed from the state of New York to the state of New Jersey, where he now resides, and he has failed and refused to contribute to the plaintiff's support in any way.

I think that, if these facts are true, the plaintiff was justified in leaving the defendant's parents' house, and that the defendant, in refusing to provide her with a home, or support her, was guilty of abandonment which justified a judgment of separation. The defendant denies that the plaintiff gave him \$2,000 as a wedding present received by the plaintiff from her mother, but admits that on the evening prior to the marriage the defendant received as a wedding gift from the plaintiff's mother \$350, which the defendant alleges he used for a wedding trip. The defendant then says that he is very desirous that the plaintiff should return and live with him, and he is willing and has always been willing to furnish a house separate and apart from his relatives; but he has furnished no such home, and has done nothing, and he does not appear to deny that the plaintiff constantly requested it during the time that she lived with his mother, and that he did not then and has not since that time taken any steps in that direction.

The court denied the motion on condition that the defendant, within 10 days after the entry of the order, serve upon the plaintiff or her attorney a written offer to provide a suitable home for the plaintiff and their child. I think that the court should have provided for a reasonable sum for the support of the plaintiff and her child until the action could be tried. There does not seem to be any doubt but that, if the defendant had provided a home for his wife, instead of compelling her to live with his parents, this whole difficulty would have been avoided. I do not think that any woman is compelled to submit to the treatment that she received from the defendant's parents, if her statement is true.

I think, therefore, that the order appealed from should be reversed, with \$10 costs and disbursements, and the motion granted, requiring the defendant to pay to his wife \$6 per week alimony, and \$50 counsel fee. All concur, except CLARKE, J., who dissents.

MOSSA v. MOSSA.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

HUSBAND AND WIFE—SEPARATE MAINTENANCE—OFFER OF HOME.

Where, in an action by a wife for a separation, the court denied plaintiff's motion for alimony and counsel fees on condition that defendant serve on plaintiff's attorney within 10 days a written offer to provide a suitable home for plaintiff and her child, a subsequent order directing plaintiff and her attorney to receive the offer was unauthorized.

Clarke, J., dissenting.

Appeal from Special Term.

Action for a separation by Mary P. Mossa against Rudolph Mossa. From an order requiring plaintiff to accept service of an offer to provide a home for her, she appeals. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Waldo G. Morse, for appellant.

Frank Walling, for respondent.

INGRAHAM, J. In this case, which was an action for a separation, the court denied a motion for alimony and counsel fee upon the condition that the defendant serve upon the plaintiff's attorney, within 10 days, a written offer to provide a suitable home for her and her child. The defendant served upon the plaintiff's attorney an instrument whereby he offered "to the plaintiff, Mary P. Mossa, to provide a suitable home for her and our child, and shall, upon the acceptance of such offer by her, forthwith proceed to furnish said home, and shall provide for the maintenance of plaintiff therein." That was returned by the plaintiff's attorney upon the ground that it was impossible for the plaintiff to determine the location of the home offered, or whether the same "is in any wise suitable for her habitation," whereupon the defendant made a motion to compel the plaintiff and her attorney to receive the offer to provide a home, and it was ordered that the plaintiff or her attorney receive the offer.

I do not think there was any authority for this order. The original order did not require the plaintiff to receive an offer. It only denied the motion on condition that the defendant served one. The result was that, if this offer was a compliance with the condition of the order, the motion stood denied. The offer was indefinite. No home was designated. It was a simple renewal of the offer that had been made in the affidavit to provide what the defendant was pleased to call a suitable home.

As upon the appeal from the order denying the motion for alimony we have reversed the order, this order should follow the same course and be reversed, with \$10 costs and disbursements, and the motion denied. All concur, except CLARKE, J., who dissents.

QUACKENBUSH v. MAPES et al.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. MORTGAGES—CONSIDERATION—SEAL.

Where a mortgage is under seal, a consideration is presumed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 30.]

2. LIMITATIONS—ACCOUNT OF ACTION—CONDITIONS PRECEDENT.

Code Civ. Proc. §§ 380, 381, provide that an action on a sealed instrument must be brought within 20 years after the cause of action has accrued. Section 415 provides that the period of limitation must be computed from the accrual of the right of action to the time when the claim is actually interposed. *Held*, that where a mortgage payable 3 years after date, with interest payable semiannually, provided that on default in

the interest the principal sum should after 30 days become due at the option of the mortgagee, and on such default the mortgagee failed to exercise his option, limitations did not commence to run until the due date of the mortgage.

3. SAME—INTEREST—INSTALLMENTS.

The statute commenced to run on the installments of interest at the time each installment became due.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 282.]

Houghton, J., dissenting.

Appeal from Special Term.

Action by Abraham Quackenbush against Daniel Mapes, Jr., and another. From the judgment (54 Misc. Rep. 124, 105 N. Y. Supp. 654), defendants appeal. Modified, and, as modified, affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Milton A. Fowler, for appellants.

Charles N. Morgan, for respondent.

McLAUGHLIN, J. This action was brought to foreclose a mortgage for \$1,900 upon certain real estate described in the complaint. The mortgage was dated June 1, 1883, and payable 3 years thereafter, with interest at 6 per cent. payable semiannually on the 1st days of June and December. Both the mortgage and the bond which it was given to secure contained a provision that, in case of default in the payment of interest, the principal sum should, after 30 days, become due and payable at the option of the mortgagee. No part of the principal or interest was ever paid, and this action was commenced on the 5th of January, 1906. The judgment from which the appeal is taken adjudges that there is due to the plaintiff the principal sum of \$1,900, with interest thereon at 6 per cent. from the 1st day of June, 1883, and directs that the mortgaged premises be sold, and the proceeds, or so much thereof as may be necessary for that purpose, applied towards the payment of such sum. The judgment is attacked upon two grounds: (1) Lack of consideration for the execution of the bond and mortgage; and (2) the statute of limitations.

As to the first ground, very little need be said. The mortgage was under seal, which was presumptive evidence of a consideration, and the burden was on the defendants to overcome this presumption. *Best v. Thiel*, 79 N. Y. 15; *Hazleton v. Webster*, 20 App. Div. 177, 46 N. Y. Supp. 922, affirmed 161 N. Y. 628, 55 N. E. 1096; *Von Schuckmann v. Heinrich*, 93 App. Div. 278, 87 N. Y. Supp. 673, affirmed in 182 N. Y. 538, 75 N. E. 1135. This they failed to do according to the findings of the trial court, and with such findings we are entirely satisfied. The evidence submitted was meager, and imported the existence of consideration quite as much as the lack of it.

As to the second claim, that the action is barred by the statute of limitations, an interesting question is presented. Default was made in the payment of interest on the 1st day of December, 1883, and in accordance with the terms of the bond and mortgage the mortgagee had the option to declare the whole debt due and payable 30 days after de-

fault occurred. This action was not brought until the 5th of January, 1906, more than 20 years after the mortgagee could have declared the principal sum due. His failure, therefore, to declare the whole sum due, makes it necessary to determine the effect of this clause in the mortgage. The Code of Civil Procedure provides (sections 380 and 381) that an action upon a sealed instrument must be commenced within 20 years after the cause of action has accrued, and that the period of limitation must be computed from the time of the accruing of the right to relief by action to the time when the claim to that relief is actually interposed (section 415).

The appellants contend that the right to commence this action accrued to the plaintiff 30 days after the 1st of December, 1883, and that, since more than 20 years have elapsed between that time and the time the action was commenced, the right to maintain the action was barred by the statute of limitations. What effect the statute of limitations has on a clause of this character in a bond and mortgage has not, so far as I have been able to discover, been determined in this state. It has to some extent been determined in some of the other states; but the decisions are conflicting and a review of them, in view of the peculiar wording of our own statutes, would throw little light on the question here to be determined. It is unquestionably true that the mortgagee might have commenced an action to foreclose the mortgage on January 1, 1884, and by reason of that fact it is urged that, under the provisions of the Code before cited, the statute then commenced to run; but I do not think this is a proper or correct construction to be placed upon those provisions. The date at which the mortgage matured was expressly fixed as the 1st day of June, 1886. Upon default in the payment of interest, the principal sum became due and payable only at the option of the mortgagees. Until he declared the principal sum due, or instituted proceedings to recover the same, the time for payment remained the time fixed in the bond and mortgage, and the mortgagor could not compel him to accept payment in advance of that time. If the mortgagee did not see fit to exercise his option, the statute of limitations did not commence to run, so far as the principal debt was concerned, until the date specified in the mortgage. *Jones on Mortgages* (6th Ed.) §§ 1182, 1183a, 1210; *Thomas on Mortgages* (2d Ed.) § 229; *Richardson v. Warner* (C. C.) 28 Fed. 343; *Keene Five Cent Sav. Bk. v. Reid*, 123 Fed. 221, 59 C. C. A. 225; *Moline Plow Co. v. Webb*, 141 U. S. 616, 12 Sup. Ct. 100, 35 L. Ed. 879.

In the case last cited action was brought on certain promissory notes payment of which was secured by a deed of trust which provided that, in case of default in the payment of interest for 90 days, the whole debt should become due, and that, if the first note remained unpaid for 6 months after it became due, then "the whole debt is to be and become due and payable, and this trust in either event to be executed and foreclosed at the option of said third party," the payee of the notes. In an action to recover upon the notes the statute of limitations was pleaded as a defense, and it was urged there, as here, that the statute began to run from the time when the plaintiff could have brought the action. Mr. Justice Harlan, in delivering the opinion of the court, referring to this claim, said:

"In our judgment the parties intended to give the holder of the notes an option, after default in the payment of interest, not only to declare the principal due, but to foreclose the deed of trust, in advance of the dates of maturity named in the notes and deed. That option not having been exercised when or after the several defaults occurred, limitation began to run on the several notes only from their respective dates of maturity as specified in them."

The appellants also contend that the statute begins to run when the right to make the demand is complete. But there is no basis for the contention. Here a time was fixed for payment, and the mortgagee had an absolute right to wait until that time arrived before demanding payment, and the mortgagor could not compel him to accept payment in advance. Until he exercised his option, either by making a demand or by commencing an action, his right to maintain an action was not complete. Not only this, but the clause was inserted in the bond and mortgage for the sole benefit of the mortgagee. The mortgagor could not compel him to accept payment after a default, and it would be an inequitable and unjust rule to permit a mortgagor by his own default to restrict in any way the rights of the mortgagee. If he could, then by simply refusing to carry out his contract he could compel the mortgagee to accept payment before the time expressly stipulated in the mortgage. This is not what the parties intended by the language used, and I do not think a fair construction of the statute accomplishes such result.

As regards the interest, a somewhat different and much more serious question is presented. By the terms of the bond and mortgage, as we have already seen, the interest was payable semiannually on the 1st days of June and December in each year. When these installments of interest became due, the mortgagee could have maintained an action to recover them if not paid. Such an action, in my opinion, would be subject to the 20-year period of limitation, since the promise to pay was under seal. This being so, it becomes necessary to determine whether these installments of interest, although they became due and payable prior to the maturity of the bond and mortgage, nevertheless can be recovered any time before an action on the bond and mortgage is barred. The interest thus payable at fixed times is, as it seems to me, analogous in the legal aspects to the interest upon a bond to which separate coupons for the interest are attached. It has been held, both in this state and in the federal courts, that such coupons partake of the nature of the bond, and, while in a sense they may become independent instruments, they are governed by the same statute of limitations as the bond itself. *McClelland v. Norfolk Southern R. R. Co.*, 110 N. Y. 469, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. Rep. 397; *Bailey v. County of Buchanan*, 115 N. Y. 297, 22 N. E. 155, 6 L. R. A. 562; *Kelly v. Forty-Second St. R. R. Co.*, 37 App. Div. 500, 55 N. Y. Supp. 1096; *City v. Lamson*, 9 Wall. (U. S.) 477, 19 L. Ed. 725; *City of Lexington v. Butler*, 14 Wall. (U. S.) 282, 20 L. Ed. 809; *Clark v. Iowa City*, 20 Wall. (U. S.) 583, 22 L. Ed. 427.

The case last cited throws much light on the question, because the court there took occasion to explain its two former decisions, cited above, as holding, not that the coupons would not be barred until the

bonds themselves were barred, but simply that the same statutory period of limitation applied. Mr. Justice Field, in his opinion, says:

"It is evident, from this examination of the cases cited, that it was not the intention of the court to decide that an action upon a coupon detached from the bond, and negotiated to other parties, was not subject to the same limitations as an action upon the bond itself, much less to hold that the coupons remained a valid and existing cause of action, not only for the period prescribed for actions on the bond after its maturity, but for the additional period intervening between the maturity of the coupon and the maturity of the bond, however great that might be. The question before the court in those cases was only whether the time the statute ran against the coupons was the longest or shortest period, * * * and the court held that the statute ran for the longest period, because the coupons partook of the nature of the bond and the statute ran for that period as to them."

The same view was subsequently expressed in *Amy v. Dubuque*, 98 U. S. 470, 25 L. Ed. 228, where a 10-year period of limitation was under consideration. Mr. Justice Harlan said:

"It seems from these authorities to be the settled law of Iowa (1) that where interest is, by contract, made payable at stated times, an action may be maintained therefor in advance of the maturity of the principal debt; * * * (2) that within the meaning of the Iowa statute of limitations the cause of action accrues when suit may be commenced for the breach of such contract. * * * This action is, beyond question, founded upon written contracts. The coupons in suit matured more than 10 years prior to its commencement. Upon the nonpayment at maturity of each coupon, the holder had a complete cause of action. In other words, he might have instituted his action to recover the amount thereof at their respective maturities. From that date, therefore, the statute commenced to run against them. The premises conceded, as they must be, there is no escape from the conclusion stated."

It was also held that the same rule applied, even if the coupons had never been severed from the bond.

In the decisions cited from this state what was actually held was simply that coupons were not barred before 20 years after their maturity, being governed by the same limitation period as the bond; and, while there are some expressions to support the claim that such coupons would not be barred until the bond was, that was not what was decided, nor do I think such a position taken or intended to be. Thus, in *Bailey v. County of Buchanan*, *supra*, it was said, regarding the coupons:

"They are secured by the same mortgage, and, although unsealed, are specialties like the bonds, and are governed by the same statute of limitations which is applicable to the bond."

And in *Kelly v. Forty-Second St. R. R. Co.*, *supra*, it was said:

"As the bonds are under seal, the holder of the coupons was entitled to 20 years after they became due before his claim would be barred by the statute."

The obligation to pay interest at stated times is precisely the same, whether evidenced by coupons attached to the bonds or not, or by the bond itself. The language used and the reasoning adopted in the authorities cited are as applicable to one case as to the other. It is true the obligation to pay interest is merely an incident to the principal debt; but where the time is specified for the payment of interest a separate action may be maintained to recover it. The condition of the bond and mortgage here under consideration was the payment of

a fixed sum at a fixed time, with interest at fixed times, and five installments of interest thus became due and payable more than 20 years before this action was commenced. As to this interest the plaintiff has had more than 20 years in which to bring his action, and the statute prevents his recovering the same. He could not, at the time this action was commenced, have brought an independent action for this interest, and to permit him to recover it in this action, upon the same instrument and the same promise, is repugnant to reason and contrary to the express provisions of the Code.

I am of the opinion the judgment appealed from should be modified, so as to permit a recovery for only \$1,900 and interest thereon from the 1st day of December, 1885, and, as thus modified, should be affirmed, without costs in this court to either party.

PATTERSON, P. J., and INGRAHAM and CLARKE, JJ., concur.

HOUGHTON, J. (dissenting). I think this judgment should be affirmed without modification. No question of coupons, or separate and independent contract as to interest represented by them, is involved. An ordinary bond and mortgage is the subject of the action. In my opinion the statute of limitations did not begin to run on the installments of interest until the bond itself was due. If the rule enunciated in the prevailing opinion be correct, annual installments of interest on a 50-year bond, not represented by independent coupons, could be recovered for only 20 years, although 50 years' interest was unpaid and the bond only presently due. The holder of an obligation may insist upon payment of his interest when due, or he may let it accumulate. Frequently ordinary notes provide for payment of interest annually for a term of years. The effect of the rule would be to prevent recovery of interest on such notes for more than 6 years prior to bringing the action. Although agreement be made as to time of payment of interest, still the interest remains an incident of the debt itself, and it should be controlled by the limitation prescribed for the principal obligation. Such is the holding in Massachusetts (*Ferry v. Ferry*, 2 Cush. 92) and in Vermont (*Grafton Bank v. Doe*, 19 Vt. 463, 47 Am. Dec. 697), and it impresses me as sound. The present action was brought upon the bond before it outlawed, and I think the plaintiff was entitled to recover all the unpaid interest thereon, whether the same was payable more than 20 years prior or not.

I therefore vote to affirm the judgment.

QUACKENBUSH v. MAPES et al.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

Appeal from Special Term.

Action by Abraham Quackenbush against Daniel Mapes, Jr., and others. From the judgment (54 Misc. Rep. 124, 105 N. Y. Supp. 654), defendants appeal. Modified, and, as modified, affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Milton A. Fowler, for appellants.

Charles N. Morgan, for respondent.

McLAUGHLIN, J. The questions presented on this appeal are similar to the ones presented in action No. 1 between the same parties. The appeals were argued together, and for the reasons stated in the opinion in action No. 1, decided herewith (107 N. Y. Supp. 1047), the judgment here appealed from must be modified, so as to permit a recovery for only \$1,900 and interest thereon from the 1st day of December, 1858, and costs, and, as thus modified, should be affirmed, without costs in this court to either party.

PATTERSON, P. J., and INGRAHAM and CLARKE, JJ., concur. HOUGHTON, J., dissents.

BUXBAUM v. DEVOE.

(Supreme Court, Appellate Division, Second Department. January 10, 1908.)

SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF LAND.

A vendor was not entitled to enforce specific performance of a contract for the sale of land, providing for delivery of a deed and possession of the premises on a certain date, where, owing to the occupancy of his tenants on that date, he was unable to deliver actual possession to the vendee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 80, 81.]

Appeal from Special Term, Westchester County.

Action by Rosie Buxbaum against Miriam C. Devoe. From the judgment, defendant appeals. Reversed.

Argued before WOODWARD, JENKS, HOOKER, RICH, and MILLER, JJ.

Ralph Earl Prime, Jr., for appellant.

F. X. Donoghue, for respondent.

MILLER, J. The vendor under a contract of purchase and sale brings this action to compel the vendee to specifically perform the contract. The contract provided that the deed and possession of the premises should be delivered on September 1, 1905. The plaintiff made a tender of a deed on said day, but was not in position to deliver actual possession of the premises for the reason that they were in the occupancy of tenants of the plaintiff. Because of the plaintiff's failure to deliver possession the defendant refused to complete the purchase. I think there can be no doubt that the possession referred to in the contract of purchase and sale meant actual, not simply constructive, possession. The defendant was not obliged to perform on her part unless she could get both the deed and possession of the property, and she certainly was not obliged to take the hazard of dispossess proceedings against the tenants.

The trial court found "that prior to the 1st day of September, 1905, the defendant notified said tenants that she was not going to buy said property and that they need not move from said premises"; and it is claimed that the defendant cannot take advantage of the situation resulting from her own act. One of said tenants did testify on direct examination to a conversation with the defendant substantially as found; but upon cross-examination she testified as follows, namely:

"I suppose I did tell her [meaning the defendant] in substance, 'We cannot move by the 1st of September,' and Mrs. Devoe did say in answer to that, 'Well, now, if I cannot get this house by the 1st of September I don't want it.'"

It clearly appears from the entire testimony of the witnesses who were sworn on the subject that the defendant was desirous of getting possession of the property on the 1st of September; that she so informed the tenants, who told her that they could not give possession at that time, whereupon she said she did not want the property unless she could get possession. It cannot be said, therefore, that the plaintiff's failure to deliver possession was due to any act of the defendant; and, as the parties expressly stipulated for possession on a stated day, equity should not decree specific performance now.

Judgment reversed, and new trial granted; costs to abide the final award of costs. All concur.

VILLARD v. MOYER.

(Supreme Court, Appellate Division, Second Department. January 10, 1908.)

CONTRACTS—CONSTRUCTION—PARTIES—JOINT AND SEVERAL.

Where parties agreed to carry for the benefit of another a designated amount of corporate stock pro rata according to the amount of their respective interests in the corporation for a certain period, the one for whose benefit it was carried to take it up during that period, the obligation was several as to the number of shares to be carried by each, and a party to the agreement was entitled to sue for failure to take up the shares carried by him, without joining the others.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 780-789.]

Appeal from Special Term, Westchester County.

Action for breach of contract by Harold G. Villard against William L. Moyer. Judgment for plaintiff (104 N. Y. Supp. 537), and defendant appeals. Affirmed.

Argued before WOODWARD, JENKS, GAYNOR, RICH, and MILLER, JJ.

C. N. Bovee, for appellant.

Wm. M. Wherry, Jr., for respondent.

RICH, J. This action was brought by plaintiff, as assignee of Goldsborough, Villard & Warner, to recover damages for breach of a written contract in the form of a letter as follows:

"8th November, 1902.

"Thos. H. Hubbard, Esq., No. 25 Broad Street, New York City—Dear Sir: I beg to say that after leaving you yesterday afternoon I saw Mr. Moyer and Mr. Haley Fiske, and definitely closed the matter with them on the basis

agreed to by you and me, to wit: Mr. Moyer is to take the presidency of the banking corporation. He is to be assured of the presidency for five years, with the hearty support of all interests; salary \$25,000 per year. The Metropolitan Life Insurance Company, you, and my firm are to carry for Mr. Moyer's benefit one thousand (1,000) shares of the capital stock of the banking corporation for a period not to exceed three years, and at an interest rate not exceeding 5 per cent. per annum. Mr. Moyer is to take up same from time to time as it is convenient for him to do so, paying therefor the cost price of the stock to us and interest upon the same at the rate of five per cent. (5%) per annum up to the time he takes up the stock. This stock is to be carried by the parties named pro rata according to the amount of their respective interests in the banking corporation.

"Very truly yours,

"We agree to the above.

"[Signed]

[Signed]

G. C. Warner.

W. L. Moyer.

"Metropolitan Life Insurance Co.

"Thos. H. Hubbard.

"Goldsborough, Villard & Warner."

The only breach of the contract alleged consisted in the refusal of the defendant to take up one-sixth of the 1,000 shares of stock tendered by plaintiff's assignors, who had carried the same for over three years. The only question presented for our consideration arises upon a demurrer to the complaint upon the ground of defect of parties plaintiff. The learned justice at Special Term overruled the demurrer, holding that the contract obligation of the plaintiff's assignors, the insurance company and Hubbard, was several as to the extent and number of shares of the banking stock each was to carry for defendant's benefit, from which it followed that the complaint stated a cause of action against the defendant. This ruling was clearly right, and in such an action it is not necessary to join the other contracting parties having no interest or right in the cause of action alleged.

The interlocutory judgment must be affirmed, with costs. All concur.

GAYNOR, J. (concurring). Three agree to carry 1,000 shares of stock for the defendant for three years, not all to carry the 1,000 shares, however, but each to carry a stated proportion thereof, and the defendant to take and pay for the same within the three years. This was a several obligation of each to him, and of him to each.

PEOPLE ex rel. CLINTON v. BINGHAM, Police Com'r.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. MUNICIPAL CORPORATIONS—POLICE DEPARTMENT—CHARGES AGAINST OFFICER—TRIAL—EVIDENCE.

Evidence held insufficient to sustain a police commissioner's finding that relator, a patrolman, was guilty of conduct unbecoming an officer, in that he had assaulted a fellow officer, so as to justify his discharge.

2. ASSAULT AND BATTERY—ELEMENTS.

That relator, a police officer, came between complainant and another officer who was assaulting him, whether for the purpose of separating them or not, did not constitute an assault by relator on complainant.

Certiorari by the people, on the relation of Eugene Z. Clinton, against Theodore A. Bingham, as police commissioner of the city of New York, to review respondent's determination dismissing relator from the police department of the city. Writ sustained. Proceedings annulled. Relator reinstated.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Jacob Rouss (Louis J. Grant, on the brief), for relator.

Theodore Connolly (Thomas F. Noonan, on the brief), for respondent.

LAUGHLIN, J. The relator had been a member of the police force 22 years. He bore a good record. The charge upon which he was placed on trial, tried, found guilty, and dismissed from the force was conduct unbecoming an officer, in that he assaulted one Walsh, a fellow patrolman, in the dormitory of the precinct station house, "by striking him in the face with his clenched fists without cause or provocation, and using profane and indecent language" to the patrolman thus assaulted. The trial was before a deputy commissioner. The relator pleaded not guilty.

The record bristles with evidence of improper conduct on the part of the deputy commissioner before whom the relator was tried; but it is unnecessary to decide whether it shows such bias or prejudice against the relator as would warrant the court in annulling the proceedings, for the record is barren of any evidence to sustain the finding that the relator was guilty of the charge which he was summoned to meet. The fair inference from the evidence is that Officer Walsh was not assaulted, either in the reserve room or in the dormitory of the police station, during the evening, as claimed, but after he had gone on patrol duty the following morning. He testified, however, that he was assaulted in the station house; but he did not testify that the relator assaulted him. There is not a word of testimony tending to show that the relator used either profane or indecent language at the time in question. In fact, it does not appear that he spoke at all. Patrolman Walsh testified that Officer Fitzgerald assaulted him with clenched fists, striking him several times in the reserve room, when Officer Unger, the relator, and others were present. Officer Walsh was then asked by the deputy commissioner, "What had Unger or Clinton to do with it?" to which he replied, "Unger came between us, and in doing so accidentally pushed me at the door and tore the sleeve of my shirt." He was then asked by the deputy commissioner, "What had Clinton to do with it?" and he replied, "At about 9:25 p. m. Officer Fitzgerald pushed me out of bed and put me up against the wall, and he came between us." Coming between the complainant and an officer who was assaulting him was presumably for the purpose of separating them; but, regardless of its purpose, it did not constitute an assault. Notwithstanding the fact that Walsh failed to testify, when interrogated by the deputy commissioner, that the relator assaulted him, he was subsequently asked by the attorney for the relator, "Are you sure each one of these defendants assaulted you?"

to which he replied, "I think so." He was then asked, "Do you remember, when you testified yesterday, that you stated that the officer who assaulted you up in the dormitory was Fitzgerald?" to which he replied, "I said Fitzgerald and Clinton." He had not, however, said Fitzgerald and Clinton, according to the record. Later on during the trial, and after the deputy commissioner had refused to allow the counsel for the relator to interrogate the witnesses, the relator, in his own behalf, asked Officer Walsh, "Have I at any time been unfriendly to you, or molested you, or spoken to you unkindly in any way?" Walsh replied, "Never." The relator then asked Walsh, "Did I assault you?" to which Walsh replied, "You separated me from Fitzgerald on April 12th in the dormitory of the Fifth Precinct station house. The three of you were right near me." This is the only testimony bearing on the relator's connection with the assault. If it might have been inferred from his previous testimony that he meant to convey the impression that the relator assaulted him, his last answer on the subject shows just what the relator did, and negatives any idea of assault. It is manifest that the evidence is wholly insufficient to warrant the finding that the relator assaulted Officer Walsh, and it is evident that his removal was not based upon evidence.

It follows, therefore, that the writ of certiorari should be sustained, the proceedings annulled, and the relator reinstated, with \$50 costs and disbursements. All concur.

In re MILLS et al.

(Supreme Court, Special Term, New York County. January 6, 1908.)

1. CORPORATIONS—STOCK—PLEDGES—PAYMENT OR OTHER DISCHARGE OF DEBTS.

Where stock is held by a broker as security for margins, a tender of the amount due and a demand for the delivery of the stock terminates the right of the broker to keep the security, and vests the right of possession in the owner.

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS—PROPERTY IN HANDS OF ASSIGNEE—CLAIMS OF THIRD PERSONS.

A stockbroker holding stock for safe-keeping, and also other stock pledged to him to cover margins, pledged it all to a bank to secure a loan to himself, and subsequently assigned for the benefit of his creditors. The bank sold sufficient of the collateral to pay its claim, including the stock held for safe-keeping, and returned the remaining collateral to the assignee, including the stock placed with the broker owned by two persons who had before the assignment tendered the amount due from them and demanded their stock. *Held*, that all the stock returned should be sold by the assignee, and the proceeds divided among the owners of the stock held for safe-keeping and of the margin stock on which tender had been made, in proportion to the actual equity of each owner in the stock.

Motion by Edward Harding, assignee of Mills Bros. & Co., for directions as to the disposition of certain securities. Motion granted.

Douglas Campbell, for petitioner.

MacFarlane, Taylor & Costello, for respondent Beach.

Noble, Jackson & Hubbard, for respondent Henck.

Hoge & Humphrey, for respondent Townsend.

GIEGERICH, J. This application, made by the assignee of a firm of insolvent stockbrokers for directions as to the disposition of certain securities now in his possession, presents interesting questions. While still doing business, and before its failure, the petitioner's assignor pledged with the Colonial Bank of New York various securities as collateral to a note which, with interest, amounted to \$35,004.86 on the 22d day of August, 1907; the latter being the date of the failure and assignment. Most of the stocks pledged as collateral on this loan were being carried for various customers of the firm on margin. Three hundred shares of United States Steel common stock, however, belonged to one Mrs. Adelaide Thaw Beach, free of any lien or charges; she having left it for safe-keeping with the said brokers. The market value on August 22, 1907, of all the securities thus pledged as collateral aggregated about \$42,965.72. Enough of the stock was sold to satisfy the loan. Among the securities so sold were 300 shares of United States Steel common stock owned by the said Adelaide Thaw Beach, and the price realized for these 300 shares was \$9,337.50. Among the securities delivered to the petitioner, the market value of which on August 22, 1907, aggregated \$6,700, were securities which were being carried for customers on margin, or which were owned by the customers and had been deposited by them to secure their trading accounts.

Prior to the assignment made by the brokers to the petitioner, two of the customers, Henck and Townsend, who were carrying stocks on margin or had deposited stocks as security, respectively made or caused to be made to the brokers a tender of the amount due and a demand for delivery of the stocks; but the tender was rejected and delivery was refused. This tender and demand terminated the right of the brokers to retain the securities and vested in the customers an immediate right of possession. *Lawrence v. Maxwell*, 53 N. Y. 19; *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145; *Stoddard v. Hart*, 23 N. Y. 556; *Douglas v. Carpenter*, 17 App. Div. 329, 45 N. Y. Supp. 219; *Matter of Pierson*, 19 App. Div. 478, 46 N. Y. Supp. 557; *Field v. Sibley*, 74 App. Div. 81, 77 N. Y. Supp. 252; *Rothschild v. Allen*, 90 App. Div. 233, 86 N. Y. Supp. 42; *Sheridan v. Presas*, 18 Misc. Rep. 180, 41 N. Y. Supp. 451; *Whitlock v. Seaboard Nat. Bank*, 29 Misc. Rep. 84, 60 N. Y. Supp. 611. Upon such tender and demand and refusal Henck and Townsend stood on an equal footing with Mrs. Beach, so far as concerned their right to their stock or to the proceeds thereof. *Rhineland v. Nat. City Bank*, 36 App. Div. 11, 55 N. Y. Supp. 229. In the latter case, which was quite similar in many of its features to the present one, it was held that the equity of a customer who was the absolute owner of stocks unincumbered by any lien in favor of the firm of brokers, which held them merely on deposit for sale and until sold for safe-keeping, was not superior to that of other claimants whose stock was held by the firm as pledgee, where it appeared that on the failure of the firm all that was due to it from the other claimants was duly tendered, and that neither the firm nor its assignee could deliver the specific shares or an equivalent number. The court further held that upon tender, demand, and refusal the pledgee's right to the securities was lost, and that such securities, be-

ing released from the lien of the pledge the proceeds thereof in the hands of the bank, were also released from any claim of the pledgee firm, and that the fund was distributable among the customers proportionately, and that the assignee had no right to any part of it. Another customer, Browning, claims equities, but his position is inferior in my judgment to that of the customers named above, because of his failure to make any tender when he demanded that his stock be delivered to him.

In *Tompkins v. Morton Trust Co.*, 91 App. Div. 274, 86 N. Y. Supp. 520, affirmed upon opinion below 181 N. Y. 578, 74 N. E. 1126, the converse of the present situation was presented. There the stocks of customers upon which the brokers had a lien for advances made, and which they had a right to hypothecate in order to raise money were sold, and a claim was made by such customers for contribution from a customer who had left stock with the brokers for safe-keeping merely, just as Mrs. Beach did in the present case, and which stock was pledged with the securities of the other customers, but which was not sold when the trust company which made the loan disposed of enough of the collateral to satisfy its demand. The situation of the customers who owed the brokers upon their stock in that case was not the same as in this, however, because there it would appear that no tender had been made of the amount due. This difference alone is enough to distinguish that case from the present one. There is another difference which might, if necessary, be deemed of controlling importance, and that is that in the case just cited customers whose stock the brokers had a right to pledge and whose stocks had been sold sought contribution against another customer whose stock the brokers had no right to pledge and which had not been sold, while in the present case a customer, who was the absolute and unincumbered owner of stocks which were deposited merely for safe-keeping and wrongfully pledged by the brokers and later sold, seeks contribution, or, to state her claim as broadly as it is made, exoneration, at the expense of other customers whose stocks were rightfully pledged by the brokers, but which, by the accident of circumstance, were not reached when the bank which made the loan sold enough of the collateral to satisfy the amount due it.

There seems to be no case reported that is directly in point. *Rhinelander v. Nat. City Bank*, above cited, was similar in some of its features; but there the question was not one of contribution, or exoneration or subrogation, but merely that of the right of various customers to the balance of moneys arising from the sale, all of the securities, deposited as collateral having been disposed of. My conclusion is that an equitable disposition of this matter will be to direct a sale of the securities turned over by the bank to the assignee and the division of the proceeds among the three customers named above, proportionately to the value of their respective interests on the 22d day of August, 1907; that is to say, Mrs. Beach's share will be based upon the value of \$9,337.50, the amount realized from the sale of her stock, and Mr. Henck's and Mr. Townsend's shares will be based, respectively, upon the excess of the value of their stocks on that date over and above the amounts owed thereon by them.

Motion granted as indicated, with \$10 costs to the petitioner.

SIEFKEN v. ERIE R. CO.

(Supreme Court, Special Term, Orange County. January 2, 1908.)

1. ACTIONS—JOINDER OF CAUSES—COUNTS AT COMMON LAW AND UNDER STATUTE.

Under Code Civ. Proc. § 484, permitting a plaintiff to join in the same complaint two or more causes of action arising out of the same transaction, a count under the common law for personal injuries, alleging negligence of defendant and freedom from contributory negligence, was properly joined with a count under the federal statute relating to the liability of common carriers engaged in interstate commerce, under which it is unnecessary to plead and prove freedom from contributory negligence, and the causes are not inconsistent merely because more proof is required in the one instance than in the other.

2. SAME—INCONSISTENT CAUSES.

Causes of action, to be inconsistent, must be intrinsically discrepant and logically contradictory.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, p. 3511.]

Action by John L. Siefken, by his guardian ad litem, against the Erie Railroad Company. On demurrer to complaint. Demurrer overruled.

Watts & Cox, for plaintiff.

Bacon & Merritt, for defendant.

TOMPKINS, J. This action is brought to recover damages for personal injuries growing out of the alleged negligence of the defendant. The complaint alleges two causes of action. The first is at common law, alleging the defendant's negligence and the plaintiff's freedom from contributory negligence. The second is under the act of the Congress of the United States of America entitled "An act relating to liability of common carriers in the District of Columbia and territories, and common carriers engaged in commerce between the states, and between the states and foreign nations, to their employes" (Act June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891]), and alleges that at the time of the accident the defendant was engaged as a common carrier in interstate commerce between the states of New York and New Jersey and elsewhere, and then alleges the negligence of the defendant and that the plaintiff's injuries were received by reason of the negligence of the defendant and its officers, agents, and employes, and contains no allegation of the plaintiff's freedom from contributory negligence. Under the federal statute in question it is not necessary to allege or prove the plaintiff's freedom from contributory negligence. The demurrer is upon the ground that the two causes of action are improperly united, in that they are inconsistent with each other; and the defendant's argument is that, inasmuch as proof of the absence of negligence on plaintiff's part contributing to the accident is essential to the first cause of action and is not necessary to the second, the causes of action are inconsistent with each other.

The complaint alleges two distinct and separate causes of action, each complete and perfect in itself, and both growing out of the same

occurrence and involving the same parties. It does not seem to me that causes of action are necessarily inconsistent with each other because more evidence is required to make out one than is necessary to establish the other, or because what would be sufficient to justify a verdict upon the one would be insufficient upon the other; and that seems to be the only difference between these causes of action. One may be made without proof on plaintiff's part of his freedom from contributory negligence, while the other will require affirmative proof of due care on plaintiff's part. It does not seem to me that such a difference in the character of the testimony that is required to make out these causes of action makes them inconsistent with each other, within the meaning of section 484 of the Code of Civil Procedure. On the contrary, I think that it appears upon the face of the complaint that the causes of action are consistent with each other. Causes of action, to be inconsistent with each other, must be intrinsically and inherently discrepant, inharmonious, and logically incompatible with and contradictory to each other. These two causes of action do not seem to me to be any more incompatible or contradictory than are causes of action at common law and under the New York state employer's liability act, which have been held by our courts to be properly united in one complaint. In such a case more and different evidence is required to make out a cause of action under the employer's liability act than is necessary under the common-law cause of action. Under the former service of a proper notice within a given time must be proven, which is unnecessary under the latter.

My conclusion is that the causes of action are properly united, and that the demurrer should be overruled, with costs, with permission to the defendant to answer within 20 days upon payment of the costs.

WEIS v. WEIS.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. **DIVORCE—PLEADING—MAKING MORE DEFINITE AND CERTAIN.**

In an action for divorce, an answer alleging that during enumerated months of a year plaintiff at various times and places within and around New York City was guilty of adultery with a person named, who supported plaintiff, is indefinite; and, on motion for a bill of particulars, defendant must, to the extent of his knowledge of the times and places at which the adultery was committed, set forth the particulars.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 348.]

2. **SAME—TRIAL—SUBMISSION OF ISSUES.**

An order in a suit for divorce directing the submission to a jury of the issue whether plaintiff, during enumerated months of a year, at various times and places within and around the city of New York, was guilty of adultery and lived with a person named, is erroneous, because the issue is too indefinite.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 486.]

Appeal from Special Term.

Action by Minnie L. Weis against Louis Weis. From an order denying a motion for a bill of particulars as to the allegations of the

answer, and from an order framing issues for trial by jury, plaintiff appeals. Reversed as to motion for bill of particulars, and modified and affirmed as to order framing issues.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

A. F. Clark, for appellant.

E. T. Taliaferro, for respondent.

INGRAHAM, J. The action was for a divorce. The defendant's answer admitted the marriage, denied the other allegations of the complaint, and alleged as a separate defense that during the months of "April, May, June, July, and August of the year 1906 the plaintiff, at various times and places within and around the city of New York, the precise times and places not being known to the defendant, committed adultery and lived in adultery with one Albert Edward Tower, who, without other consideration than such adulteries, supported and maintained the said plaintiff and advanced to her large sums of money and other things of value." There is no demand for affirmative relief. The plaintiff then moved to compel the defendant to serve a bill of particulars specifying the times and particular places at which the plaintiff committed adultery and lived in adultery with said Tower, the particulars as to how said Tower supported and maintained the plaintiff, and the particular sums of money and other things of value advanced to the plaintiff by said Tower. This motion was denied. This allegation in the answer is indefinite and general. The defendant, to be justified in setting up such an answer to a charge of adultery against him, must have some knowledge as to the time and place at which the said adultery was committed; and to that extent I think the order should have been granted.

The order denying the motion for a bill of particulars is therefore reversed, and the defendant is required to serve a bill of particulars specifying the times and places at which he charges the plaintiff committed adultery.

The defendant also moved to frame issues for a trial before a jury. The court directed three issues as to the defendant's adultery to be tried by a jury, and also directed that the issue as to whether the plaintiff, during the months of April, May, June, July, and August, 1906, at various times and places within and around the city of New York, committed adultery and lived with one Albert E. Tower. I think this last issue is entirely too indefinite to submit to a jury, and the provision submitting that issue should therefore be stricken from the order, with leave, however, to the defendant to renew the motion to frame an issue as to the plaintiff's adultery after the service of a bill of particulars.

The result is that the order denying the motion for a bill of particulars should be reversed, and the motion granted to the extent indicated, and that the order framing issues should be modified as hereinbefore stated, and, as so modified, the order should be affirmed, with \$10 costs and disbursements of the appeal to the plaintiff. All concur.

PEOPLE ex rel. CLANCY v. BINGHAM, Police Com'r. .

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

MUNICIPAL CORPORATIONS—OFFICERS—POLICE—REMOVAL.

Where defendant, a police officer, was tried for an offense before the police commission, and was served with notice of trial only 44½ hours before the hour of trial, his dismissal was invalid, under a department rule requiring a notice of trial of not less than 48 hours before the hour of trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 498.]

Certiorari by the people, on the relation of Peter Clancy, to Theodore A. Bingham, police commissioner, to review the dismissal of relator from the police force.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Daniel F. Cohalan, for relator.

Theodore Connolly, for respondent.

PER CURIAM. The relator, a member of the police force detailed as a member of the tenement house squad, was charged with having assaulted and insulted a young colored woman, and after a trial was convicted and dismissed from the force. It is alleged in the petition, and not denied by the return, that the relator was given less than 48 hours' notice of trial; the notice having been served on him at 1:35 p. m. on February 26th to appear for trial at 10 a. m. on February 28th, thus giving him only 44½ hours' notice. The rule of the department (36g) requires that a notice of trial shall be served not less than 48 hours before the hour of trial, exclusive of Sundays, legal holidays, and half holidays. The defendant, when arraigned for trial, asked for an adjournment, which was denied.

The failure to give sufficient notice was fatal to the validity of the proceedings, and the writ must be sustained, the determination of the respondent annulled, and the relator reinstated, with \$50 costs and disbursements.

ROSS v. BAYER-GARDNER-HIMES CO.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

ATTORNEY AND CLIENT—COMPENSATIONS—REASONABLE VALUE OF SERVICES.

The attorney of plaintiff, who prosecuted claims to judgment after plaintiff had assigned his interest therein to an assignee with authority to continue the action, and who agreed to pay plaintiff all money in excess of a specified sum, was entitled from the proceeds to the reasonable value of his services, limited by a bill rendered for services and disbursements, together with the reasonable value of subsequent services.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 407-411.]

Appeal from Special Term.

Action by Charles R. Ross against the Bayer-Gardner-Himes Company. From an order refusing to confirm the report of a referee

determining the lien of John Aitken, plaintiff's attorney, for services in the action, the Old Colony Realty Corporation, plaintiff's assignee, appeals. Modified and affirmed.

See 87 N. Y. Supp. 36.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

A. J. Skinner, for appellant.

George R. Westerfield, for respondent.

INGRAHAM, J. This is a proceeding to substitute the Old Colony Corporation as plaintiff in this action, to determine to whom the moneys to be collected upon certain judgments in favor of the plaintiff should be paid. By an agreement executed on the 10th day of September, 1902, the plaintiff assigned, transferred, and conveyed to the Old Colony Realty Company all its right, title, and interest in certain claims against the defendant, and authorized the said corporation to continue such actions in the name of the plaintiff; the corporation agreeing to pay to the plaintiff all money recovered in said action or actions received by the Old Colony Realty Company in excess of the sum of \$2,230.65 and interest, whether the same be for costs or for damages. The action was tried in October, 1904, and resulted in a verdict for the plaintiff for \$2,433.04. The defendant appealed to this court, where the judgment was affirmed, and subsequently to the Court of Appeals, with the like result. John Aitken was the attorney for the plaintiff in such action, and remained the attorney of record down to the affirmance of the judgments by the Court of Appeals.

When the application came on to be heard at Special Term, a referee was appointed to take the proof and ascertain the extent and the amount of the lien as existing in favor of John Aitken for services and disbursements respecting the original judgment rendered upon the verdict of a jury and the two judgments on appeal. The referee reported that the plaintiff was entitled to receive out of the proceeds of said judgments the costs and disbursements as taxed, and the sum of \$150 expended by him for premiums on surety bonds subsequent to the assignment of the causes of action to the petitioner; that the Old Colony Realty Company be entitled to receive the balance. The plaintiff's attorney filed exceptions to this report, and upon motion to confirm it the Special Term denied the motion and ordered the sheriff to pay out of the money in his hands, first, the referee's fees, and, second, to the plaintiff's attorney the sum of \$1,535.34 as the value of his services, and the balance of the money to the Old Colony Realty Corporation. After the affirmance of this judgment by the Appellate Division, the plaintiff's attorney rendered a bill to the Old Colony Company for \$882.43, which he testified was the reasonable value of his services up to that time.

I agree with the court below that the plaintiff's attorney was entitled to the reasonable value of his services; but I think that the amount to be paid him should be limited to \$882.43, the amount of his bill for services and disbursements up to the time that this court affirmed the judgment, the costs in the Court of Appeals, and \$100 for his

services in the Court of Appeals. The amount of the costs as taxed in the Court of Appeals was \$104.10. The plaintiff should be paid his bill of \$882.43, \$104.10 costs in the Court of Appeals, and \$100 for his services in the Court of Appeals, making in all \$1,086.53; the balance to be paid to the Old Colony Realty Company.

The order should be modified, by directing the payment to the plaintiff's attorney of \$1,086.53, and, as modified, affirmed, without costs. All concur.

SCHROTER v. SCHROTER.

(Supreme Court, Special Term, New York County. December 31, 1907.)

MARRIAGE—ANNULMENT—ALLOWANCE OF ALIMONY.

In an action by a husband to annul a marriage, the wife, after paying her counsel fees and expenses, cannot compel the plaintiff to reimburse her for such fees and expenses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, § 137.]

Action by George H. Schroter against Sofi G. Schroter to annul a marriage. Judgment for defendant. Motion by defendant for an order to compel plaintiff to pay counsel fees and expenses incurred in defending the action. Motion denied, without costs.

See 106 N. Y. Supp. 22.

James W. Osborne, for the motion.

Alexander Bacon, opposed.

GIEGERICH, J. The wife, in an action brought by the husband to annul a marriage for alleged physical incapacity and for fraud, having succeeded upon the trial (56 Misc. Rep. 69, 106 N. Y. Supp. 22), now seeks by this motion an award of \$7,500 for the services of counsel already rendered and \$3,723.64 for expenses heretofore paid or incurred in her defense. There is no statute which in terms authorizes an award of a counsel fee to a wife to enable her to defend an action to annul a marriage. The provisions of section 1769 of the Code of Civil Procedure, relative to the payment of a counsel fee to enable the wife to carry on or defend an action, apply only to actions for a divorce or for a separation. The Revised Statutes (2 Rev. St. [1st Ed.] pt. 2, p. 148, c. 8, tit. 1, § 58), as well as the Revised Laws (2 Rev. Laws, p. 201, § 14), provided only for the granting of a counsel fee to carry on or defend such actions.

The sources of the power of the court to grant to the wife a counsel fee pendente lite in an action to annul a marriage have been elaborately discussed by the Court of Appeals from time to time, and notably in the cases of Griffin v. Griffin, 47 N. Y. 134, Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460, Higgins v. Sharp, 164 N. Y. 4, 58 N. E. 9, and Jones v. Brinsmade, 183 N. Y. 258, 76 N. E. 22, 3 L. R. A. (N. S.) 192, 111 Am. St. Rep. 746. These cases in substance decide that, although the statute which authorizes and regulates actions to annul a marriage is silent as to alimony and counsel fees, the court is not without power to allow the same to a wife where she defends the action; the general jurisdiction so conferred to entertain

such action carrying with it by implication any incidental powers necessary for its proper exercise, among them being the guarding and protecting of the rights of the wife, which have always been regarded as a part of the general equitable jurisdiction of the court. In all these cases it is recognized that the same rules respecting the allowance of alimony and counsel fees apply to actions to annul a marriage as to actions for divorce. In *Griffin v. Griffin*, 47 N. Y., at page 142, the court held that, the marriage having been found to be valid, the necessary expenses incurred by the wife in consequence of the action of the husband could be awarded upon the same principle as in other cases of divorce; and in *Higgins v. Sharp*, 164 N. Y., at page 9, 58 N. E., at page 10, the court said that actions to annul a marriage are governed with respect to alimony and counsel fees by the same principle as all other actions for divorce.

Now, with respect to actions for divorce, it has become the settled law of this state that, where the wife has already succeeded in carrying on her defense from her own means or credit, an order will not be made directing the husband to pay such past expenses (*Beadleston v. Beadleston*, 103 N. Y. 402, 8 N. E. 735; *McCarthy v. McCarthy*, 137 N. Y. 500, 33 N. E. 550; *Emerson v. Emerson*, 26 N. Y. Supp. 292; *Winkemeier v. Winkemeier* [No. 1] 11 App. Div. 199, 42 N. Y. Supp. 586); the theory being that the purpose of the statute is to furnish the wife means to carry on her action or to defend the same during the pendency thereof, and that the allowance looks to the future, and there can be no necessity for an allowance to make a defense which has already been made or solely to pay expenses already incurred (*Beadleston v. Beadleston*, supra). In support of the application reliance is placed upon *Griffin v. Griffin*, supra, which was decided before the Code of Civil Procedure was adopted and when the statutory declaration regarding the allowance to a wife was found in 2 Rev. St. (1st Ed.) pt. 2, p. 148, c. 8, tit. 1, § 58, which provided as follows:

"In every suit brought, either for a divorce or for a separation, the court may, in its discretion, require the husband to pay any sums necessary to enable the wife to carry on the suit during its pendency, and it may decree costs against either party and award execution for the same, or it may direct such costs to be paid out of any property sequestered or in the power of the court or in the hands of a receiver."

In the *Griffin Case* the husband sued the wife to have the marriage declared void upon the ground that she had a former husband living at the time of the making of the marriage contract. Judgment was given in favor of the wife. She moved the court for an allowance for a counsel fee and for the disbursements and expenses of the action, most of which had been paid by the attorney. The wife's attorney presented his affidavit showing how much time and money he had expended upon the case. Upon his affidavit, accompanied by the affidavit of the client in corroboration, the court made an order allowing to the defendant's attorney \$1,500 for a counsel fee, allowed \$250 to the defendant's counsel, and allowed \$929.50 for expenses in defending the action; the last sum being the entire amount which the attorney by his affidavit showed had been expended in the conduct of the defendant's side of the case. The General Term, on appeal by the plain-

tiff, modified the order by deducting \$300 from the allowance to the defendant's attorney, and affirmed the order as modified. On appeal to the Court of Appeals the order as modified by the General Term was affirmed. The Court of Appeals in its opinion reviewed the powers of the Supreme Court in actions of this character, among other things saying, at page 142:

"But the marriage having been found to be valid, and the expenses having been necessarily incurred by the wife in consequence of the action of her husband, the obligation rests upon him to pay them, and they can be awarded in the action brought by him upon the same principle as in other cases of divorce. Similar orders were made on the final hearing in the cases of Germond v. Germond, 1 Palge, 83, Graves v. Graves, 2 Palge, 62, and Kendall v. Kendall, 1 Barb. Ch. 610. In the first of these cases the wife was defendant. In Kendall v. Kendall the chancellor remarks that it was not the intention of the Legislature, by 2 Rev. St. (1st Ed.) pt. 2, p. 148, c. 8, tit. 1, § 58, which declares that costs may be decreed against either party, that the allowance to the wife for costs should be confined to the mere taxable costs between party and party, but that the court should determine whether any and what allowance should be made for extra expenses and counsel fees beyond taxable costs."

When a similar question came up later in the Beadleston Case, *supra*, in an action for divorce, the Griffin Case, as is shown by the citation of authorities printed in the report, was not called to the court's attention, and it was held that under section 1769 of the Code of Civil Procedure, which provides that the court may during the pendency of the action "from time to time make and modify an order or orders requiring the husband to pay any sum or sums of money necessary to enable the wife to carry on or defend the action," there was no authority to reimburse a wife for expenses already incurred in a defense already made. There was no discussion of or reference to the portion of the statute which was relied upon in the Griffin Case, namely, the significance of the word "costs," although the language of section 1769 upon the point is very similar to that of 2 Rev. St. p. 148, § 58; the Code section reading as follows:

"The final judgment in such an action may award costs in favor of or against either party."

When the same question came up in the Court of Appeals a few years later in *McCarthy v. McCarthy*, 137 N. Y. 500, 33 N. E. 550, the Griffin Case was cited in the brief submitted on behalf of the wife, but the opinion made no reference to that case, and rested squarely upon the authority of the Beadleston Case, saying that it was to be regarded as a precise authority upon the point. In view of the reiterated declarations of the Court of Appeals that the same rules with respect to counsel fees apply in actions to annul a marriage as apply in actions for divorce, I feel bound by the decisions in the Beadleston and McCarthy Cases, although this, like the Griffin Case, is an action for an annulment, while the Beadleston and McCarthy Cases were actions for divorce.

It should further be observed that no part of the sums claimed on the present application appear to be necessary to further carry on the defense. The defendant has been successful in the action, and all that now remains to be done is the procuring of the signing and entry of the decision and judgment. A counsel fee of \$500 to enable the

defendant to defend the action was heretofore granted. If the sum so allowed was insufficient for the purpose of defending the action, the defendant should have applied for a further allowance before the trial of the case, and before expending or permitting her counsel to expend the sums in question, and should not have waited, as she has done, until after the trial is over and the cause decided in her favor. If an appeal should be taken, then, as was said in the McCarthy Case, 137 N. Y., at page 503, 33 N. E., at page 550, upon proper application made, the court would be justified in granting a further allowance, and which might, upon proper evidence offered, be made to comprehend the unpaid items of the past.

The propriety of the expenditures claimed to have been made, as well as the reasonableness of the charges for counsel fee and medical experts, is seriously questioned by the plaintiff; it being claimed in his behalf that he would be entitled to a jury trial with respect to the disputed items of expenditure. But upon this point I do not express any opinion, basing, as I do, the denial of the motion solely upon want of power in the court to order the husband to pay for past services and expenses of counsel.

The motion is therefore denied, but without costs.

READ v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—IMPUTED NEGLIGENCE.

Contributory negligence of the operator of an automobile is not chargeable to a passenger therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 147.]

2. RAILROADS—ACCIDENT AT CROSSING—DUTY TO LOOK AND LISTEN.

Decedent, a man 36 years of age, in full possession of his faculties, received fatal injuries in a collision between an automobile in which he was a passenger and defendant's train at a crossing. If decedent had looked at any time while the train was covering 2,000 feet from the point at which it was visible from the crossing, he must have seen the train, and an exclamation would have prevented the accident. *Held*, that it was decedent's duty to look and listen to ascertain whether a train was approaching before crossing the track, and that his failure to do so was negligence as a matter of law, precluding recovery for his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1055.]

Appeal from Trial Term.

Action by Sarah C. L. Read, as executrix of the last will of Frank B. Read, deceased, against the New York Central & Hudson River Railroad Company. From a judgment for plaintiff, and from an order denying defendant's motion to set aside the verdict and order a new trial, it appeals. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Alton B. Parker, for appellant.

George W. Weiffenbach, for respondent.

INGRAHAM, J. The plaintiff's testator lost his life as the result of a collision between an automobile in which he was riding and one of the trains of the defendant railroad at the crossing near Van Cortlandt Park in the city of New York on the 12th day of June, 1904. The facts are stated in the case of *Noakes v. New York Central & Hudson River Railroad Company* (Sup.) 106 N. Y. Supp. 522, which was an action by a passenger in this same automobile who was injured at the same time. The chauffeur operating the automobile at the time of the accident testified that the automobile crossed a bridge from 175 to 200 feet from the defendant's tracks, from which he could see the railroad tracks to the south for a distance of about 2,000 feet; that he looked towards the south when he was at the bridge to see if there was a train coming from New York, but saw none; that he then proceeded very slowly on an upgrade to the tracks; that about 25 to 30 feet from the tracks there is a steep grade, and the road was crowded with people; that the automobile was proceeding slowly through the crowd towards the track; there was a train that had stopped north from the crossing at a water tank; that the automobile continued towards the track, and just as its front wheel was on the north-bound track—

"all at once the crowd opened up with a shriek and fell to one side, and I just turned my head quick that way (illustrating), and I saw there was a train approaching from the south, and immediately like that it struck that. When I first noticed it, as well as I am able to judge, I think it was about perhaps 400—300 or 400—feet, or something of that sort, from our car. I don't know just how far, but as well as I am able to judge about that distance. * * * I saw no train until then. I looked quickly then, and I saw that there was a train coming. * * * When I first saw that train, I turned on all the power I had; but it was so sudden that the engine wouldn't take it, of course. * * * The first time I looked for the train I was at that bridge. The second time I looked for the train was just as I started up this little incline, this other additional rise. I was, I should say, about 25 feet, or something like that, from the nearest rail the last time I looked along the track. When I was 25 feet from the rail I looked for the train, and saw none, and then proceeded to cross. * * * The auto was going very slow across the tracks. I was just about moving. * * * I reached the point where I saw this approaching train 400 feet away, and turned on speed and attempted to accelerate my speed."

On cross-examination the witness said that he could see all parts of the railroad tracks between the bridge and the highway crossing at the station, and that there was nothing to obstruct his view; that no one had given him any warning of the coming of the train from the south; that Mr. Read (deceased) did not give him any warning, or call his attention to the train coming, nor did any one else in the automobile give him any warning.

Mr. Noakes; the owner of the automobile, and who was on the front seat with the chauffeur, testified that he did not look either way for the trains, and saw no train coming from the south; that he did not know that he had had an accident until he regained consciousness. Upon the back seat of this automobile was Mrs. Noakes, who was seated on the west side of the back seat. Miss Noakes was seated next to her mother in the middle, and the deceased was seated on the right side of the automobile towards the direction from which the train which caused the accident was coming. Mrs. Noakes testified that as the

automobile approached the crossing she did not see a train on the south-bound track, and that the first that she saw of the train was when they were almost across the tracks about 6 feet away from the approaching train; that they were all apparently looking ahead; that the deceased was talking and laughing just before the accident with her daughter, who was seated between them. Miss Noakes testified that she did not remember much about the accident, and did not see any train on the track before she was struck; that she remembered seeing the number on the engine when it was right opposite her; that was all she remembered; that she did not remember what the deceased was doing at about the time they started to cross the track. There was a station just to the north of this crossing at which this approaching train was to stop.

In the Noakes Case we sustained the judgment upon the ground that the age, sex, and situation of the plaintiff in that case, a girl 16 years of age, seated between her mother and the deceased, made it a question for the jury as to whether she was negligent in not looking and seeing the train and warning the chauffeur to stop the automobile before it was upon the track. It was expressly stated that the age and sex of the plaintiff, the situation in which she was placed, and the surrounding circumstances were such that a question was presented as to whether it was negligence for the plaintiff not to look, which was for the jury, and the case was not one of those which imposes an absolute duty upon a passenger in a vehicle of looking and listening for an approaching train, a violation of which is, as matter of law, contributory negligence. We have in this case a man 36 years of age, seated on the back seat of an automobile on the side of an approaching train. For a distance of from 175 to 200 feet he had an unobstructed view of 2,000 feet of the railroad track. When the automobile in which he was a passenger approached the track, the deceased was talking and laughing with a fellow passenger on his left away from the approaching train. He was acquainted with the locality, as the automobile had crossed the track a short time before. The automobile was proceeding very slowly, and the jury would have been justified in finding that a word to the chauffeur would have caused him to stop the automobile, and the accident would have been avoided. It was certainly contributory negligence to place this automobile immediately in front of a rapidly approaching train, where there was nothing to obstruct the view or to prevent those in the automobile from seeing the approaching train; and, while the deceased was not chargeable with the negligence of the chauffeur, it was his duty to look and listen for approaching trains when he was approaching the track, although a passenger, and to prevent so far as he could the chauffeur from crossing in front of the train, and a failure to perform that duty is contributory negligence. *Gorton v. Erie Ry. Co.*, 45 N. Y. 660; *Wiwirowski v. L. S. & M. S. Ry. Co.*, 124 N. Y. 424, 26 N. E. 1023; *Dolfini v. Erie R. R. Co.*, 178 N. Y. 1, 70 N. E. 68; *Keller v. Erie R. R. Co.*, 183 N. Y. 67, 75 N. E. 965. The duty imposed upon the deceased requires that he should look and listen before the vehicle is placed in a position that an accident would result if a train is approaching, and a failure to perform that duty is contributory

negligence that relieves the defendant from liability. *Hoag v. N. Y. C. & H. R. R. Co.*, 111 N. Y. 199, 18 N. E. 648; *Brickell v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648.

The special circumstances that existed in the *Noakes Case* which we thought justified the court in submitting the question of contributory negligence to the jury, namely, the age and sex of the plaintiff who was injured, did not exist in this case, as here the deceased was a man 36 years of age, in full possession of his faculties, and seated in the automobile on the side from which the train was approaching. There is certainly nothing, either in the age, sex, or condition in which the deceased was seated, that excused him from the performance of the duty which the law imposes upon every person approaching a railroad track of taking such measures as may be necessary to ascertain whether or not a train is approaching at such a distance as would make it dangerous to cross the track in front of it. There is not only no evidence that the deceased did look or listen, but the evidence of those in the automobile with him negatives such a conclusion. He was talking and laughing with a fellow passenger upon his left, and it is apparent that, if he had looked at any time while the train was covering the 2,000 feet from the point at which it was visible from the crossing, he must have seen the train, and an exclamation would have caused the chauffeur to stop, and thus the accident would have been avoided. It being the duty of the deceased, although a passenger in the automobile, to look or listen to ascertain whether or not a train was approaching before crossing the track, and a failure to perform that duty being contributory negligence, the failure of the deceased either to look or listen to ascertain whether a train was approaching, or, if he did see an approaching train, his not taking any means to have the automobile stopped or avoid the accident, establishes affirmatively that he was guilty of contributory negligence, and a judgment in favor of his representatives cannot be sustained.

Sherwood v. N. Y. C. & H. R. R. Co., 120 App. Div. 639, 105 N. Y. Supp. 547, was an action by the representatives of a boy 16 years old, who was killed by a collision between one of the defendant's trains and an automobile in which he was riding. A judgment for plaintiff was sustained upon the ground that, considering the age of the boy, it was a question for the jury whether under all the circumstances the deceased conducted himself as a lad of his age ordinarily would; the court holding that the jury were justified in finding that the plaintiff's intestate used all the care which an ordinary lad in his circumstances would have exercised, and that he was not chargeable with contributory negligence as matter of law—a position analogous to that in the *Noakes Case*, but which has no application to the case at bar.

I think, therefore, that the judgment and order appealed from must be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

RICHMOND v. LEE et al.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. LANDLORD AND TENANT—REPAIRS—COVENANTS.

Defendants leased a building to plaintiff's intestate; the lessee covenanting to keep it in repair, and the lessors agreeing to keep the roof and skylights in order, and that if the premises should be injured by fire or otherwise, but not rendered untenable, they should be repaired with all proper speed at the expense of the lessors. The only sewer connection of the leased premises led across adjoining lots belonging to third persons, and was destroyed in making an excavation for a building on such lots. On refusal of the lessor to make a new sewer connection, the lessee did so. *Held*, that the lessee could not recover the cost of the new connection, as, under the lease, the lessees were not obliged to keep in condition a sewer not on the leased premises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 538-541.]

2. SAME—DUTY TO REPAIR.

In the absence of agreement, a landlord is under no obligation to repair leased premises, and a covenant to repair will not be implied, nor will an express covenant be enlarged by construction; and hence, where the only sewer connection of leased premises is across adjoining lots owned by third persons, the lessee is bound to know that fact and provide in the lease against injury to the sewer, in order to charge the lessor with the cost of repairs thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 536.]

Houghton, J., dissenting.

Appeal from Trial Term.

Action by Sarah E. Richmond, executrix, against Lucy E. Lee and another. From a judgment for plaintiff, defendants appeal. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

William H. L. Lee, for appellants.

James M. Fisk, for respondent.

McLAUGHLIN, J. In February, 1901, by an instrument under seal, the defendants leased for a term of ten years premises situate at 326 Fifth avenue, in the city of New York, to the plaintiff's intestate, who occupied the same until the time of his death, which occurred in November, 1904. The lessee covenanted, among other things:

"To make, at his own cost and expense, all such repairs as shall be necessary to preserve the said premises in good order and condition, and that all such repairs shall be fully equal to the original in class and quality; it being understood that the said lessors shall keep the roof and skylights in order, but shall not be made liable to the said lessee for any damage caused by the leakage of the roof, unless they shall neglect to repair the same within a reasonable time after a written notice of such leakage shall be delivered to them from said lessee."

The instrument contained a further provision that:

"If the premises hereby leased shall be injured by fire or otherwise, but not rendered untenable, the same shall be repaired with all proper speed

at the expense of the lessors; but if the damage shall be so extensive as to render the premises untenable, the rent shall be proportionately paid up to the time of such damage and shall from thenceforth cease until such time when the same shall be put in good repair."

At the time the lessee went into possession of the leased premises the only sewer pipe or drain to carry off the sewerage, waste, and drainage ran entirely underground from the southerly side of the leased premises in a southerly direction, under and across three lots of land which were owned by and in the exclusive possession of persons other than the defendants herein, and thence connected and discharged into a public sewer running through Thirty-Second street. The owners of these lots, in July, 1904, in making an excavation for the construction of a building, destroyed so much of the sewer pipe as ran across their lots, and there was then no place where the sewerage, waste, and drainage could be discharged, except on the premises leased. After the destruction of this pipe the lessee notified the agent of the defendants (the defendants being at the time absent in Italy) and made a demand upon him that the lessors cause a new sewer pipe to be constructed and connected with the public sewer. The agent, however, having refused to comply with such demand, the lessee did so himself at a cost of \$350, and thereafter the plaintiff brought this action to recover such amount, upon the ground that under the terms of the lease the defendants were obligated to do this work. She had a judgment, and defendants appeal.

A careful consideration of the lease fails to disclose any covenant obligating the lessors to build this sewer. They did covenant that if the leased premises were injured by fire or otherwise, but not rendered untenable, they should be repaired with all proper speed at the expense of the lessors. But the premises themselves were not injured. They were in precisely the same condition that they were at the time the lessee went into possession, so far as the sewer pipe was concerned, and this covenant did not obligate them to keep a sewer not on the leased premises in proper condition or repair. The rule is thoroughly settled that, in the absence of an agreement between the parties, a landlord is under no obligation to his tenant to keep demised premises in repair. 18 Am. & Eng. Enc. of Law (2d Ed.) 215. It is also equally well settled that a covenant to repair will not be implied, nor will an express covenant be enlarged by construction. *Witty v. Matthews*, 52 N. Y. 512. A rule similar to that of caveat emptor applies to leasing of real property, and throws upon the lessee the responsibility of examining the demised premises for defects and providing against their consequences before he enters into the lease (*Watson v. Almirall*, 61 App. Div. 429, 70 N. Y. Supp. 662); and he assumes all of the risks arising from the condition of the premises, unless he has an express agreement on the part of the landlord in relation thereto (*Franklin v. Brown*, 118 N. Y. 110, 23 N. E. 126, 6 L. R. A. 770, 16 Am. St. Rep. 744). Here the tenant was bound to know the condition of the premises with reference to the sewer on the adjacent lots when he entered into his lease, and, if he did not want to assume the burden of making another connection in case that portion of the sewer were destroyed, he should, by an appropriate covenant in

the lease, have imposed that obligation on the defendants. He did not do so, and therefore the plaintiff was not entitled to recover from the defendants what it cost to build the new sewer or make the new connection.

The judgment appealed from, therefore, must be reversed, and a new trial ordered, with costs to appellants to abide event.

INGRAHAM and CLARKE, JJ., concur. PATTERSON, P. J., concurs in result. HOUGHTON, J., dissents.

ACME LUMBER CO. v. MONTGOMERY.

(Supreme Court, Appellate Division, Second Department. January 10, 1906.)

1. FACTORS—CONVERSION—DEMAND—NECESSITY.

Where lumber, consigned for sale for the consignor's benefit and account, was converted, by the hypothecation of a warehouse receipt therefor, for the sole benefit of the consignee, the consignor could sue for the conversion without proving a demand for redelivery and a refusal thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Factors, § 41.]

2. SAME—EVIDENCE.

In an action for the conversion of consigned lumber by the hypothecation of a warehouse receipt therefor, evidence that the consignee failed early in April, 1905, two or three months after the hypothecation, and that between December 1, 1904, and July, 1905, there was no time when the lumber of the kind converted was worth less than \$35 per 1,000 feet, was sufficient to show the time of the conversion and the value of the lumber at that time.

Appeal from Trial Term, Kings County.

Action by the Acme Lumber Company against George F. Montgomery. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and HOOKER, GAYNOR, RICH, and MILLER, JJ.

Frank C. Mebane (Isaac N. Miller, on the brief), for appellant.
C. A. Mountjoy, for respondent.

RICH, J. The plaintiff consigned certain lumber to the International Mahogany Company, of New York, of which company the defendant was general manager, to be sold for the benefit and account of the consignor. Freight and other charges on this consignment were paid by the consignee, and sufficient of the lumber was sold to solvent purchasers to more than pay such advancements. The remainder of the lumber was stuck up in the yard of the consignee to permit its drying out before being placed on the market. Subsequently the defendant stored that portion of the lumber for which the plaintiff has recovered in this action in a storage warehouse, and received a warehouse receipt, which he hypothecated with the American Bonding Company, of Baltimore, as security for a bond given by it to discharge an attachment levied upon property of the International Mahogany

Company. Thereafter the International Company (the consignee) became insolvent and went into bankruptcy. The warehouse receipt was hypothecated in January or February, 1905, and the defendant testified that he conducted the hypothecation personally and was responsible for it. Thereafter, and in July, 1905, one Wickery, the sales agent of the consignee, sold some or all of this lumber to a solvent purchaser, but was unable to deliver it because of defendant's inability to procure its release.

The defendant contends that the action could not be maintained without proof of a demand and refusal to deliver, because of the fact that the possession of the consignee company was lawful. The evidence established an actual conversion by the hypothecation of the warehouse receipt for the sole benefit of the consignee, which was an unwarranted disposition of the lumber and in hostility to the purpose for which it was placed in the possession of the International Company, and proof of a demand and refusal was not a condition precedent to plaintiff's recovery; but there was sufficient evidence of demand and refusal having been made in the testimony of Wickery, if such a demand was necessary.

It is further contended that the amount of damages awarded by the jury is not sustained by the evidence, and this contention is based upon the ground that the proper measure of damages is the value of the lumber at the time of its conversion, and that there is no evidence either of the time of the conversion or of the value at that time. The defendant testified that the International Mahogany Company failed early in April, 1905, two or three months after the hypothecation of the warehouse receipt, which would make the time of the conversion in January or February, 1905. Wickery testified that between December 1, 1904, and July, 1905, there was no time when tupelo lumber of the grade and quality of that converted was worth less than \$35 per 1,000 feet. I think this evidence answers the appellant's contention.

The judgment and order must be affirmed, with costs.

HOOKER, GAYNOR, and MILLER, JJ., concur. HIRSCHBERG, P. J., not voting.

SCHRAMME v. LEWINSON et al.

(Supreme Court, Appellate Division, Second Department. January 10, 1908.)

ABATEMENT AND REVIVAL—DEATH OF PARTY PENDING APPEAL—REVIVAL.

Under Code Civ. Proc. § 764, providing that, after verdict or decision, an action for personal injuries does not abate by the death of a party, the administratrix of plaintiff in a personal injury action dying pending an appeal from a judgment on a directed verdict for defendant, rendered after the setting aside of a verdict for plaintiff, may be substituted as plaintiff, and if, on the appeal, the action of the trial judge is reversed, the original verdict for plaintiff must be reinstated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Abatement and Revival, §§ 835-848.]

Appeal from Special Term, Queens County.

Action by Frederick Schramme against Maximilian Lewinson and another, in which Kate Schramme, administratrix of Frederick

Schramme, deceased, sought to be substituted as plaintiff, on the death of plaintiff pending an appeal. From an order denying the substitution, the administratrix appeals. Reversed.

Argued before WOODWARD, JENKS, RICH, MILLER, and GAYNOR, JJ.

Lehman & Telsey, for appellant.

William L. O'Brien, for respondents.

WOODWARD, J. This action was brought to recover damages for personal injuries claimed to have been sustained by the plaintiff by reason of the alleged negligence of the defendants. The action was tried before a jury, and resulted in a verdict in favor of the plaintiff in the sum of \$11,000. After the rendition of the verdict the court, at the request of the attorneys for the defendants, set aside the verdict and directed a verdict in favor of the defendants and against the plaintiff, and the jury, in accordance with such direction, then rendered a verdict for the defendants. From the judgment entered on this last verdict the plaintiff appealed. While said appeal was pending, and before it had been brought on for a hearing, the plaintiff died. Thereafter his widow was duly appointed administratrix, and as such seeks to be substituted as plaintiff in the action. From an order denying a motion to make such substitution this appeal is taken.

While the procedure leading up to the appeal in the original action is somewhat complicated by the court having set aside the original verdict and then directed the jury to render a contrary one, yet we feel that the facts bring the case fully within the spirit of the rule laid down in *Wood v. Phillips*, 11 Abb. Prac. (N. S.) 1. The object of section 764 of the Code of Civil Procedure evidently was to preserve any rights represented in a verdict which would have abated had the death of the party occurred prior to its rendition. If on the appeal in the main case this court should reverse the action of the trial judge, then we think that as matter of course the verdict originally rendered in behalf of the plaintiff will be reinstated.

The order appealed from should be reversed, with \$10 costs and disbursements, and the motion granted. All concur.

PEOPLE v. MARTIN et al.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. GAME—STATUTORY PROVISIONS—UNLAWFUL POSSESSION—PENALTIES.

Article 2 of the forest, fish, and game law (Laws 1900, p. 22, c. 20) is entitled "Birds," and embraces sections 20-39 inclusive. Section 22, as amended by Laws 1904, p. 1401, c. 578, makes the close season for quail from December 1st to October 31st, both inclusive. Section 25, as amended by Laws 1902, p. 879, c. 317, makes the close season for grouse from December 1st to September 15th, both inclusive. Section 30, as amended by Laws 1904, p. 1413, c. 588, provides that plover shall not be taken or possessed from January 1st to August 15th, both inclusive. Section 28, as amended by Laws 1902, p. 880, c. 317, provides that grouse and quail shall not be sold or possessed during the close season, except in December, and possession or sale thereof during December shall be

presumptive evidence that they were unlawfully taken by the possessor. Laws 1900, p. 29, c. 20, § 39, provides that a person violating any provision of the article is guilty of a misdemeanor, etc. In an action by the people for the prescribed penalties for unlawfully possessing certain quail, grouse, and plover, it appeared that on January 1st defendants had in their possession a number of each kind of the birds mentioned. *Held*, that a verdict for plaintiff for the full amount of the statutory penalty was properly directed.

2. SAME—POLICE POWER—IMPORTED GAME.

The fact that the grouse were imported was no defense, since in the exercise of police power the Legislature may make possession of imported game unlawful.

3. SAME—STORING GAME—STATUTORY PROVISIONS—INTENT TO HAVE GAME STORED.

Section 141, Laws 1902, p. 487, c. 194, provides that if there is any open season therefor, any dealer, if he has given the bond provided for, may hold during the close season such part of his stock as he has on hand undisposed of at the opening thereof, but no presumption that the possession of game is lawful shall arise until it affirmatively appears that the provisions of the section have been complied with. One of the defendants testified that he intended to send the game back the next day to the wholesale dealer of whom he bought them that the wholesale dealer might, upon giving the required bond, put them in cold storage. *Held*, that such an intention was no defense and that the burden of showing that the provisions referred to were complied with was on defendants.

Appeal from Trial Term.

Action by the people against John B. Martin and another for penalties for unlawful possession of game birds. From an adverse judgment, and an order denying a new trial, defendants appeal. Affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Finch & Coleman (John Burlinson Coleman, of counsel), for appellants.

John K. Ward (Robert C. Beatty, of counsel), for respondents.

CLARKE, J. This is an action for penalties for violation of section 28 of the forest, fish, and game law of the state (chapter 20, p. 27 of the Laws of 1900, as amended by chapter 317, p. 879, of the Laws of 1902, and section 30 of said law (as amended by chapter 588, p. 1413, of the Laws of 1904), in unlawfully possessing certain quail, grouse, and plover in the period when such possession is prohibited. At about 2:50 p. m. on January 1, 1907, two game protectors found in the possession of the defendant John B. Martin, at the Café Martin, in the city of New York, 45 grouse, 8 plover, 102 quail, and 14 partridges. All of the birds were picked. Some of them were in the preparing room, near the kitchen fire, where the cooking was done, and the rest were in the ice box. There is no controversy about the possession or the number of birds, or the amount of the judgment, provided the direction of the verdict was proper.

Section 22 of the forest, fish, and game law, as amended by chapter 578, p. 1401, of the Laws of 1904, provides that the close season for quail shall be from December 1st to October 31st, both inclusive. The close season for plover is from January 1st to August 15th, both inclusive. Section 30, as amended by chapter 588, p. 1413, of the Laws

of 1904. The close season for grouse is from December 1st to September 15th, both inclusive. Section 25, as amended by chapter 317 of the Laws of 1902. Section 28, *supra*, provides as follows:

"Woodcock, grouse and quail not to be possessed.—Woodcock, grouse and quail shall not be sold or possessed during the close season, except in the month of December, and possession or sale thereof during December shall be presumptive evidence that they were unlawfully taken by the possessor."

Section 30, *supra*, provides:

"* * * Plover shall not be taken or possessed from January 1st to August 15th, both inclusive."

Section 39 of the forest, fish, and game law, in article 2, entitled "Birds," provides that:

"A person who violates any provision of this article is guilty of a misdemeanor and is liable to a penalty of \$60 and to an additional penalty of \$25 for each bird taken or possessed in violation thereof."

It will thus be seen that the close season for quail and grouse began on the 1st day of December, after which it was unlawful to take such game birds. The Legislature, however, allowed one month in which such birds lawfully taken during the open season could be disposed of, but provided that possession or sale thereof during December should be presumptive evidence that they were unlawfully taken by the possessor. These birds were found in the possession of the defendant on the afternoon of January 1st, in the preparing room of the kitchen of his café, after the expiration of the month allowed for the sale or disposition thereof.

In *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, it was held that there is no property in game other than that which the state permits. The taking of it may be absolutely prohibited, or traffic and commerce in it may be absolutely prohibited. It is proper exercise of the police power and within the discretion of the Legislature.

The 45 birds designated as "black grouse" were imported. In *People v. Bootman*, 180 N. Y. 1, 72 N. E. 505, it was held that the Legislature, in the exercise of the police power, has power to make the possession of imported game unlawful, and that the method of affording protection to game is necessarily within the discretion of the Legislature; that laws passed for this purpose do not interfere with private property, for there is no property in living wild animals, and only as the laws permit their capture is there property in wild animals after they are caught or killed; that the Legislature may provide a close season for the taking of game, and may prohibit the possession or sale of game during that season.

In *People ex rel. Hill v. Hesterberg*, 184 N. Y. 126, 76 N. E. 1032, 3 L. R. A. (N. S.) 163, it was held that by virtue of the act of Congress passed May 25, 1900 (31 Stat. 187, c. 553, § 2), the so-called Lacey act, that Congress practically said to the citizens: We do not prohibit the importation of foreign game, but subject it to the local laws; and you must see to it at your risk that you do not violate these laws. It was further held that the provisions of the forest, fish, and game law, prohibiting the possession of game coming from without the state

during the close season, is not unconstitutional as a deprivation of property without due process of law and is a proper exercise of the police power of the state.

The appellants seek to extend the period of one month allowed for the possession and sale of these game birds after the expiration of the close season under section 141 of the forest, fish, and game law (Laws 1902, p. 487, c. 194):

"* * * Provided nevertheless that if there be any open season therefor, any dealer therein, if he has given the bond herein provided for, may hold during the close season, such part of his stock as he has on hand undisposed of at the opening of such close season, * * * but no presumption that the possession of fish or game or the flesh of any animal, bird or fish is lawfully possessed under the provisions of this section, shall arise until it affirmatively appears that the provisions thereof have been complied with."

The defendant testified that on the afternoon when the birds were seized he said to the wardens:

"All right; those game go back tomorrow to Mr. Silz, where I bought the game."

The argument of the appellant is in brief that because, after the discovery of the game, the defendant said that it was his intention on the next day to send them back to the wholesale dealer from whom he had bought them, in order that that wholesale dealer, upon giving the bond required by law, might put them in cold storage for preservation until the next season should open and he could lawfully sell them, therefore, defendant's mental intention to send the game to another man, in order that that man might comply with the bonding provision of the law, made defendant's possession lawful and the judgment error. But the section relied upon expressly provides that:

"No presumption that the possession of * * * game * * * is lawfully possessed under the provisions of this section shall arise until it affirmatively appears that the provisions thereof have been complied with."

Not an intention that somebody else may hereafter comply with said provisions, but that it affirmatively appears that the provisions have been complied with. When a person claims the benefit of an exception, the burden is put upon him to show that he comes within its provisions. In the face of the positive provisions of the various sections of the game laws, the contention of the appellants cannot be sustained. If an intention to do an act is equivalent to the doing of it, and sufficient to nullify the express provisions that no presumption shall arise until it affirmatively appears that the provisions of the act have been complied with, no penalties can ever be inflicted. Intent is not made a part of the statute. Mere possession is enough. To allow a mental process to be substituted for the positive requirement of the statute would be to emasculate the necessarily drastic provisions thereof. If the court is to legislate, for how long a period should it extend, by mental process of the offender, the period during which it is lawful to possess game? The law has allowed a reasonable time to get rid of game lawfully killed, to wit, one month, and in the interest of dealers has permitted the bonding and preservation of said game in cold storage thereafter. But so carefully has the Legislature guarded against the violation of the statutes which they have deemed neces-

sary for the preservation of our wild animals, fish, and birds that even the allowance of possession during the month of December is coupled with the requirement that the presumption is that the birds so possessed were unlawfully taken, and at the end of such month it has provided that the privilege to hold in cold storage and under bond depends upon affirmative proof that the necessary bond has been given. To weaken by judicial construction these carefully considered and appropriate provisions of the statute would be to invite violations of this salutary law. We are to interpret the laws, not make them.

It therefore follows that the judgment and order appealed from should be affirmed, with costs to the respondent. All concur.

**JAMES MCCREERY REALTY CORP. v. EQUITABLE NAT. BANK OF
NEW YORK.**

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. APPEAL—EFFECT IN LOWER COURT OF TRANSFER OF CAUSE—NEW TRIAL.

The right to move for a new trial being statutory, the removal of a judgment to the United States Supreme Court by writ of error and its affirmance by that court is no bar to a motion for a new trial for newly discovered evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2196.]

2. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT.

It is within a trial court's discretion to grant a new trial for newly discovered evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 10, 201.]

Ingraham and Clarke, JJ., dissenting.

Appeal from Appellate Term.

Action by the James McCreery Realty Corporation against the Equitable National Bank of New York. From a determination of the Appellate Term (104 N. Y. Supp. 959), affirming an order of the New York City Court (102 N. Y. Supp. 975) granting plaintiff's motion for a new trial, defendant appeals. Affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Louis Marshall, for appellant.

Henry F. Wolff, for respondent.

SCOTT, J. The appellant appeals from a determination of the Appellate Term, affirming an order of the City Court of the city of New York, which granted a new trial on account of newly discovered evidence. The action was brought to recover an installment of rent, amounting to \$750, claimed to be due for the month of January, 1905, under a written lease whereby the demised premises were let for a term of five years from May 1, 1902. The defendant entered into possession under the lease in May or June, 1902, and occupied the premises and paid rent therefor until February, 1904, when a receiver was appointed, who continued to occupy the premises and pay rent therefor

for some time after his appointment. It is unnecessary to recite in detail the history of the case, or the nature of the newly discovered evidence which the plaintiff seeks an opportunity to present, since that ground has been exhaustively covered by the prevailing opinion of Mr. Justice Giegerich in the Appellate Term. The same learned justice has satisfactorily demonstrated that the right to move for a new trial in this state is, and has been at least since 1832, a right conferred by statute, and hence that the removal of the judgment to the Supreme Court of the United States by writ of error and its affirmance by that court constituted no bar to the plaintiff's present motion. *Fuller v. U. S.*, 182 U. S. 562, 21 Sup. Ct. 871, 45 L. Ed. 1230.

The right of the City Court to entertain the motion being thus determined, the question whether or not the motion should be granted became one for the exercise of the court's discretion. Assuming, but without deciding, that this court has power to review the discretionary order of the City Court, affirmed by the Appellate Term, I am very clearly of the opinion that we should not in the present case exercise that power. I am not unmindful of the apparent weakness of the plaintiff's case for a new trial, and much doubt whether, as an original proposition, I should have been disposed to grant the motion. But that point is one upon which reasonable minds may well differ, and it certainly cannot be said that the City Court abused its discretion in deciding to grant the application. Under these circumstances, I do not think that we should overrule both the City Court and the Appellate Term.

The order should be affirmed, with \$10 costs and disbursements.

PATTERSON, C. J., and LAUGHLIN, J., concur.

INGRAHAM, J. (dissenting). This action was commenced on January 4, 1905, in the City Court, and was brought to recover a monthly installment of rent of real property for the month of January, 1905—the complaint alleging that on or about the 1st of May, 1902, the plaintiff and the defendant entered into a lease in writing whereby the plaintiff leased and demised to the defendant a portion of the premises, 803 Broadway, in the city of New York, for a term of five years, to commence on the 1st day of May, 1902, at the yearly rental of \$9,000, payable in equal monthly installments on the 1st day of each month in advance; that the defendant entered into possession and enjoyment of the premises demised in said lease on the 1st day of May, 1902; and that the monthly installment of rent under said lease for the month of January, 1905, is due and unpaid. The answer denies that the defendant executed the lease, or that it entered into possession of the premises, and alleges as a separate defense that the defendant was a national bank, organized under and existing by virtue of the laws of the United States, and was organized as such, and authorized by the Comptroller of the Currency to commence the business of banking on or about the 2d day of June, 1902; that the alleged lease set forth in the complaint was made, executed, and entered into by the plaintiff with certain persons purporting to act on behalf of the defendant before the date of its organization, and before the

defendant had any corporate existence, and before it had been authorized by the Comptroller of the Currency to commence the business of banking; that at the time when the said lease was executed and delivered the defendant had no corporate existence, nor were there any officers or directors of the defendant corporation, nor any other person or persons then or at any time having power or authority to make the lease set forth in the complaint; that the alleged lease set forth in the complaint was null and void and of no effect from the date thereof. Subsequently the complaint was amended so as to allege that the lease was executed and delivered on June 19, 1902. The case came on for trial before a justice of the City Court without a jury, who, on February 24, 1905, filed his decision, in which he found that the certificate of organization of the defendant was filed with the Comptroller of the Currency on the 19th of May, 1902; that its incorporators met and organized on the 27th day of May, 1902, electing a president and one John Carraway cashier; that the certificate of the Comptroller of the Currency authorizing the defendant to commence the business of banking was issued on the 2d day of June, 1902; that on the 27th day of May, 1902, the plaintiff and the defendant entered into a lease in writing, dated the 1st day of May, 1902, whereby the plaintiff leased and demised to the defendant a portion of the premises, No. 803 Broadway, in the city of New York; that the defendant entered into possession and enjoyment of the demised premises under said lease on or about the 10th day of May, 1902, and continued in the actual occupation thereof until the month of February, 1904; that the plaintiff executed said lease prior to the 27th day of May, 1902, and delivered the same to the defendant for execution; and that on the 27th day of May, 1902, the defendant by its president and cashier executed said lease and delivered the same to the defendant corporation on said day, and the said lease was thereupon accepted and retained by the plaintiff; that the defendant paid the rent of the said premises for the month of May, 1902, and for each and every month thereafter to January, 1904, in advance, as required by the terms of said lease. As conclusions of law the court found that the defendant was not at the time of the execution and delivery of the lease set forth in the complaint authorized by the Comptroller of the Currency to commence the business of banking; that the defendant corporation, not being authorized to commence business, had no authority to execute and deliver the lease set forth in the complaint on the 27th day of May, 1902, or to legally bind the defendant corporation thereby; that the act of the officers in executing and delivering said lease on said day was null and void; and judgment was directed for the defendant. Judgment was duly entered upon this decision, from which the plaintiff appealed to the Appellate Term, where the judgment was affirmed on the 1st of June, 1905. Application having been made to appeal to this court, which was refused, the plaintiff obtained a writ of error from the Supreme Court of the United States, where the judgment was subsequently affirmed on the 19th day of November, 1906. 203 U. S. 584, 27 Sup. Ct. 782, 51 L. Ed. 328.

The sole issue presented in this case was as to the date of the execution of the lease by the defendant. That issue was presented by the

pleadings, and that issue was tried and determined upon these pleadings in favor of the defendant. After the case was submitted to the Supreme Court of the United States for its decision, and on the 23d day of October, 1906, the plaintiff obtained an order to show cause why there should not be a new trial upon the ground of newly discovered evidence. This motion came on for argument after the decision of the Supreme Court of the United States had been announced, and resulted in the order appealed from, which was entered on the 28th day of December, 1906, granting the motion. This order was affirmed by the Appellate Term, who allowed an appeal to this court.

Before discussing the main question presented upon this appeal, we should determine how far this court, upon an appeal from the Appellate Term, should review orders of the City Court which are of the class known as discretionary orders. Appeals from the City Court are regulated by the Code of Civil Procedure. Section 3189 provides that an appeal to the Supreme Court may also be taken from an interlocutory judgment rendered, or an order made at chambers, or at a Special Term or Trial Term of the City Court, or from an order made by a judge thereof out of court, in a case where an appeal may be taken to the Appellate Division of the Supreme Court from an interlocutory judgment rendered or an order made in like manner as prescribed in sections 1347, 1348, and 1349 of the Code; that upon such an appeal the Supreme Court shall have full power to review any exercise of discretion by the court or judge below. Section 4 of article 6 of the Constitution provides that:

"Appeals from inferior and local courts, now heard in the Court of Common Pleas for the city and county of New York and the Superior Court of Buffalo, shall be heard in the Supreme Court in such manner and by such justice or justices as the Appellate Division in the respective departments which include New York and Buffalo shall direct, unless otherwise provided by the Legislature."

Under this authority the Appellate Division has created a term of the Supreme Court to be held by three justices, and has directed that appeals from the City Court be held at said term. Section 3191 of the Code provides that an appeal to the Appellate Division of the Supreme Court in the First Judicial Department may be taken from a judgment or order entered upon the determination of an appeal taken as prescribed in sections 3188 and 3189 of the Code. An appeal from the City Court is to the Supreme Court, and upon such an appeal the Supreme Court shall have power to review any exercise of discretion by the court or judge below. Whether that appeal is heard by the Appellate Term of the Supreme Court, or the Appellate Division, full power is given to the Supreme Court to review a discretion exercised by the City Court, and that power is necessarily lodged in the Supreme Court, whether the appeal is heard at the term created by the Appellate Division for that purpose or by the Appellate Division itself; and on an appeal from the Appellate Term, exercising this power to review the discretion of the City Court, this court necessarily has the same power to review the determination of the Appellate Term as if the appeal had been directly taken from the City Court to this court. The right to review the discretion of the City Court being vested in the

Supreme Court, it is the duty of that court to review the discretion of the City Court; and it seems to me, therefore, that the question of the proper exercise of judicial discretion in granting an order for a new trial is properly before us for review.

Bearing in mind, therefore, that the sole question presented upon these pleadings for determination in the City Court was as to the date of the delivery and execution of this lease, the question is then presented as to whether the City Court should have granted a new trial upon the ground of newly discovered evidence. The evidence which is thus said to have been newly discovered is that of the following named witnesses: One John W. Wooten, who was formerly one of the defendant's attorneys, was called on behalf of the defendant to testify as to the date, execution, and delivery of the lease, and was examined and cross-examined. He testified that this lease was executed on May 27, 1902, that he was present when it was executed, and that it was delivered to a Mr. Easter, representing the plaintiff, on that day. There was presented on this application an affidavit, verified by Wooten on the 22d day of October, 1906, over 18 months after the trial, that he handed these papers to Easter, plaintiff's employé, after June 2, 1902, and that the signatures of the plaintiff and the cashier of the defendant were affixed by both parties after June 2, 1902. This person is now an inmate of the state's prison under a judgment convicting him of a crime. The second witness that it is alleged the plaintiff has since discovered was one Carraway, who was the cashier of the defendant. The alleged lease was signed by Carraway as cashier, and was acknowledged by him on the 19th day of June, 1902. The plaintiff, therefore, had full knowledge that Carraway, having been cashier of the defendant and having executed the lease on its behalf, could give material evidence as to the date of the execution of the lease and its delivery. There is no allegation that the plaintiff or its attorney made any effort to procure the testimony of Carraway upon the trial, or to ascertain from him the date of the execution and delivery of this lease. In an affidavit upon which this motion was made it appears that in September, 1906, one Gandy, whose connection with the case is not disclosed, called upon the plaintiff's attorney and stated that he had been informed by Carraway that the said lease was signed and delivered after June 2d and not before. Just why this disclosure was made, or its object, is not disclosed; but the plaintiff's attorney annexes to his affidavit a telegram, dated September 10, 1906, to Carraway in Mississippi, asking him when he intended coming to New York, and "whether you can carry out Mr. Arthur Gandy's suggestion regarding bank case." Just what that suggestion was is not disclosed. An answer to that telegram is also annexed to the affidavit which states:

"Can come to New York at any time desired. Mr. A. O. Gandy of Hotel Endicott represents me."

The plaintiff's attorney then telegraphed to Carraway that Gandy and Cockrell had informed the plaintiff's attorney that Carraway did not sign the lease until after June 2d, and requested Carraway to telegraph:

"Whether those facts and whether you are willing to make deposition accordingly. Not necessary for you to come to New York unless you desire to. Must however know to-day what the fact is in regard to date of your signature and your presence in the city."

In answer, Carraway telegraphed:

"Gandy and Cockrell both know the facts in matter referred to. I am writing to make deposition setting forth the truth."

And these telegrams are the only communications from Carraway to plaintiff's attorney as to what the facts were that he was willing to testify to. There is, therefore, here not only no affidavit of Carraway as to what was the truth, or as to what he would testify to, but no direct statement from Carraway to the plaintiff's attorney as to whether his testimony would be at all material upon a new trial. We have, then, an affidavit of Gandy, who also carefully refrained from any statement as to his relations to the case, to the plaintiff, or as to what induced him to interfere. He states that at the time of the trial Carraway was absent from the state of New York and in the state of Mississippi, but that in June or July, 1905, he had a conversation with Carraway, in the course of which Carraway said that the lease was signed by the president of the defendant and by himself as cashier after June 2, 1902, and not before; that in the month of July, 1906, he had a conversation with Carraway, stating that he had received a communication from one Cunningham, an employé of the plaintiff, requesting an interview, but that he (Carraway) did not desire to see Cunningham, as he was afraid that he might be served with a subpoena to appear as a witness in some proceeding connected with this action, and that he did not desire to give testimony, inasmuch as his testimony would be adverse to the defendant, and hence adverse to his interest as a stockholder of the defendant, repeating his statement that the lease was not signed until after June 2, 1902. Gandy then says that on or about the 1st of September, 1906, he communicated these facts to the plaintiff's attorney, and subsequently received a letter from Carraway, in which Carraway stated that he would give his deposition; that on September 17, 1906, he received a telegram from Carraway stating that he signed the lease after June 2d and would make an affidavit to that effect; that since September 17, 1906, Carraway had refused to furnish an affidavit for use upon the motion, for the reason that he was unwilling to volunteer testimony in this case adverse to his own interest as a stockholder of the defendant and the interest of his friends similarly situated; and this is the only evidence we have as to what Carraway would testify to. There is not the slightest evidence that Carraway would be willing to testify on a new trial of the action to any fact that would be of assistance to the plaintiff, any more than he would be willing to make an affidavit for use on the motion. There is also the affidavit of one O'Neale, who says that a few days before June 2, 1902, he entered the employment of the defendant as assistant cashier, and for some time thereafter acted as teller; that after the defendant had commenced business one Easter, who was in the employ of the plaintiff, called at the bank on several different occasions and inquired about this lease; that he spoke to Carraway about it, who

told him the lease would be ready in a few days. And it was to obtain the testimony of these three witnesses that this motion was made.

Assuming that the court had power to grant a motion for a new trial on the ground of newly discovered evidence after the defeated party had exhausted his remedy by an appeal to the highest court of the state or nation, such an application should only be granted in a clear case, and where it clearly appears that the testimony which the witnesses will give upon the new trial would have a material influence on the result, that the plaintiff's attorney could not in the exercise of ordinary diligence have obtained this testimony upon the trial, and that after the trial the plaintiff and its attorney exercised due diligence in their endeavors to procure the testimony of the witnesses upon whose evidence they rely for the granting of the application. It is quite clear that the practice should not be encouraged of such an application, made after the right to appeal has been exhausted and the judgment reviewed by the highest courts in the country, when the plaintiff's attorney first makes an investigation as to what additional testimony he could have procured upon the trial. But little attention, I think, should be paid to this affidavit of Wooten, who testified on the trial that the lease was delivered upon the 27th of May, and who is an inmate of the state's prison, and now comes forward with an affidavit that his testimony was false, and that he is willing now to testify that the lease was delivered subsequent to June 2d. No judgment could stand, if witnesses who had testified to material facts should be allowed afterwards upon affidavits that they had before testified to a falsehood, but would now be willing to testify differently, could be received as a reason for granting a new trial. As to the testimony of Carraway and O'Neale, they were both officers of the defendants. Carraway had signed the lease. The plaintiff's attorney had notice long before the trial that Carraway would give material testimony upon this question, and by the exercise of ordinary diligence could have ascertained who were the other officers of the bank to whom he could apply for information. He made no effort to obtain the evidence of Carraway, and, so far as appears, no effort to ascertain what other officers or employes of the bank would have knowledge of the fact which it was material for him to prove. He brought his case on for trial without making any effort to obtain this testimony, or even to ascertain what the officers or employes of the defendant who had to do with the making of the lease would testify to. After the trial, when defeated, he accepted the result, and instead of then endeavoring to ascertain from the persons who, from the facts within his knowledge, would necessarily have knowledge as to the date of the delivery of the lease, took an appeal and prosecuted that appeal to the Supreme Court of the United States; and it was only as the result of some undisclosed arrangement between Gandy and the plaintiff's attorney that the motion for a new trial was made, without statement from Carraway to the court or to the plaintiff's attorney that he could testify to any fact which would be of the slightest benefit to the plaintiff.

The principles upon which these new trials upon the ground of newly discovered evidence are granted are well settled. They are

stated in the cases of *Biddescomb v. Cameron*, 58 App. Div. 42, 68 N. Y. Supp. 568, and *Simonowitz v. Schwartz*, 73 App. Div. 489, 77 N. Y. Supp. 209, and need not be here repeated. I do not think the plaintiff has brought itself within the rule which requires a party to an action to act with diligence to procure the testimony necessary for the successful prosecution or defense of the action, and in the absence of such diligence, if defeated, he cannot apply to the court upon the ground that he subsequently has discovered testimony which would have been material if it had been produced upon the trial. The plaintiff knew before the trial that Carraway could give material evidence as to the date of the execution and delivery of this lease. He made no effort to procure his testimony, or to ascertain what he would testify to; and it is too late for him, after the affirmance of the judgment by the Supreme Court of the United States, to make investigation as to other evidence as a basis of a new trial. In addition, attention should be paid to the very suspicious character of this "newly discovered" evidence. It is perhaps unnecessary to say more than that the good faith of these witnesses and the credibility of their testimony is subject to grave suspicion. People, who had no recollection in 1905 of the delivery of a lease in 1902, in 1906 suddenly acquire recollection which, if testified to, might help the plaintiff, and the witnesses, who positively testified to a date in 1905, recollected in 1906 that their testimony was wrong, and a witness who refused to make an affidavit, or who refused to state to the plaintiff's attorney what the fact was, is relied upon as being able to furnish testimony as to the fact. All of this is too suspicious and uncertain, it seems to me, to justify a new trial in a case that was brought on for trial by the defeated party, relying upon the testimony that he then had to prove the one fact which was at issue, and, when defeated, exhausting his right to appeal before taking any steps to discover whether there was other evidence which, if he had produced it, would have been material upon his side of the controversy. I have not reverted to the affidavit of Easter, which was read in reply to the defendant's affidavit in opposition to the motion, who was not one of the witnesses upon whom the plaintiff relied in making the motion; but his revival of recollection in consequence of a conversation with O'Neale is quite insufficient to bolster up a motion that was made without attempting to rely upon his testimony.

I do not think that, under the circumstances as they appeared before the City Court, this application should have been granted, and I therefore think that the order appealed from should be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs.

CLARKE, J., concurs.

ROOME v. SMITH.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. REFERENCE—COMPULSORY REFERENCE.

Under Code Civ. Proc. § 1013, providing that the court may of its own motion or on the application of either party direct a trial of the issues of fact by a reference where the trial will require the examination of a long account, etc., and that in an action triable by the court without a jury a reference may be made "as prescribed in this section," etc., the words "as prescribed in this section" refer to where the trial will require the examination of a long account; and in actions in equity, as well as at law, there can be no compulsory reference, unless the trial involves such determination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reference, §§ 13-23.]

2. SAME.

Where, in an action to compel defendant to restore plaintiff's right of way over certain property, destroyed by defendant in excavating for a building, and to recover damages caused plaintiff's building by the negligent manner in which the work was done, and for interference with the right of way, the answer put in issue the material allegations of the complaint, the issues involved arose on the pleadings, and could not be referred, under Code Civ. Proc. § 1013.

Appeal from Special Term.

Action by William J. Roome against Robert S. Smith. From an interlocutory judgment requiring defendant to restore a certain right of way, and sending other questions raised by the pleadings to a referee to hear and determine, defendant appeals. Reversed.

Argued before PATTERSON, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Franklin Pierce, for appellant.

Robert J. Mahon, for respondent.

McLAUGHLIN, J. The plaintiff at the time of the commencement of this action was the lessee of a parcel of land annexed to and adjoining a parcel owned by the defendant. In connection with his lot plaintiff had a right of way 12 feet wide across the rear end of defendant's lot. In excavating for the erection of a building on his lot, defendant destroyed this right of way, and this action was brought to compel him to restore the same, and also to recover damages alleged to have been caused to the building on plaintiff's lot by the negligent manner in which the work was done. The answer put in issue the material allegations of the complaint. After issue had been joined the cause came on for trial at Special Term, and the learned justice holding the term, after hearing the evidence relating to the right of way, made a decision upon which an interlocutory judgment was entered which required defendant to restore the right of way within a time specified and referred all the other questions to a referee to hear and determine. The matters sent to the referee to hear and determine were:

"(a) Was the defendant guilty of the negligent and unlawful acts as described in the complaint, and alleged as having been the cause of the destruction of the stable described in the complaint? (b) Were those acts the proximate and sole cause of the injury to plaintiff's said stable? (c) And if the defend-

ant was guilty of negligence and unlawful acts as alleged in the complaint, and they were the proximate cause of said condition of said stable as alleged, what damages, if any, did the plaintiff suffer therefrom? (d) And what damages, if any, did plaintiff suffer from defendant's interference with said right of way?"

The disposition thus made in sending the issues to the referee was against the objection and exception of defendant's counsel. Defendant has appealed from the interlocutory judgment, and assails its validity upon the ground that the court had no power to send to the referee the issues which he did. The sections of the Code authorizing compulsory references are section 1013 and section 1015. Section 1015 refers to incidental questions; that is, other than those raised by the pleadings. Section 1013, therefore, is the only section which need be considered. This section provides:

"The court may, of its own motion, or upon the application of either party, without the consent of the other, direct a trial of the issues of fact, by a referee, where the trial will require the examination of a long account, on either side, and will not require the decision of difficult questions of law. In an action, triable by the court, without a jury, a reference may be made, as prescribed in this section, to decide the whole issue, or any of the issues; or to report the referee's finding, upon one or more specific questions of fact, involved in the issue."

The words "as prescribed in this section" refer to where the trial will require the examination of a long account; and in actions in equity, as well as those at law, there can be no compulsory reference unless the trial involves such determination. *Doyle v. Met. El. Ry. Co.*, 136 N. Y. 505, 32 N. E. 1008; *Thayer v. McNaughton*, 117 N. Y. 111, 22 N. E. 562; *Standard Fashion Co. v. Siegel-Cooper Co.*, 44 App. Div. 121, 60 N. Y. Supp. 739; *Russell Hardware, etc., Co. v. Utica Drop Forge Co.*, 112 App. Div. 703, 98 N. Y. Supp. 777; *Bentz v. Carleton & Hovey Co.*, 114 App. Div. 865, 100 N. Y. Supp. 206. The negligence of the defendant and the alleged damage to plaintiff's building by reason thereof, as well as the damage for interference with the right of way, are clearly issues arising on the pleadings and could not be referred. *Doyle v. Met. El. Ry. Co.*, supra; *Standard Fashion Co. v. Siegel-Cooper Co.*, supra.

The judgment appealed from, therefore, must be reversed, and a new trial ordered, with costs to appellant to abide event. All concur.

KELSEY v. CITY OF NEW YORK et al.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. MUNICIPAL CORPORATIONS—DEFECTS IN WATER COURSES—LIABILITY OF PERSON CAUSING DEFECT.

A city, in relocating a water main, to permit the building of a rapid transit station, is not liable for a failure to select the best possible route or to adopt the best possible plan of construction, if those selected were reasonably safe.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1780, 1781.]

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2. TRIAL—CONDUCT OF COUNSEL—APPEAL TO PREJUDICE.

In an action against a city for damages resulting from a bursted water main, it was improper for plaintiff's counsel to bring before the jury the fact that the city and the contractor, who was a party defendant, were indemnified by a bond from the subcontractor, who did the work, justifying reversal on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, §§ 803-307.]

Appeal from Trial Term.

Action by Julia R. Kelsey against the city of New York and others. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant city of New York appeals. Reversed.

Argued before PATTERSON, P. J., and McLAUGHLIN, HUGH TON, SCOTT, and LAMBERT, JJ.

R. E. T. Riggs, for appellant.

E. J. Murphy, for respondent.

SCOTT, J. The plaintiff has recovered a judgment against the city of New York for injury caused to certain personal property contained in the basement of a house in West Ninety-Second street. The injury resulted from the bursting of a water main on Broadway, between Ninety-First and Ninety-Second streets. John B. MacDonald was originally included as a defendant, but at the close of the case the complaint was dismissed as to him. Under the contract and plans for the construction of the rapid transit road, it became necessary, in order to provide for the station at Ninety-First street and Broadway, to shift a 36-inch water main running along Broadway. Originally the main ran under the roadway east of the westerly sidewalk. To make room for the station, a new section of main was put in, being carried from the old main at an angle until it came under the sidewalk a short distance below Ninety-First street, thence along under the sidewalk to a point a short distance above Ninety-First street, and thence again at an angle to connect with the old main. In order to effect this diversion, it became necessary to carry the new main diagonally over a brick sewer running under the sidewalk. The water main was laid 3 or 4 feet below the surface to avoid freezing, and there was a clearance of about 4 inches between it and the top of the sewer. The relocation of the sewer was done by the subcontractor under MacDonald, the general contractor for the rapid transit road. The work was completed and the water turned into the relocated main on December 16, 1901. The break occurred on February 19, 1904, just at the point where the water main crossed over the brick sewer.

It is not clear why the main broke. The plaintiff's theory, and it is only a theory, is that it was insufficiently supported, and that it settled or sagged, so that its weight came upon the sewer. Clearly this may have been the cause; but the evidence tended to show that there may have been other causes having no relation to the manner in which the main was built or supported. It is not necessary to consider at length the contract between the city and MacDonald. It is sufficient to say that the duty of properly constructing and supporting the main fell primarily upon the latter, or his subcontractor. Whatever duty rested upon the city went no further than to exercise reasonable care to

see that the work had been properly done before the water was turned into the new section of main, and it cannot be held liable unless it knowingly or carelessly put an unsafe and improperly constructed water main into use. Certainly the city can be held to no more stringent rule of liability than it would have been subject to if it had undertaken to relocate the main itself, through a contract with an independent contractor. In that case it would not have been obliged, at its peril, to select the best possible route, or to adopt the best possible plan, provided the route selected and the plan adopted were reasonably safe. *Uppington v. City of N. Y.*, 165 N. Y. 222-228, 59 N. E. 91, 53 L. R. A. 550.

In the present case, under the rapid transit act, the city had little or no control over the contractor, or power to dictate how he should perform the work required by his contract. Much evidence was given as to whether or not the main was properly supported. The method adopted was to support the pipe by hemlock bed blocks rammed into the earth on either side of the sewer. The plaintiff called a single expert witness, who had never examined the work or the locus in quo, who testified, in answer to a hypothetical question, that in his opinion it would have been better and safer to have supported the main upon a cement foundation. He conceded, however, that if the ground on either side of the sewer was sufficiently hard or settled, as to which he had no knowledge, the use of hemlock bed blocks would be safe and proper. The method of construction which was in fact adopted was approved by a number of experienced engineers and pipe layers, who had observed the work while in progress and were thoroughly familiar with the conditions under which it was done, and the engineers called by the defense agreed in testifying that, in their opinion, the use of a cement foundation would, for reasons which they gave, have been bad practice from a technical standpoint, and in any event quite unnecessary. The question, therefore, whether a proper method of construction was adopted, resolved itself into one of expert opinion, of which the very great preponderance was in favor of the plan and method which was adopted for supporting the main. At the very most, even accepting the evidence of the plaintiff's expert, the city could be charged with nothing worse than an error of judgment, and upon all the evidence in the case there was no ground for charging it with so much. Or negligence on its part there is no evidence, nor is there ground for charging it with having knowingly or negligently accepted and put into use an improperly constructed main, and consequently no actionable liability on the part of the city was established, and for this reason the judgment must be reversed.

We are unwilling to leave the case, however, without reference to the extremely improper action upon the part of the counsel for the plaintiff in bringing to the attention of the jury the wholly irrelevant fact that MacDonald (as to whom the complaint had not yet been dismissed) and the city of New York were indemnified by a bond from the subcontractor who had performed the work of relocating the sewer. This alone would have been sufficient to call for a reversal of the judgment, even if no other reason had existed. To mention such a fact upon the trial, or in any way to bring it to the attention of

the jury, can have no legitimate bearing upon the issues in the action, and can have no purpose, except to prejudice the jury in favor of the plaintiff. This practice, which we regret to observe is becoming all too common in damage suits, has been so frequently and so pointedly condemned by the Court of Appeals and this court that no counsel engaged in the trial of causes can plead ignorance of its impropriety. When counsel persists in pursuing it, the trial court should not hesitate, if requested by the defendant, to withdraw a juror and order a retrial before another jury. Failing that, this court, when it appears that the verdict may possibly have been influenced by the reference, will not hesitate to reverse the judgment.

Judgment and order reversed, and new trial granted, with costs to appellant to abide the event.

McLAUGHLIN, HOUGHTON, and LAMBERT, JJ., concur;
PATTERSON, P. J., concurs in result.

CÆSAR MISCH INCORPORATION v. MOSHEIM.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

SALES—SALE ON COMMISSION—CONSTRUCTION OF CONTRACT.

Defendant, an auctioneer, advanced to plaintiff \$5,000 on certain stock and fixtures, and agreed to sell them at auction, guaranteeing them to bring at least \$6,000, the proceeds over the sum of \$5,500 to be divided between them equally, and the goods were sold for \$6,201, whereupon defendant tendered plaintiff one-half of the proceeds over \$5,500. *Held*, that the contract was not a sale of the goods to defendant, but an agreement by him to sell the goods for plaintiff on commission, and plaintiff was entitled to the \$5,500 absolutely, and in addition thereto one-half of the proceeds over that sum.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 16-18.]

Appeal from Trial Term, New York County.

Action by the Cæsar Misch Incorporation against Julius R. Mosheim. From a judgment in favor of plaintiff for less than the amount claimed, and from an order denying a motion for new trial, plaintiff appeals. Reversed and remanded.

Argued before PATTERSON, P. J., and McLAUGHLIN, HOUGHTON, SCOTT, and LAMBERT, JJ.

Sol. De Young, for appellant.

Franklin Bien, for respondent.

HOUGHTON, J. The plaintiff was the owner of a stock of goods and store fixtures, and the defendant was an auctioneer. The defendant submitted to plaintiff the following written proposition:

"We hereby advance you \$5,000 on stock and fixtures contained in premises 241 Sixth Ave. Same to be sold at public auction. All over and above the sum of \$5,500 realized at public sale on stock and fixtures we will divide in equal parts. All expenses to be paid by J. E. Mosheim & Co. Stock and fixtures guaranteed to bring not less than \$6,000, and any deficiency below this amount will be paid by us."

This was accepted and signed by both parties. The amount realized upon the sale was \$6,201.05. The defendant tendered to plaintiff one-half of the amount over \$5,500, insisting that was all plaintiff was entitled to. The plaintiff claimed that it was entitled to, not only such one-half, but also to the \$500 necessary, in addition to the \$5,000 which had been paid, to make the \$5,500 stipulated by the contract. On trial the court directed a verdict for plaintiff on the basis of such one-half only, interpreting the contract as giving to defendant the \$500 as well as one-half the surplus over \$5,500.

We cannot agree with the interpretation placed upon the contract by the trial court. The contract is very plain. The defendant did not buy the goods. He simply sold them for the plaintiff. He guaranteed that under his conduct of the sale the goods should bring a certain amount, and made advancements before the sale was begun. For compensation for his services and expenses in conducting the sale he agreed that he should take one-half of all the goods brought above \$5,500. Up to that amount all the proceeds belonged to the plaintiff absolutely. There can be no question as to the interpretation of so plain a contract.

The judgment and order should be reversed, and a new trial granted, with costs to the appellant to abide the event. All concur.

CONRAD v. CONRAD.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. DIVORCE—JURISDICTION—PLACE OF MARRIAGE—DOMICILE OF PARTIES.

Code Civ. Proc. § 1763, provides that an action for a separation may be maintained in this state, either where both parties were residents thereof when the action is commenced, or, the parties being married within the state, plaintiff was a resident thereof when the action was commenced, or the parties, being married without the state, have become and continue to be residents thereof at least one year, and plaintiff is a resident thereof when the action is commenced. Plaintiff and defendant were married outside the state, and defendant had never been domiciled therein. *Held*, that plaintiff was not entitled to maintain her action in this state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 208-216, 220.]

2. SAME—ALIMONY—ALIMONY PENDENTE LITE—COUNSEL FEES—WHEN PROPER.

Where plaintiff in an action for a separation does not show herself within Code Civ. Proc. § 1763, providing when such an action may be maintained within the state, she fails to show reasonable ground for believing she will succeed in her suit, and therefore is not entitled to alimony pendente lite and counsel fee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 591, 592.]

3. MOTIONS—SCOPE OF—DISPUTED FACTS.

Where the decision of a question depends upon disputed facts, it should not be decided upon motion, but should be held for determination upon trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Motions, § 1.]

Appeal from Special Term.

Action by Reine Conrad against George J. Conrad for a separation. From an order granting alimony pendente lite and counsel fee, defendant appeals. Reversed, and motion denied.

See 107 N. Y. Supp. 655.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Arnstein & Levy (Alexander Pfeiffer, of counsel), for appellant.
May & Jacobson (I. N. Jacobson, of counsel), for respondent.

CLARKE, J. The action is for a separation on the ground of abandonment and nonsupport. The moving papers aver that the plaintiff and defendant were married at Lyons, Kan., on or about the 16th of August, 1888, and that at that time both parties lived at St. Louis, Mo.; that the defendant has never been domiciled in the state of New York; and that the defendant is not a resident of the state of New York. Plaintiff obtained an order of arrest upon the ground of defendant's nonresidence.

Section 1762 of the Code of Civil Procedure provides for what causes an action for a separation may be maintained. Section 1763 provides that:

"Such an action may be maintained in either of the following cases: (1) Where both parties are residents of the state, when the action is commenced; (2) where the parties were married within the state, and the plaintiff is a resident thereof, when the action is commenced; (3) where the parties, having been married without the state, have become residents of the state, and have continued to be residents thereof at least one year; and the plaintiff is such a resident, when the action is commenced."

Having affirmatively shown that both parties were not residents of the state when the action was commenced, that they were not married within the state, and that, having been married without the state, they had not become residents of the state and continued to be such residents at least one year, plaintiff has established that she comes not within any of the provisions of the statute providing for the maintenance of the action which she has brought. The general rule is that where a wife presents a prima facie case in an action for separation or divorce, and there is reasonable ground to believe that she will succeed, an order providing for the payment of alimony pendente lite and a reasonable counsel fee is proper. Where, by her express allegations of facts, she has shown that she does not come within any of the statutory classes of cases in which such an action may be maintained in the courts of this state, she cannot be said to have presented a prima facie case and furnished reasonable ground to believe that she will succeed. Upon her own showing, therefore, she ought not to have been awarded alimony.

The other questions presented upon the whole record, the validity of the Ohio divorce obtained by the defendant and whether the wife abandoned the husband or the husband the wife, depend upon disputed facts, and ought not to be decided upon motion, but should be left for determination upon the trial.

The order appealed from should be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs. All concur.

WINDMULLER et al. v. GOODYEAR TIRE & RUBBER CO.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

ACCORD AND SATISFACTION—RETENTION OF CHECK—EFFECT.

Where the buyer of rubber sent the sellers a check "in settlement" of the invoice, stating that the balance was ascertained under the salesman's warranty that the rubber would not shrink more than 40 per cent., the sellers' retention of the check was not an accord and satisfaction, where they credited the buyer's account with the amount of the check and in acknowledging receipt thereof stated that a specified sum remained due, and demanded payment thereof; they denying, before and after receiving the check, that such warranty was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Accord and Satisfaction, §§ 88-91.]

Laughlin, J., dissenting.

Appeal from Trial Term.

Action by Louis Windmuller and others against the Goodyear Tire & Rubber Co. From a judgment dismissing the complaint, and from an order denying a new trial, plaintiffs appeal. Reversed, and new trial granted.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Cephas Brainerd, for appellants.

George D. Beattys, for respondent.

SCOTT, J. The plaintiffs appeal from a judgment dismissing the complaint. There is no dispute as to the facts, the evidence being wholly documentary, and the only question is whether the receipt and retention by plaintiffs of a check sent them by defendant constituted an accord and satisfaction. The action was for a balance claimed to be due on a sale of Borneo rubber by plaintiffs to defendant. The answer alleges that prior to the sale plaintiffs warranted and represented that the rubber, in being washed, dried, and shrunk, would not shrink more than 40 per cent. of the net weight, and further agreed that, if the said rubber did shrink more than 40 per cent., defendant could settle and pay for the rubber at a net price of 70 cents per pound dry weight. It was further alleged that plaintiffs furnished defendant, before the sale, with a special sample of the rubber taken from the bulk of the goods, with which sample the plaintiffs agreed said rubber should in all respects be equal; that defendants purchased the rubber, relying on said representations and sample, but that the rubber delivered did not correspond with the sample, and was not as represented and warranted, in that in the process of washing, drying, and breaking down it shrunk in weight nearly 53 per cent., and, being worth, at 70 cents per pound net weight, \$231.43 less than it would have been worth at 42 cents per pound, if it had been as represented. The plaintiffs, in reply, admit delivering a sample of rubber prior to the sale, but deny any warranty or representations, and the defendant's reliance thereon, and allege that in purchasing the rubber the defendant relied wholly upon its own examination of the sample.

The action is for the sum of \$231.43, being the difference between the

price of the rubber at 42 cents per pound, the agreed price, and 70 cents per pound, dry weight. The rubber was shipped on January 13, 1904, and was received by defendant about January 20, 1904; for on that date defendants wrote a letter acknowledging the receipt and promising to mail a check on the following Friday. On January 21st defendants again wrote, saying that they had been informed by the factory superintendent that the quality of the rubber was very poor, and that they should, before paying for the same, wait for the shrinkage. On January 23d plaintiffs replied, declining to admit any claim on the rubber and asking for a prompt remittance. On January 30, 1904, defendants wrote inclosing a check for \$800, and saying that they would remit balance as soon as the shrinkage on the rubber had been ascertained. On February 1, 1904, plaintiffs wrote acknowledging the receipt of the check for \$800, and stating that that payment left a balance due of \$293.67. They also specifically declared that:

"The arrangement regarding the shrinkage ceased with your examination of the large sample of about eight pounds sent on the 30th of December and your definite order for one ton on the 7th of January at 42 cents per pound."

On February 6, 1904, defendants wrote inclosing check for \$62.25 "in settlement of your invoice of January 11th," and then explained how this sum was arrived at, as follows:

"When this rubber was purchased from your representative, he guaranteed that the rubber would not have a shrinkage of more than 40 per cent, or in other words the rubber would not cost us more than 70 cents per pound dry weight. The rubber weighed up 1,230 pounds dry weight, at 70 cents would be \$861. We have already paid you \$800, and the check inclosed covers balance due on this invoice, also cartage of \$1.25."

To this letter plaintiffs replied at once, acknowledging the receipt of the check for \$62.25, with which they credited defendants' account, and stating that there still remained due \$231.42, of which they demanded payment. They again denied that there had been any warranty or representations. Upon evidence of this transaction the court below decided that the receipt and retention of the check for \$62.25 constituted an accord and satisfaction, and dismissed the complaint. This, as we think, was erroneous. "Ordinarily the retention of a check inclosed in a letter which refers to the amount as the balance due on accounts between parties will not be held to be an accord and satisfaction, so as to bar an action for the balance due. It is only in cases where a dispute has arisen between the parties as to the amount due, and a check is tendered on one side in full satisfaction of the matter in controversy, that the other party will be deemed to have acquiesced in the amount offered by an acceptance and retention of the check." *Eames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289-300, 51 N. E. 986, 989. In the present case the only controversy was as to the alleged warranty, and the only question between the parties was as to whether there had been such a warranty or not. No check was ever sent in settlement of that controversy, and as to it there was, therefore, no accord and satisfaction. The sum of \$62.25, for which a check was sent, was not in settlement of any controversy; for the defendants admittedly owed that amount in any event, and as to it there was no controversy whatever. The case falls squarely within the rule

of Eames Vacuum Brake Co. v. Prosser, *supra*, and Laroe v. Sugar Loaf Dairy Co., 180 N. Y. 367, 73 N. E. 61. It differs essentially from cases in which the plaintiff's claim was for an unliquidated amount, and the payment was in terms made in full settlement. In the present case there is no question as to the amounts. Upon the only question in controversy between the parties there was no attempt or intention to pay anything in satisfaction, and hence there could be no accord. That controversy remained open, and it is evident that both parties so understood it.

Judgment and order reversed, and new trial granted, with costs to appellant to abide the event.

PATTERSON, P. J., and INGRAHAM and CLARKE, JJ., concur.

LAUGHLIN, J. (dissenting). I am of the opinion that the acceptance and use of the check for \$62.25 constituted an accord and satisfaction. The question arises over the purchase of one ton of Borneo rubber by the defendant from the plaintiffs at the agreed price of 42 cents per pound. After the delivery of the rubber the defendant claimed that it was of a very poor quality, and declined to pay for it until the amount of shrinkage could be ascertained. The defendant in the meantime remitted to the plaintiffs a check for \$800 to apply on account. The total purchase price of the rubber, if it had been of good quality and did not shrink in weight, would have been \$1,093.67. The plaintiffs insisted that the weight should be determined as of the time of delivery, and not at a later period, after shrinkage had taken place. The defendant received the rubber on the 20th of January, 1904. On the 6th day of February thereafter, and after the plaintiffs had rejected the contention of the defendant that it was entitled to a deduction on account of excess of shrinkage, the defendant inclosed a check for \$62.25 to the plaintiff, with a letter stating that the rubber had been purchased under a guaranty that there would not be a shrinkage of more than 40 per cent., which would make the purchase price, dry weight, 70 cents per pound, and that the dry weight of the rubber was 1,230 pounds, which, at 70 cents per pound, would amount to \$861, to which \$1.25 was added for cartage, and that the check was sent to cover the balance due on the invoice, which was for \$1,093.67. It is manifest that the vendee did not even concede its liability to the vendor for the amount which it paid. It had asserted that the rubber was of poor quality and that it did not come up to the guaranty with respect to shrinkage; but, with a view to settlement, it offered to pay on the basis of the purchase price, deducting for the excess of shrinkage. The claim was unliquidated, the amount of the defendant's liability was in dispute, and therefore, when the plaintiffs accepted and used the check sent in full settlement, it constituted an accord and satisfaction. *Nassoio v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695; *Dunn v. Whalen*, 120 App. Div. 729, 105 N. Y. Supp. 588; *Jackson v. Volkening*, 81 App. Div. 36, 80 N. Y. Supp. 1102, affirmed 178 N. Y. 562, 70 N. E. 1101.

I therefore vote for affirmance of the judgment.

AMERICAN RADIATOR CO. v. CITY OF NEW YORK et al.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. APPEAL—MODIFICATION OF JUDGMENT—STRIKING OUT ERRONEOUS FINDINGS.

Where, in a suit involving the right to a sum due a subcontractor under a contract with the principal contractor, claimed by an assignee of the subcontractor and by the subcontractor's trustee in bankruptcy, the undisputed evidence showed that after the assignment and on the faith thereof the assignee made advances to the subcontractor in excess of the sum due under the contract, and that such advances remained unpaid, a judgment awarding that sum to the assignee could not be reversed because the court made unnecessary findings, based on an accounting between the subcontractor and the assignee, and embodied such findings in the judgment, but the unnecessary findings would be stricken from the judgment.

2. JUDGMENT—RES JUDICATA—UNNECESSARY FINDINGS.

Findings which do not necessarily enter into the judgment are not res judicata between the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1268.]

Appeal from Special Term.

Action by the American Radiator Company against the city of New York and others. From a judgment in favor of defendant the Capital Company against defendant Charles P. Wortman, as trustee in bankruptcy of William N. Tobin, said defendant Wortman appeals. Modified, and, as modified, affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Oliver D. Burden, for appellant.

Henry B. Johnson, for respondent.

LAUGHLIN, J. The action was brought to foreclose a municipal lien, filed by the plaintiff on the 1st day of May, 1906, against the fund due or to grow due under a contract made by Charles Meads & Co. with the city of New York for the erection of public school No. 45 in the borough of Brooklyn. The contractor sublet the work of furnishing the labor and material necessary to install and complete the steam heating according to the plans and specifications to the bankrupt for the agreed price and consideration of \$2,600. The plaintiff, pursuant to a contract with the bankrupt by which the latter agreed to pay therefor the sum of \$416.39, furnished a sectional steam boiler, which was installed in the performance of the contract work. No part of this consideration was paid to the plaintiff, and the lien was filed for the whole amount. At the time of filing the plaintiff's lien there had been duly paid by Charles Meads & Co., on account of the contract with the bankrupt, the entire contract price of the work, with the exception of \$1,187.56, which subsequently became due and owing on the contract with the bankrupt and was paid into court by Charles Meads & Co. on the 14th day of February, 1907, pursuant to an order made on consent of all parties. There was no controversy with respect to the amount remaining unpaid on the contract between the bankrupt

and Charles Meads & Co. at the time of filing of the lien. On the 19th day of April, 1906, the bankrupt made two assignments to the Capital Company. One of these related only to his contract with Charles Meads & Co., and in and by it he assigned the moneys due and to grow due to him thereunder. The other embraced the moneys due and to grow due to the bankrupt under that and other contracts and accounts. The consideration stated in each was \$1 and other good and valuable considerations. The assignment, embracing more than the Charles Meads & Co. contract, contained a clause to the effect that it was understood and agreed that it was made to secure the Capital Company—

“the repayment of the sum of \$10,000, with interest, this day loaned by the said the Capital Company to said William N. Tobin, and upon payment in full of said loan, with interest thereon, the said William N. Tobin shall be entitled to a reassignment of said accounts, or so many of them as shall not have been paid.”

These assignments were duly filed by the Capital Company on the 1st day of May thereafter, and prior to the filing of the plaintiff's notice of lien. The court decided that the claim of the Capital Company under these assignments was superior to the claim of the plaintiff and to its rights under its notice of lien, and from the judgment there has been no appeal by the plaintiff. The controversy presented by the appeal is between the trustee in bankruptcy and the Capital Company. The answer of the Capital Company was duly served on the trustee, and in the answer it set forth its business relations with the bankrupt and facts tending to show that there remained due and owing it from the bankrupt under the assignments the sum of \$9,250, together with interest thereon from the 5th day of April, 1906, and also interest on \$10,000 from the 28th day of February, 1906, to the 5th day of April, 1906, and it demanded in its prayer for relief that Charles Meads & Co. and the bankrupt be adjudged to pay that amount to it, “or so much of said sums as the amounts ascertained and fixed” as due and unpaid under the contract between the city of New York and Charles Meads & Co. and between William N. Tobin and Charles Meads & Co. would cover. The answer of the Capital Company also contained the usual prayer for other and further relief and for judgment for costs. It did not, however, demand an adjudication between it and the bankrupt as to the amount due and owing to it from him under the assignments, and therefore that was not in issue, excepting to the extent necessary to decide which of them was entitled to the balance paid into court by Charles Meads & Co. The court found that the amount paid into court by Charles Meads & Co. as aforesaid was the amount due and owing from them to the bankrupt under the contract between them, and decreed that the Capital Company have judgment therefor, together with any accrued interest thereon, less the fees of the chamberlain, and that it recover costs of the trustee in bankruptcy. At the time of the execution of these assignments the bankrupt made and delivered to the Capital Company his two promissory notes, payable to its order, one for \$9,000 and one for \$1,000, in renewal of an outstanding note for advances made by the Capital Company and for advances made which were not represented by a note and for advances

to be made thereafter. The assignments were intended as security for these notes and for moneys to be thereafter advanced by the Capital Company to the bankrupt. The undisputed evidence is that after the assignments were made the Capital Company advanced to the bankrupt on the strength and security thereof the sum of \$3,537.42, and received on account of collections under the assignments the sum of \$1,376.99, leaving the amount of \$2,160.43 advanced by the Capital Company on the strength and security of these assignments after they were made, which had not been repaid at the time of the trial of the issues.

The trustee attacks the validity of the assignments as security for the notes and claims that the notes were usurious and void. Considerable evidence was taken upon this subject, and the court reached the determination that neither the notes nor any part of the consideration was tainted with usury, and in effect took an accounting between the Capital Company and the bankrupt, and found that the bankrupt owed the Capital Company on the 1st day of May, 1906, the sum of \$11,000 "and upwards, besides interest," and that there was due and owing to the Capital Company, upon advances made to the bankrupt on the security of the assigned property, the sum of \$11,315.86 and interest thereon from the 9th day of May, 1906. Inasmuch as the undisputed evidence showed that the Capital Company advanced under the assignments more than the amount owing to the bankrupt under his contract with Charles Meads & Co. and recoverable in this action, for which, in any event, the assignments would be valid, it was unnecessary to the determination of the issues to take an accounting between the parties or to decide the questions raised with respect to the validity of the assignments so far as they related to the notes and other past indebtedness. It was sufficient for a decision of the issues in this action to determine that the Capital Company, on account of advances made to the bankrupt under the assignments, was entitled to the balance due under the contract, and the other questions might well have been left to be determined when necessarily presented for adjudication. Since, in any view of the case, however, the Capital Company was entitled to the balance owing on the contract between the bankrupt and Charles Meads & Co., there is no authority for reversing the judgment on account of an unnecessary finding. These unnecessary findings were unnecessarily reiterated in the judgment. We are of opinion that the judgment should be modified by striking them therefrom, and then, doubtless, under the rule that findings which do not necessarily enter into the judgment are not *res adjudicata* between the parties, the judgment will not be *res adjudicata* upon those issues. *Springer v. Bien et al.*, 128 N. Y. 99, 27 N. E. 1076; *Lance v. Shaughnessy*, 86 Hun, 411, 33 N. Y. Supp. 515, affirmed 153 N. Y. 653, 47 N. E. 1008; *Rudd v. Cornell*, 171 N. Y. 114-129, 63 N. E. 823; *Thorn v. Breteuil*, 86 App. Div. 405-428, 83 N. Y. Supp. 849.

Judgment is therefore modified by striking from paragraph No. 4 thereof the words "which are hereby fixed and adjudged to be the sum of \$11,315.86 and interest from May 9, 1906," and, as modified, affirmed, without costs of the appeal to either party. All concur.

PEOPLE v. QUINN.

(Supreme Court, Appellate Division, Second Department. January 10, 1908.)

CRIMINAL LAW—EVIDENCE—DECLARATIONS OF ACCOMPLICES.

On trial of defendant and another for a burglary, evidence that after the burglary, and in defendant's absence, the accomplice stated to a police officer, while being taken to the police station under arrest, that defendant participated in the crime, was inadmissible, being a mere narrative made after the act to be proved by it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 950, 1004.]

Appeal from Kings County Court.

Martin Quinn was convicted of burglary, and he appeals. Reversed, and new trial ordered.

Argued before WOODWARD, JENKS, GAYNOR, RICH, and MILLER, JJ.

Martin T. Manton, for appellant.

Peter P. Smith, for respondents.

JENKS, J. The defendant appellant and Savage were indicted for burglary. It appears from the record that Savage had pleaded guilty. At the trial of the appellant a witness for the people, Officer Langdon, who had arrested Savage in the house burglarized, was permitted, over objection and exception, to testify that Savage, in the absence of the defendant, told the witness that the defendant took part in the crime. This confession, or at least the important part thereof, was made by Savage after his arrest, and when he was on his way to the police station house in the custody of Langdon. I think that this ruling was reversible error. When the confession (or its important part) incriminating the defendant was made, the burglary had ended. *People v. Huter*, 184 N. Y. 237, 77 N. E. 6. The rule is declared in *Greenleaf on Evidence* (volume 1 [15th Ed.] § 233), where, after discussion, the author says:

"In fine, the declarations of a conspirator or accomplice are receivable against his fellows only when they are either in themselves acts, or accompany and explain acts, for which the others are responsible, but not when they are in the nature of narratives, descriptions, or subsequent confessions."

See, also, *Commonwealth v. Thompson*, 99 Mass. 444; *State v. Stair*, 87 Mo. 268, 56 Am. Rep. 449, citing *State v. Duncan*, 64 Mo. 266; *Abbott's Trial Brief*, Criminal Cases, p. 314.

The judgment of conviction is reversed, and a new trial is ordered. All concur.

PEOPLE ex rel. GERACI v. ITALIAN ASS'N ST. BARTHOLOMEW
EOLIANA OF MUTUAL AID OF NEW YORK.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

MANDAMUS—PROCEEDINGS—HEARING—JURY TRIAL—MAKING FINAL ORDER.

Under the express provisions of Code Civ. Proc. §§ 2082, 2083, after issue of fact is joined on the issuance of an alternative writ of mandamus, the proceedings are the same as in an action, except as otherwise provided, and such issue must be tried by a jury as if it were an issue joined

in an action, unless a jury trial is waived or a reference directed by consent of parties. Section 2084 provides that at the conclusion of the trial, where the writ was granted at Special Term, the verdict, report, or decision must be returned to, and the final order thereupon must be made by, the Special Term. *Heid*, that where the writ was granted at Special Term and issues of fact were raised by the return, it was error for the judge at Trial Term, after hearing the proof, to make a final order dismissing the proceeding on the merits, without submitting any question to the jury or directing a verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, *Mandamus*, § 380.]

Appeal from Special Term.

Mandamus by the people, on the relation of Domenico Geraci, against the Italian Association St. Bartholomew Eoliana of Mutual Aid of New York. From an order dismissing an alternative writ, and an order denying a new trial, relator appeals. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and McLAUGHLIN, HOUGHTON, SCOTT, and LAMBERT, JJ.

Guiseppe L. Maggio, for appellant.

James E. Brande, for respondent.

McLAUGHLIN, J. The relator was a member of the defendant society. Under proceedings taken by the society he was expelled for alleged failure to comply with the by-laws in respect to the payment of dues and feigning illness so as to obtain a sick benefit. He applied to and obtained from the court at Special Term an alternative writ of mandamus for his reinstatement. The return of the society put in issue the material allegations of the papers upon which the writ was granted. The issue thus raised subsequently came on for a hearing at a Trial Term of this court, and after hearing the proof of the respective parties the learned justice sitting at Trial Term dismissed the proceedings on the merits, from which, and also from an order denying a motion for a new trial, the relator has appealed.

The conclusion at which I have arrived renders it unnecessary to pass upon the merits of the relator's claim, because the practice adopted necessitates a new trial. The trial court should have submitted the case to the jury with appropriate instructions, or if, in his opinion, there was nothing to submit to them, then he should have directed a verdict. *People ex rel. Gleason v. Scannell*, 172 N. Y. 316, 65 N. E. 165; *People ex rel. Bean v. Clausen*, 74 App. Div. 217, 77 N. Y. Supp. 521. When an issue of fact has been joined on the issuance of an alternative writ of mandamus, the proceedings thereafter are the same as in an action, except as otherwise provided by law (section 2082, Code Civ. Proc.); and such issue must be tried by a jury as if it were an issue joined in an action, unless a jury trial is waived or a reference directed by consent of the parties. *Id.* § 2083. At the conclusion of the trial the verdict, report, or decision must be returned to, and the final order thereupon must be made by, the Appellate Division or the Special Term, as the case requires. *Id.* § 2084; *People ex rel. Ryan v. Bingham*, 114 App. Div. 170, 99 N. Y. Supp. 593. Here the learned trial justice at the conclusion of the trial did not submit any question to the jury, nor

did he direct a verdict, but instead made a final order dismissing the proceeding. This he had no right to do. *People ex rel. Bean v. Clausen*, *supra*. The final order could only be made by the Special Term, after the verdict of the jury had been returned to it.

The order appealed from, therefore, must be reversed, and a new trial ordered, with costs to appellant to abide event. All concur.

PEOPLE *ex rel.* WILSON v. WARDEN OF CITY PRISON OF CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. ARREST—CRIMINAL CHARGE—NECESSITY OF WARRANT.

One charged with larceny from the person, which is a felony, may be lawfully arrested, either with or without a warrant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arrest, § 144.]

2. CRIMINAL LAW—COMMITTING MAGISTRATE—JURISDICTION.

Code Cr. Proc. § 188, provides that when a defendant is brought before a magistrate, on an arrest either with or without warrant on a charge of having committed a crime, the magistrate must immediately inform him of the charge and of his right to the aid of counsel, etc. *Heid*, that where relator was brought before a magistrate charged with a felony, and raised no question as to her arrest, the magistrate had jurisdiction to examine the charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 468-473.]

3. SAME—COMPLAINT.

A complaint alleging that the complaining witness was attacked on a public street within the territorial jurisdiction of the magistrate by relator and another woman, and that relator took from his pocket and carried away a pocketbook, of the value of \$2, containing checks, papers, and cards, was sufficient to give the magistrate jurisdiction to hold relator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 420-430.]

4. SAME—ORDER FIXING BAIL—MISUSE OF PRONOUN "HE."

That a magistrate, in an order fixing bail, in two instances used the pronoun "he" for the pronoun "she," did not affect the magistrate's jurisdiction previously exercised in deciding that the evidence was sufficient to satisfy him that a crime had been committed and that there was sufficient cause to believe that defendants had committed it, and to issue a commitment thereon.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, p. 3224.]

Appeal from Special Term.

Habeas corpus by the people, on the relation of May Wilson, against the warden of the city prison of the city of New York. From an order sustaining the writ and discharging relator from custody, the people appeal. Reversed, and writ dismissed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Robert S. Johnstone, Deputy Asst. Dist. Atty., for the People.

LAUGHLIN, J. The warden of the city prison held the relator under a commitment duly issued by one of the city magistrates in due

form, charging her, upon the oath of one Walter B. Hatch, with having committed the crime of larceny from the person, which is grand larceny and a felony; and he was commanded by the commitment to hold her to answer to the Court of General Sessions. The commitment was annexed to the return. The relator then traversed the return by presenting the record of the proceedings before the city magistrate. This record does not show how the relator came to be taken before the magistrate; but that is immaterial, for she might have been lawfully arrested either with or without a warrant, and as she was before the magistrate and raised no question with respect to her arrest he had jurisdiction to examine the charge. Code Cr. Proc. §§ 168, 177, 188; *People ex rel. Farley v. Crane*, 94 App. Div. 397, 88 N. Y. Supp. 343.

The record shows that the complaining witness made a deposition in due form before the magistrate, on the day on which the relator was arraigned, specifically charging that the relator, in the nighttime, upon a public street in the borough of Manhattan, New York, feloniously took his pocketbook from the left-hand hip pocket of his trousers and carried the same away, and that the pocketbook was of the value of \$2, and contained checks, papers, and cards. The record also shows that the relator was duly examined before the magistrate on this charge, and duly informed that she was at liberty to waive making a statement, and that she voluntarily submitted to an examination, and gave her name, age, place of birth, residence, and business, and that in answer to the question, "Give any explanation you may think proper of the circumstances appearing in the testimony against you, and state any facts which you think will tend to your exculpation," she said only, "I am not guilty." The deposition of the complaining witness clearly gave the magistrate jurisdiction to hold the relator; for it showed that he was attacked on a public street within the territorial jurisdiction of the magistrate by the relator and another woman, and that the relator took from his pocket the pocketbook and carried it away.

It is difficult to understand upon what theory the writ of habeas corpus was sustained, unless it be that it did not appear how the relator came to be before the magistrate, which, as has been seen, was not required, or upon the technical ground that in the record of the proceedings before the magistrate, after the recital that it appeared to the magistrate by the depositions that the crime had been committed and that there was reasonable cause to believe both defendants guilty thereof, in the order fixing the amount of bail in two instances the pronoun "he," instead of the pronoun "she," is used. This manifestly did not affect the jurisdiction of the magistrate, which had been duly exercised in previously deciding that the evidence was sufficient to satisfy him that the crime had been committed and that there was sufficient cause to believe that the defendants had committed it, and to issue the commitment thereon. We are of opinion, therefore, that the magistrate had jurisdiction, and that the deposition of the complaining witness was sufficient to warrant him in holding the relator to answer for the crime and to issue the commitment to that end.

Judges and courts are required, through the instrumentality of the writ of habeas corpus, to discharge from custody any person held without due process of law; but great care should be exercised in discharg-

ing this duty, to the end that those who are in custody by due process of law shall not be discharged, and thus enabled to escape the punishment which the law has prescribed for the crime with which they are duly charged. There has been no appearance for the relator on the appeal, and it may now be difficult or impossible to apprehend her again.

It therefore follows that the order should be reversed, and the writ of habeas corpus should be dismissed. All concur.

In re WILLIAMS.

(Supreme Court, Special Term, Niagara County. January 13, 1908.)

1. **MANDAMUS—JURISDICTION—SCOPE OF INQUIRY—RIGHT TO RECOGNITION AS ELECTED OFFICER.**

Though the title to an office cannot be tried by mandamus proceedings, if the facts are undisputed which determine the right of a person to a certificate of election or to recognition as the duly elected officer, mandamus will lie to compel the giving of the certificate or due recognition of the election.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 161-169.]

2. **RELIGIOUS SOCIETIES—ELECTIONS—QUALIFICATIONS OF VOTERS—DETERMINATION—STATUTORY PROVISIONS.**

Under Religious Corporations Law, Laws 1895, p. 494, c. 723, § 33, providing that the presiding officer of election meetings of the Protestant Episcopal Church shall be the rector thereof, and that he shall be the judge of the qualifications of the voters, receive the votes cast, declare the result, etc., a rector, who as presiding officer of a parish election meeting receives the ballot of a person as an elector, exercises his legal function of judging of the qualifications of such person to vote; and hence, where a rector permits one who is a candidate for warden to vote at such a meeting, he cannot subsequently declare the candidate not a qualified voter, and therefore not entitled to the office to which he is elected.

3. **MANDAMUS—SUBJECTS OF RELIEF—RELIGIOUS CORPORATIONS—ELECTION OF CHURCH WARDEN—RECOGNITION OF RESULT.**

The rector of a Protestant Episcopal Church parish, presiding at an election meeting of the parish, received the ballots of W. and others. W. received a majority of the votes cast for warden, and the result was read. Objection was made to the qualification of some of the voters. The rector announced that the protest was well taken, and he could not then declare who was elected; but he subsequently decided that W. was not a qualified voter, and hence not eligible for election to the office in question, and refused to recognize W. as such. *Held*, that mandamus will lie to compel the recognition of W. as warden.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 161-169.]

Application by William A. Williams for writ of mandamus to compel the rector of Grace Church parish of the Protestant Episcopal Church of the diocese of Western New York and others to recognize him as warden in parish meetings. Peremptory writ granted.

Millar & Moyer, for the motion.

Bissell & Riley, opposed.

BROWN, J. At an annual election of the Grace Church parish of the Protestant Episcopal Church of the diocese of Western New

York, held at the parish church in Lockport, N. Y., on December 2, 1907, for the election of one church warden for two years, one vestryman for one year, and three vestrymen for three years, there were present and voting 88 persons. The rector, as the presiding officer, appointed two tellers, and the polls were declared open at 12 o'clock noon. The provisions of the statute specifying qualifications of voters were read, and the election proceeded by ballot.

By provision of statute (Religious Corporations Law, Laws 1895, p. 494, c. 723, § 33) the rector is made the judge of the qualifications of the voters, shall receive the votes cast, and shall declare the result of the votes cast at such election. At such election William A. Williams voted as an elector, his vote being unchallenged, and the same was received by the rector. After the polls were closed and the ballots were canvassed by the tellers, a protest was made against the election as illegal, for the reason that many persons who had voted did not have the statutory qualification. The rector stated that the protest was well taken, and that it was not possible for him to declare who was elected until he had further investigated the matter and the law bearing on the same. The vote for warden as canvassed and presented by the tellers to the rector was as follows: For Warden: William A. Williams, 52; John T. Darrison, 32; scattering, 4—which result of the votes cast at such election was read by the rector to the persons present.

It is made the duty of the rector to enter the proceedings of such meeting in the book of the minutes of the vestry and sign the same. The rector was unable to obtain this book until about the 15th day of December, 1907, and on December 11, 1907, he made a record of such proceedings of the meeting substantially embodying all the above facts. On December 13, 1907, the rector made another record of the above facts, substantially as the one of December 11, 1907, adding thereto, after the item of result of votes cast, a statement to the effect that he as presiding officer had made an examination of the list of voters to ascertain the validity of the protests, and found that many were disqualified as voters, and, pursuant to the law providing that church wardens shall be elected from persons qualified to vote, the said William A. Williams, not being qualified as a voter, was not eligible for election as a warden, and therefore declared that William A. Williams was not elected; that, John T. Darrison being eligible as warden, the rector declared said Darrison elected as warden for a term of two years, which statement and record was signed by the rector, and on or about December 15, 1907, the record of December 11, 1907, and the one of December 13, 1907, were entered in the book of the minutes of the vestry, since which date the said rector has refused to recognize the said William A. Williams as a warden of such parish in any manner. It is conceded that William A. Williams has been a warden of such church and parish for upwards of ten years last past, is a communicant of the church, and has been a regular attendant upon church services and a regular contributor to the parish funds for many years up to March, 1907. There is no dispute as to any of the foregoing facts. While it is true that the title to an office cannot be tried and ascertained by mandamus proceedings, yet, if the facts are undisputed

which determine the right of a person to be given a certificate of election or to be recognized as the duly elected officer, mandamus proceedings are proper to compel the giving of such certificate or due recognition of such election.

When the rector, as presiding officer of the parish meeting, received the ballot of William A. Williams as an elector, such presiding officer necessarily exercised his legal function of judging of the qualification of Mr. Williams to vote. It was a legal decision that Mr. Williams possessed all the statutory qualifications to vote, and that he was a legal voter. That decision was made on December 2, 1907. It therefore clearly appeared that on that day, in that meeting, he was duly qualified to be voted for by any duly qualified elector for the office of church warden. No question was raised of the qualification of any elector at the time his vote was offered and received. The acceptance by the rector of the ballots cast at that election was a judicial determination by such rector as presiding officer at that time that the persons whose votes were actually cast and received by him were each a duly qualified voter. Such decision was final. The right to make such decision having thus been exercised, and the vote received and cast, the power of such presiding officer to decide again, at a later day, 10 days after such election, that such voter was not qualified to vote, did not exist, and the alleged declaration or determination of the 13th of December, 1907, that William A. Williams was not eligible to be voted for as warden was a nullity. The rector, as presiding officer, in compliance with statute, having declared or read the result of the votes cast at such election as being 52 for William A. Williams, 32 for John T. Darrison, and 4 scattering, his power to declare again, 10 days after such election, that William A. Williams was not elected, and that John T. Darrison was elected, warden, did not exist.

It clearly appearing that the qualification of William A. Williams had been duly and legally determined by the constituted church and legal authority to be such as to legally qualify him to vote at such election, he being thus qualified to be elected as warden, and he having been duly elected as such warden, it is the duty of the rector and church authorities to recognize him as such warden in all parish meetings, and, the rector refusing and declining so to do, a peremptory writ of mandamus will issue.

SCHRIER v. SHAFFER.

(Supreme Court, Appellate Division, Second Department. January 10, 1908.)

1. TRESPASS—DAMAGES—TREBLE DAMAGES.

One breaking the lock of a building and removing goods placed therein by another, who, though present, offered no resistance, is not liable for treble damages, under Code Civ. Proc. § 1669, authorizing treble damages for disseisin in a forcible manner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, § 146.]

2. SAME—PERSON LIABLE.

The true owner is not answerable in damages for dispossessing a trespasser having no title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, § 9.]

Appeal from Municipal Court, Borough of Brooklyn, Third District. Action by Herman Schrier against Fanny Shaffer. From a judgment for plaintiff, defendant appeals. Reversed, and complaint dismissed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and MILLER, JJ.

Isaac Miller, for appellant.

Paul A. Katske, for respondent.

WOODWARD, J. This is an action to recover damages for an alleged trespass to real property owned by the defendant and occupied by the plaintiff for the storage of paper. The complaint reads:

"Damages by reason of unlawful entry on plaintiff's premises destroying his property."

The answer was a general denial. The plaintiff proved no right or title to the premises, a cellar, into which he had moved a stock of paper on October 14th, claiming to have rented the cellar from the tenant of the store above. About a week later he was told by the owner of the cellar, the defendant, to move his goods out, and upon his refusal to do so until the 1st of the following month the defendant broke the lock of the cellar and in the presence of the plaintiff, who offered no resistance, removed the goods to the sidewalk, whence after about an hour they were returned to the cellar by the defendant upon the unsought advice of the local police officer. The case was tried without a jury, and the justice found that the plaintiff was entitled to treble damages under section 1669 of the Code of Civil Procedure.

That section relates to disseisin "in a forcible manner," but the record contains no evidence whatever of personal violence or riotous entry. The only force used was in the breaking of the lock, and in *McDougall v. Sitcher*, 1 Johns. 43, where the defendant broke the lock of the premises in quo and removed goods left within by the plaintiff, Livingston, J., writing for the court, says (page 44):

"The goods which were left could not prevent the entry being peaceable. They were incapable of resistance, and therefore no breach of peace could ensue."

Willard v. Warren, 17 Wend. 257, was an action under the statute to recover treble damages for the forcible disseisin from lands. Cowen, J., proceeds at great length in defining forcible entry, saying in part:

"The result seems to be that there must be something of personal violence, or a tendency to or threat of personal violence, unless the entry or detainer be riotous. In all cases there must be something beyond a mere trespass upon the property."

In the case at bar the defendant was not even a trespasser. Indeed, the case is remarkable, in that the trespasser himself brings the action, for the general rule is that the true owner cannot be made answerable in damages for dispossessing a trespasser divested of all title. *Hyatt v. Wood*, 4 Johns. 157, 4 Am. Dec. 258.

The refusal of the justice to dismiss the complaint was error, for

which the judgment should be reversed, with costs, and the complaint dismissed, with costs. All concur, except HIRSCHBERG, P. J., not voting.

ROBINSON v. THOMAS et al.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. ABATEMENT AND REVIVAL—PROCEEDINGS BEFORE REVIVAL—VALIDITY.

Where an action has abated by the death of plaintiff, no order can be entered, *ex parte* or otherwise, until the action has been revived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 364-367.]

2. SAME.

Where an order reviving an action which abated by the death of plaintiff, and substituting one attorney for plaintiff in place of another, was irregular because entered *ex parte*, the court, on motion of defendant to vacate the order, could not, on vacating it so far as it revived the action, refuse to vacate it so far as it substituted attorneys.

3. APPEAL—ABATEMENT OF ACTION—REVIVAL—NECESSITY.

Where an action abated by the death of plaintiff, no appeal could be taken or prosecuted until the action was revived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1851-1868.]

Appeal from Special Term.

Action by Charles K. Robinson against Edward R. Thomas and others. From so much of an order as refused to vacate an *ex parte* order substituting Charles S. Taber as attorney for plaintiff in place of Russell & Winslow, defendants appeal. Dismissed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Richard A. Irving, for appellants.

Charles S. Taber, for respondent.

INGRAHAM, J. The record fails to show the object of this action. There is an allegation that a demurrer was interposed to the complaint, which would seem to have been sustained, with permission to the plaintiff to serve an amended complaint; the time within which it was to be served not having expired when the sole plaintiff died on the 7th of October, 1906. Upon the death of the plaintiff the action abated, and no order could have been entered, *ex parte* or otherwise, until the action was revived. On the 26th day of June, 1907, an *ex parte* order was entered reviving the action and substituting Charles S. Taber as attorney for the plaintiff. This order being irregular, it having been entered *ex parte*, without notice to the defendants, the defendants made a motion to vacate it, whereupon the court entered an order vacating the order so far as it revived the action, "but that said order stand in so far as it substitutes said Charles S. Taber as attorney for the plaintiff in place of Russell & Winslow"; and from that order this appeal is taken by the defendant.

Whatever was the status of the action before the *ex parte* order reviving it was vacated, as soon as that order was vacated the former

status of the action as one which had abated by the death of the plaintiff was reinstated, and no order could be entered and no proceedings taken in the action until it was properly revived by the personal representatives of the plaintiff. It is difficult to see upon what principle Charles S. Taber could be substituted as attorney for the plaintiff in the action, the plaintiff being deceased, as upon no principle that I know of could a deceased plaintiff require an attorney. The action, however, having abated, no motion could be made in it, and no appeal could be taken or prosecuted until the action was revived.

This appeal, therefore, was entirely nugatory, and it is therefore dismissed, without costs. All concur.

ROBINSON v. THOMAS et al.

(Supreme Court, Appellate Division, First Department. January 10, 1908.)

1. ABATEMENT AND REVIVAL—PROCEEDINGS FOR REVIVAL—AFFIDAVITS.

An order to revive an action on the death of plaintiff should not be granted on the affidavit of an attorney, stating that he is the attorney for the executors of the decedent without averring that they authorized him to make a motion to revive.

2. SAME.

Under Code Civ. Proc. § 757, providing that, on the death of the sole plaintiff in a cause of action which survives, the court must on motion allow the action to be continued by his representative, etc., the moving papers on a motion to revive an action on the death of plaintiff should contain the complaint, or the nature of the action should be shown, so as to enable the court to determine whether the cause of action survives.

3. SAME—ACTIONS WHICH SURVIVE.

An action to compel defendant to account for moneys received by him for the benefit of plaintiff, for which defendant owes plaintiff an accounting, survives the death of plaintiff pending the action.

4. PARTIES—DEFECTS—NONJOINDER OF PARTIES PLAINTIFF.

A defect of parties plaintiff can only be cured by amending the summons by joining the necessary parties as plaintiffs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, §§ 160-168.]

5. SAME—NONJOINDER OF PARTIES DEFENDANT.

A defect of parties, resulting from omission of necessary parties defendant, can only be cured at the instance of plaintiff, without the consent of defendants, by serving a supplemental summons, as authorized by Code Civ. Proc. § 453.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, §§ 85, 160-168.]

6. ABATEMENT AND REVIVAL—REVIVAL OF ACTIONS—PROCEEDINGS AFTER REVIVAL.

Where the original plaintiff at the time of his death was authorized to serve an amended complaint, which he had not served, the facts with respect thereto should be fully shown on the motion to revive the action, to the end that the court might know in what respect the original plaintiff was authorized to amend, and thus give his representatives a reasonable time within which to serve an amended pleading setting up the facts which the original plaintiff was authorized to set up by an amended complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, § 490.]

7. SAME.

Under Code Civ. Proc. §§ 453, 544, 760, authorizing the bringing in of a new defendant, permitting the filing of supplemental pleadings, and relating to the revival of actions on the death of a party thereto, it is not necessary to serve a supplemental summons and complaint on the revival of an action after plaintiff's death, unless a new party defendant is to be brought in, since the right of the representatives of plaintiff to continue the action is not an issuable fact occurring after its commencement, and that question must be determined solely on the motion to revive or by appeal from the order granting it.

8. SAME.

Where the affidavit on a motion to revive an action on the death of plaintiff averred that during plaintiff's lifetime a demurrer had been interposed to the complaint, and that the same was, as affiant was informed, sustained because of a defect of parties, with leave to plaintiff to serve an amended complaint, without stating the source of affiant's information, an order of revival with authority to serve an amended complaint was erroneous, so far as it granted leave to the substituted plaintiffs to serve an amended complaint.

Appeal from Special Term.

Action by Charles K. Robinson against Edward R. Thomas and others. From an order granting a motion for a reargument of the motion to revive the action, and reviving it in the names of the executors of the deceased plaintiff as plaintiffs, and permitting them to serve an amended complaint, defendants appeal. Modified and affirmed.

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and SCOTT, JJ.

Richard A. Irving, for appellants.

Charles S. Taber, for respondent.

INGRAHAM, J. We would not review the discretion of the court in granting the motion for a reargument. The relief, however, granted by the court on the reargument, was unwarranted by the moving papers. This is the second attempt to revive this action, and the papers are still defective. The first motion to revive it was made *ex parte*. This motion on notice was based solely upon the affidavit of an attorney who states that he is the attorney for the executors; but he does not show that they authorized him to make the motion—a fact which, it was pointed out in *Wilson v. Harter*, 57 App. Div. 584, 68 N. Y. Supp. 116, should appear either by his affidavit or by the affidavit of the executors. Assuming that it might be presumed that the attorney had authority to make the motion, the complaint should have been made a part of the moving papers, or the nature of the action should have been more fully shown; for the authority of the court to make the order depends upon whether the cause of action survives. Code Civ. Proc. § 757. The attorney states in his affidavit that the action was brought to compel the defendants to account for moneys alleged to have been received by them for the benefit of the plaintiff under an agreement in writing, and that is not controverted. If the action be to compel the defendants to account for moneys received by them for the benefit of the decedent, for which they owed him an accounting, the cause of action would, of course, survive.

There are other more serious objections to the order. The authority to serve an amended complaint is conferred by the order in general language, with no limitation. The attorney states, in his affidavit, that during the lifetime of the original plaintiff a demurrer was interposed to the complaint, and that he is "informed" that it was sustained "because of a defect of parties," with leave to the plaintiff to serve an amended complaint; but he does not state the source of his information, nor does he even say that he believes it to be true. This is all that he shows on that subject. If the demurrer was sustained on the ground that there was a defect of parties plaintiff, the defect could only be cured by amending the summons by joining the necessary parties as plaintiffs, and if the defect was an omission of necessary parties defendant that could only be cured at the instance of the plaintiff, without their consent, by serving a supplemental summons. Code Civ. Proc. § 453. It does not, however, appear that authority to amend the summons or to issue a supplemental summons was granted. It was doubtless intended, under this order, to authorize the executors to serve an amended complaint, such as the decedent was entitled to serve in his lifetime, with appropriate allegations with respect to his death and their appointment as executors and the revival of the action, because if, as indicated, a demurrer to the original complaint had been sustained, it would have been futile to have amended it by merely alleging the revival and continuance of the action. If the original plaintiff at the time of his death was authorized to serve an amended pleading, which he had not served, the facts with respect thereto should have been fully shown, to the end that the court might know in what respect he was authorized to amend, and might have given the executors a reasonable time within which to serve an amended pleading, setting up in addition the formal matters concerning their right to continue the action, a practice which, although unnecessary, is customary—the facts which their decedent was authorized to set up by an amended complaint. As has been seen, however, this was not done. Unless a new party defendant was to be brought in without his consent, there was no necessity of serving a supplemental summons or complaint (Code Civ. Proc. §§ 453, 544, 760); and if the cause of action survived, and no new party was to be brought in against his will, the motion having been made on the application of the executors, who stood in the right of the original plaintiff, it was not even necessary to serve an amended or supplemental summons and complaint, for no issue could be joined by the pleadings with respect to the right of the executors to be substituted and to continue the action, as these were not issuable facts occurring after its commencement and required to be pleaded in a supplemental complaint (Code Civ. Proc. § 544), and they were to be determined solely upon the motion or by appeal from the order granting it (*Wood v. Flynn*, 30 Hun, 444). On these facts the order could have been made without prejudice to the proceedings already had in the action, even though the case had proceeded to judgment or an appeal was pending. *Riley v. Gitterman*, 55 Hun, 605, 10 N. Y. Supp. 38; *People ex rel. Collins v. Donohue*, 64 Hun, 635, 19 N. Y. Supp. 36; *Hoefflin v. Gedney*, 23 Misc. Rep. 518, 51 N. Y. Supp. 871.

The order, therefore, in so far as it granted leave to the substituted plaintiffs to serve an amended complaint, was unauthorized. If the decedent had that right, and the time for serving the pleading had not expired, the executors, upon being substituted, took his place, and might serve the pleading under the original authority which the decedent had and without further order of the court; and if they need further time, or the time has expired, they may apply to the court for an extension of time or to open his or their default.

It follows that the order should be modified, by striking out the provision authorizing the plaintiffs to serve an amended complaint within 20 days, and, as so modified, affirmed, without costs. All concur.

MOFFAT v. LONG ISLAND R. CO.

(Supreme Court, Appellate Division, Second Department. January 10, 1908.)

1. CARRIERS—BAGGAGE—LIABILITY.

A railroad company's liability for baggage is that of a common carrier from the time the baggage is received until it arrives at the station of its destination and the passenger has had reasonable opportunity to take it away, acting promptly. After that the liability is reduced to that of warehouseman, requiring the exercise of ordinary care only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1519-1543.]

2. SAME—ACTION FOR LOSS—QUESTION FOR JURY.

In an action against a carrier for the value of articles taken from a passenger's trunk by burglars after its arrival at the station of its destination, *held*, under the evidence, a question for the jury whether plaintiff called for the trunk within a reasonable time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1571.]

3. SAME.

A carrier's practice of giving checks in exchange for transfer company checks amounts to an agreement to receive the baggage when it arrives and check it to its destination seasonably, and contemplates that it may not go by the train the passenger takes; and hence the carrier's liability for the baggage so checked is not lessened because it does not go on the same train.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1508.]

4. SAME—NOTICE OF ARRIVAL—NECESSITY.

A carrier need not notify a passenger of the arrival of his trunk at its destination, in order to terminate its obligation as common carrier on his failure to call for it within a reasonable time.

Appeal from Nassau County Court.

Action by William L. Moffat against the Long Island Railroad Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

The action was to recover damages for the loss of articles from the plaintiff's trunk which the defendant had received and carried as baggage.

The plaintiff arrived in New York City by train from Montreal on the morning of August 29, 1906. Following the usual course, he gave his baggage check for one trunk to Westcott's Express Company—a baggage transfer company in the city of New York—to be transferred to the station of the defendant at the foot of East Thirty-Fourth street. He then went to the said station, purchased railroad tickets of the defendant for himself and wife to their

home at Manhasset, Long Island, showed them to the baggage agent, and delivered to him the check of the transfer company, which he received, and in exchange gave to the plaintiff a check of the defendant for the said trunk as baggage to Manhasset. Nothing was done to ascertain whether the trunk was there. This was all according to the usual course established by the defendant. The plaintiff took the defendant's boat which left the said station at 10:50 a. m. to connect with a train from Long Island City on the other side of the East river to Manhasset. He arrived at the Manhasset station in about an hour. He did not ask for his trunk, but immediately drove to his house, a mile and a half distant. The trunk did not come by the train he came by. He did not expect that it would. He testifies that he did not expect it to arrive sooner than from 24 to 30 hours from the time he left Montreal (viz., the evening before), as it was customary for trunks from Montreal to take that time at that season of the year. He came back to the station that evening at 6 o'clock to meet his brother who came from New York City by train at 6:05. He did not then ask for his trunk, or have the check for it with him, which had to be presented and delivered up on getting the trunk. He next went to the station at 7:20 the next morning to bring his brother to the train. His trunk was there then. It had arrived by regular train at 6:27 the evening before. The station was closed for the night at 7:04. The trunk was kept over night in the express room, which was locked. The station was locked also. During the night burglars broke in and robbed the station. They broke open the plaintiff's trunk and took part of the contents. The station agent informed the plaintiff of the burglary on his arrival, and on examination the plaintiff found his trunk there. He did not have the check for it with him, and did not come to get the trunk. The agent delivered it to him without the check.

Argued before WOODWARD, JENKS, HOOKER, GAYNOR, and MILLER, JJ.

Matthew J. Keany, for appellant.

Theodore L. Frothingham, for respondent.

GAYNOR, J. The learned trial judge ruled that the defendant was liable for the loss and directed a verdict for the plaintiff. In this he erred. The liability of a railroad company for baggage is the strict liability of a common carrier from the time it receives the baggage until it arrives at the station of its destination, and then until the passenger has had reasonable time and opportunity to take it away, acting promptly. After that its liability ceases to be that of common carrier, i. e., absolute, act of God or of public enemy only excepted, and its obligation is reduced to that of ordinary care. *Kressin v. Central R. of N. J.*, 119 App. Div. 86, 103 N. Y. Supp. 1002; *Burnell v. New York Central R. Co.*, 45 N. Y. 184, 6 Am. Rep. 61; *Matteson v. New York Central & H. R. Co.*, 76 N. Y. 381.

It was a question of fact whether the plaintiff had called for his baggage within a reasonable time. He says he did not call for it because he did not expect it sooner than 24 to 30 hours from the time he left Montreal, as it was customary for baggage to take that time from Montreal at that season of the year; but the jury were not obliged to believe this, no matter how much we would be disposed to from the high character of the plaintiff. Unless it was so the plaintiff did not use due diligence and promptness in calling for his baggage. And if it be so, the 24 hours from the time he left Montreal must have expired some time the evening previous to the morning he got his trunk, viz., the evening of August 29th. The exact hour of

his leaving Montreal on the evening of August 28th not having been fixed by the evidence, it is impossible to know when the 24 hours would be up. If the trunk could have been reasonably expected to arrive, as it did, at 6:27 o'clock on the evening of August 29th, then the plaintiff should have attended on the coming of that train and got his trunk. His failure to do so did not release the defendant from duty to him to care for his trunk, but only reduced its obligation from that of common carrier to that of ordinary care of warehousing the trunk. This is entirely just. The strict obligation of a common carrier as such should not be continued any time whatever after it has performed all of its duties as common carrier. The law then relieves it of its liability as insurer of freight and baggage, and subjects it to the liability of due care of a warehouseman.

The liability of the defendant was in no way lessened by the fact that the baggage did not go by the same train the plaintiff went by. The course of business of the railroad company in giving its checks in exchange for checks of transfer companies amounts to an agreement by it that it will receive the baggage for the passenger when it arrives and check it to its destination seasonably, and this contemplates that it may not go by the train that the passenger takes. *Curtis v. D., L. & W. R. Co.*, 74 N. Y. 116, 30 Am. Rep. 271; *Williams v. Central R. Co. of N. J.*, 93 App. Div. 582, 88 N. Y. Supp. 434, affirmed 183 N. Y. 518, 76 N. E. 1116. There was no obligation on the defendant to notify the plaintiff of the arrival of his trunk in order to terminate its obligation of common carrier.

The judgment and order should be reversed.

Judgment and order of the County Court of Nassau county reversed, and new trial ordered; costs to abide the event. All concur.

In re MACCAFFIL.

(Surrogate's Court, Westchester County. December 13, 1907.)

1. EXECUTORS AND ADMINISTRATORS—APPOINTMENT.

Only one person should be appointed to administer the estate of a decedent, and, where a will appoints an executor, he, if competent, should administer the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 128-130.]

2. WILLS—CONSTRUCTION.

In construing a will effect should be given to every provision thereof as far as possible.

3. EXECUTORS—RIGHT OF ADMINISTRATION.

The executor appointed in a will disposing of real estate only, leaving the personalty undisposed of, has the right to administer the personalty by paying the debts and distributing the balance among the next of kin entitled to it by law.

4. SAME.

A testator, who specifically devises real estate only, leaving personalty undisposed of, and who appoints an executor, shows an intention that the executor shall administer the personalty; otherwise, he would have nothing to do.

5. SAME.

A testator, who specifically devised real estate only, leaving personality undisposed of, and who appoints an executor and provides that, in case the executor should become a nonresident, he should be allowed to act without giving bond, shows an intention that the executor shall administer the personality.

6. SAME.

The court, in appointing one to administer the estate of a testatrix, should lean towards the upholding of her selection, rather than the appointment of one whom she did not select.

7. SAME—"INTESTACY."

The word "intestacy," in Code Civ. Proc. § 2660, providing that administration in case of "intestacy" must be granted to the relatives of the decedent entitled to succeed to his personality in the order enumerated, when considered in connection with section 2682, providing that one entitled absolutely or contingently to administration on the estate of an intestate may present a written petition praying for letters of administration, etc., refers to the person and not to specific property.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, p. 8732.]

8. SAME—APPOINTMENT OF ADMINISTRATOR.

Where an executor appointed in a will should not have the management of the estate, the court should appoint an administrator with the will annexed, pursuant to Code Civ. Proc. § 2643, providing for the appointment of an administrator with the will annexed on the death or incompetency of the executor, etc.

In the matter of the administration of Charlotte M. Maccaffil, deceased. Motion by Howard R. Maccaffil, the surviving husband of decedent, to revoke letters testamentary granted to the executor named in the will of the decedent and for the issuance of letters of administration. Denied.

John P. Duff (William L. Snyder, of counsel), for petitioner.
Crocker & Wickes, for respondent.

MILLARD, S. Charlotte M. Maccaffil died in the county of Westchester, leaving a last will and testament under and by virtue of the provisions of which she gave and bequeathed certain real estate in the city of New York to her brother-in-law, Wilbur Harrison Kirkham, to be held and enjoyed by him during the term of his natural life, and after his death gave and devised the same to his son for the term of his natural life, and after his death to his lawful issue and their heirs absolutely. Said will also provided that, in case her said nephew should die leaving no issue, then the property was to be otherwise disposed of as in said will set forth. She then appointed her said brother-in-law, Wilbur H. Kirkham, as executor of her last will and testament, and revoked all former wills which she at any time made. This will was offered for probate before me, and the testimony of the subscribing witnesses taken and letters testamentary issued; and now a motion is made on the part of the attorney for the petitioner to revoke the letters testamentary so granted to said executor named in said will and for the issuance of letters of administration upon the estate of said Charlotte M. Maccaffil, claiming that the said will fails to dispose of any personal property, but is a valid will only of real

estate, and that said Charlotte M. Maccaffil died intestate as to her personal property, and that letters of administration should therefore be granted to her husband Howard R. Maccaffil, who makes the petition and application therefor.

In the first place, as a matter of public policy, it does not seem to me that the orderly administration of an estate should be committed to two persons, part to one called an "executor" and part to another called an "administrator"; but, on the contrary, the use of ordinary common sense and good judgment requires that one person should administer the estate, and not two, who, as in this case, are apparently unfriendly one to the other. The duties of an executor or administrator are apparently the same. An executor is named by the deceased to administer an estate, while an administrator is the person provided by the statute to act in the event of the deceased not making any nomination, so that the difference between an executor and an administrator is largely one in name only. In construing all wills, it should be the duty of the court to give force to every provision thereof as far as possible; and in doing this in this case there are two things which are absolutely without force or significance, unless the executor has some power other than the petitioner herein would admit.

It is claimed by the petitioner that the appointment of the executor is mere surplusage, that the will disposes of the real estate without the intervention of the executor, and that the parties to whom it is devised take it by reason of the provisions of the will. It is admitted by the attorney for the executor named in the will that this appointment would be surplusage unless there was something for the executor to do. It was held in *Wager v. Wager*, 89 N. Y. 161, 166, "that, if there is any part of an estate that is not effectually disposed of by the will, the executor holds it in trust for those who are entitled to it under the statute of distribution"; and so in this case, the executor having been named in the will and the personal property being undisposed of, it is my opinion that the executor has the right to administer the personal estate by paying the debts and distributing the balance among the next of kin entitled to it by law.

There are two things in this will itself which show the intention of the testatrix to have the executor named therein administer her estate. First, she must be presumed to know the law, and the fact that she names an executor, who could have nothing whatever to do with the specifically devised real estate, as is conceded by all parties, is a clear evidence of her intention that he was to administer the personal property, otherwise he would have nothing whatever to do; and, second, the further provision of the will, "I direct that in case he [referring to the executor named] at my decease shall be or become a non-resident of the state of New York, he shall be allowed to act as such executor without giving bonds," again evidences this intention. What possible thing would there be for this executor to do unless he was to administer the personal estate, and what act did the testatrix contemplate when she used this language. I am convinced from these provisions of the will that the testatrix intended to have the executor named therein administer her personal property, and I think it should be the duty of the court to lean towards upholding the testatrix's own

selection, rather than the appointment of one whom she did not select, although she had that opportunity, and who the law by chance would appoint to administer the estate if no executor were named.

Section 2660 of the Code, in providing where letters of administration shall issue, says: "In cases of intestacy." The word "intestacy," as used in this connection, refers to the person, and not to specific property. This is further evidenced by the language of section 2662 of the Code, which expressly states that no letters of administration shall issue until it is proved "that the decedent left no will." This condition the petitioner in this case could not fulfill, and I am sure that if it was intended to allow the appointment of an administrator of unbequeathed assets the provisions of the Code would be amended, and would contain, in addition to the above statement, "or assets unbequeathed by such will," or other words or statements showing that this alone was necessary. This same doctrine has been held in *Matter of Haughian*, 37 Misc. Rep. 457, 75 N. Y. Supp. 932.

It also seems plain that, if it was necessary to do anything beyond appointing the executor named in the will and the issuance of letters testamentary to him, the appointment of an administrator with the will annexed would be the proper practice, rather than an administrator, as asked for here. The provisions of section 2643 of the Code provide that:

"If no person is named as executor in the will or selected by virtue of a power contained therein, or if at any time, by reason of death, incompetency adjudged by the surrogate, renunciation in either of the methods prescribed in section 2639 and section 2642 of this act, or revocation of letters, there is no executor, or administrator with the will annexed, qualified to act, the surrogate must, upon the application of a creditor of the decedent, or a person interested in the estate of the decedent, or having a lien upon any real property upon which the decedent's estate has a lien, and upon such notice to the other creditors and persons interested in the estate, as the surrogate deems proper, issue letters of administration with the will annexed, as follows: * * *

(8) If there is no such legatee or guardian, or none who will accept, then to the husband, or wife, or to one or more of the next of kin, or to one or more of the heirs or devisees, so qualified."

It will thus appear plain that, if the executor here should not have the management of this estate, it should then pass to an administrator with the will annexed, who would be appointed as provided in this section, and that the applicant here, the husband of the deceased, would only get it after all those preferred by this statute had failed to qualify or waived their right to the appointment. I have considered in arriving at this conclusion the memoranda submitted to me, including all the English cases therein referred to, and I do not believe that any of them are in conflict with the law as I have attempted to lay it down in this proceeding.

For every reason, including the proper and speedy administration of the estate, as well as giving respect to the wishes of the testatrix, I am convinced that the letters testamentary should be issued to the executor named in the will, and that the application for letters of administration upon the estate should be denied, as I am satisfied that the granting of such letters would tend to create a confusing condition of affairs, without serving any good purpose.

MEMORANDUM DECISIONS.

ADAM, Respondent, v. ELLENTUCH, Appellant. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by Bettie Adam against Max Ellentuch. A. D. and, for appellant. F. Wasserman, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

ADDUNISIO, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Amalia Addunisio against the Brooklyn Heights Railroad Company. No opinion. Judgment and order unanimously affirmed, with costs.

ADDY, Appellant, v. HUTCHINSON ACOUSTIC CO. et al., Respondent. (Supreme Court, Appellate Division, First Department. December 8, 1907.) Action by Arthur R. Addy against the Hutchinson Acoustic Company and others. W. D. Gaillard, for appellant. J. Quinn, for respondent. No opinion. Judgment affirmed, with costs, with leave to plaintiff to amend on payment of costs. Order filed.

In re ALLISON. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) In the matter of the accounts of Eli Allison, deceased, as trustee, etc., under the will of William J. Lazear, deceased, etc. No opinion. Decree of Surrogate's Court affirmed, with costs to respondent payable out of the estate, on opinion of WHEELER, S., in 53 Misc. Rep. 222, 102 N. Y. Supp. 887.

ALPERT, Respondent, v. RAU, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Zussman Alpert against Alfred M. Rau. No opinion. Judgment of the Municipal Court affirmed, with costs.

ALTMAN, Appellant, v. WILSON, Respondent. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Kalman Altman against Edward I. Wilson. No opinion. Motion to dismiss appeal denied, without costs.

ALVINO, Appellant, v. NEW YORK CONTRACTING CO., Respondent. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by Josephine Alvino, as administratrix, against the New York Contracting Company. T. J. O'Neill, for appellant. J. C. Toole, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

In re ANDREWS. (Supreme Court, Special Term, New York County. December 30, 1907.)

In the matter of the guardianship of Blanche L. Andrews, an insane person. Motion for stay pending appeal. Motion granted on condition. For former report, see 106 N. Y. Supp. 13, 1096. Parker, Hatch & Sheehan, for Constant A. Andrews and Blanche L. Andrews. George C. Kobbe, for Nannie V. Roosevelt. Grant Notman, for John E. Roosevelt.

DAYTON, J. Motion for stay pending appeal. Upon his petition, verified November 20, 1907, Mr. John E. Roosevelt asks a stay of all proceedings under the order removing Mr. Andrews and himself as committee, pending an appeal by himself and Mrs. Roosevelt from part of that order, and for an order practically directing that until the determination of said appeals Messrs. Andrews and Roosevelt continue as such committee. By an order of this court, dated December 2, 1907, Mr. Sylvester J. O'Sullivan, the substituted committee, was directed to be served with the order to show cause on this application, which subsequently came before Mr. Justice Greenbaum, and was referred to me December 24, 1907. The ground of this motion is the allegation that no notice of any application for the removal of Messrs. Andrews and Roosevelt was ever given to either Mr. or Mrs. Roosevelt, and that great confusion would result in the management of the estate if the stay be not granted. It is to be noted that Mr. Andrews does not join in or oppose this application, or express an intention to appeal. The notices of appeal, dated December 23, 1907, and served December 26, 1907, by Mr. and Mrs. Roosevelt, are separate documents, but similar in form, and are addressed to Mr. Andrews individually, the special guardian, and to Mr. and Mrs. Roosevelt interchangeably, but not to Mr. O'Sullivan, the substituted committee. These appeals are not from the entire order of November 26, 1907, but from so much thereof as (1) orders Messrs. Andrews and Roosevelt to account since January 6, 1907; (2) orders the removal of said committee; (3) orders the appointment of Mr. O'Sullivan as substituted committee of the estate; (4) orders that Messrs. Andrews and Roosevelt deliver to the substituted committee the property of the estate; (5) orders that the substituted committee vote upon the 1,714 shares of stock of the Elkhorn Valley Coal Land Company; (6) orders the vacation of the orders of reference and appointment of special guardian; (7) as combines in one order with a different title, a determination upon three distinct referees' reports in three separate special proceedings, together with two other special proceedings pending before a referee, "in no way before the court for decision." It is to be noted that no appeal is taken (a) from that part of the order denying Mr. Andrews' claim to surcharge Mr. Roosevelt with about

\$12,000 received by him as president of the coal company; (b) from that part of the order which restricts the visits of relatives or friends to the incompetent; (c) from that part of the order which provides for the payment of allowances and costs to attorneys, special guardians, physicians, and to the referee in full for services in the above mentioned proceedings; (d) from that part of the order which denies the application to remove Mr. Andrews as committee of the person (which was before Mr. Hubbell, as referee); (e) from that part of the order which directs the payment to Mr. Andrews of \$1,500 per month. In these five particulars the order of November 28, 1907, stands affirmed, and whether the right to appeal from the parts specified in the notices of appeal remains is a question I may not pass upon. All the parties interested were fully aware that all these proceedings were before me, and they submitted to the jurisdiction of the court with full knowledge and notice that I would determine the whole subject, including the removal of Mr. Roosevelt and Mr. Andrews (Mr. Andrews having offered his resignation as committee of the estate the more effectually to press for the removal of Mr. Roosevelt), and all the parties incontestably know that the order of November 28, 1907, was made, not "capriciously," but after "patient and careful hearing of all matters" which bore upon the questions involved. It would seem that these appeals should not succeed. They have, however, been taken in apparent combination with Mr. Andrews, in the possible anticipation that they would be unopposed. Though I deem a stay to be of doubtful propriety, it will nevertheless be granted, but only upon the following express conditions: First. That within five days from December 30, 1907, Mr. and Mrs. Roosevelt file with the clerk of this court, in this proceeding, their written stipulation to have their papers on said appeals filed in the Appellate Division, also their briefs and notices of argument for the calendar for the February term, 1908, and to argue them when reached; also to pay all expenses of printing and counsel fees on said appeals and not to ask reimbursement therefor out of the incompetent's estate unless authorized so to do by the Appellate Division; also to serve a copy of the papers on said appeals with timely notice of argument thereof upon Sylvester J. O'Sullivan, Esq., the substituted committee. Second. Messrs. Andrews, Roosevelt, and Devlin are stayed from voting upon any of the shares of the Elkhorn Valley Coal Land Company belonging to the incompetent. Third. Messrs. Andrews and Roosevelt are stayed from performing any of the duties of committee of the estate, except the payment of \$1,500 per month to Mr. Andrews, as committee of the person, as directed by the order of November 28, 1907, and the collecting and depositing the income of said estate. Fourth. In all other respects the stay granted by the order to show cause, dated November 29, 1907, is vacated. Fifth. If the stipulation mentioned in paragraph "First" of this memorandum be not made and filed as therein provided, an order will be entered forthwith denying this motion and wholly vacating said stay of November 29, 1907. Order signed.

ARMOUR PACKING CO. Respondent, v. **EDISON ELECTRIC ILLUMINATING CO. OF BROOKLYN**, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by the Armour Packing Company against the Edison Electric Illuminating Company of Brooklyn. No opinion. Order affirmed, with \$10 costs and disbursements. See 115 App. Div. 57, 100 N. Y. Supp. 609.

AUBURN & NORTHERN ELECTRIC R. CO., Respondent, v. **LEHIGH & N. Y. R. CO.** et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by the Auburn & Northern Electric Railroad Company against the Lehigh & New York Railroad Company and another. No opinion. Orders modified in accordance with memorandum filed with the clerk, and, as so modified, affirmed, without costs of this appeal to either party.

AUBURN & S. ELECTRIC R. CO., Respondent, v. **LEHIGH & N. Y. R. CO.** et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by the Auburn & Syracuse Electric Railroad Company against the Lehigh & New York Railroad Company and another. No opinion. Order modified in accordance with memorandum filed with the clerk, and, as so modified, affirmed, without costs of this appeal to either party.

AVON SPRINGS SANITARIUM CO., Respondent, v. **KELLOGG**, Appellant. (Supreme Court, Appellate Division, Fourth Department. December 6, 1907.) Action by the Avon Springs Sanitarium Company against J. Francis Kellogg. No opinion. Motion for reargument granted. See 106 N. Y. Supp. 1116.

BACON, Appellant, v. **AMERICAN MECHANICAL CASHIER CO.**, Respondent. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Helen H. Bacon against the American Mechanical Cashier Company. H. B. Closson, for appellant. D. McCurdy, for respondent. No opinion. Determination affirmed, with costs and disbursements. Order filed.

BAKER et al., Appellants, v. **DUFF** et al., Respondents. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Action by Theodore Baker and others against Mary E. Duff and another. No opinion. Order affirmed, with \$10 costs and disbursements.

BALDWIN, Respondent, v. **WERTHEIM**, Appellant (two cases). (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Thomas St. John Baldwin against Charles Wertheim. No opinion. Judgments of the Municipal Court affirmed, with costs.

BALFE, Respondent, v. **FRANK BREWERY**, Appellant. (Supreme Court, Appellate Division, Second Department. January 10,

08.) Action by George Balfe against the Frank Brewery.

PER CURIAM. Order affirmed, with \$10 costs and disbursements.

HIRSCHBERG, P. J., not voting.

BALFE, Respondent, v. FRANK BREWERY, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Ethel Balfe, an infant, by George Balfe, her guardian ad litem, against the Frank Brewery.

PER CURIAM. Order affirmed, with \$10 costs and disbursements.

HIRSCHBERG, P. J., not voting.

BANK OF LONG ISLAND, Respondent, v. YOUNG, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by the Bank of Long Island against John Alvin Young. No opinion. Judgment affirmed, with costs.

BANNISTER, Appellant, v. MICHIGAN MUTUAL LIFE INS. CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Catherine Bannister against the Michigan Mutual Life Insurance Company.

PER CURIAM. Judgment affirmed, with costs. See 105 N. Y. Supp. 1108.

SPRING, J., dissents.

BARNES et al., Respondents, v. LONG ISLAND R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 9, 1908.) Action by William S. Barnes and others against the Long Island Railroad Company. No opinion. Motion granted. Settle order before Mr. Justice GAYNOR.

BECK, Respondent, v. BECK et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Mary E. Beck against Carrie Beck and others. No opinion. Motion to dismiss appeal granted, with \$10 costs.

BECKER, Respondent, v. MacGREGOR, Appellant. (Supreme Court, Appellate Division, Second Department. December 5, 1907.) Action by Henry Becker against Clara MacGregor. No opinion. Order of the County Court of Westchester county affirmed, with \$10 costs and disbursements.

BEHRENS v. STURGES. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by Margaretha Behrens against Sarah S. Sturges. No opinion. Motion denied, with \$10 costs. Order filed.

BELFER et al., Respondents, v. McELROY, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Charles J. Belfer and another against Samuel A. McElroy. No opinion. Judgment of the Municipal Court affirmed, with costs.

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BENSINGER et al., Appellants, v. EHRHARDT et al., Respondents. (Supreme Court, Appellate Division, First Department. December 8, 1907.) Action by Eleanor Bensinger and another against Joel B. Ehrhardt and another. S. Untermeyer, for appellants. J. L. Cadwalader, for respondents. No opinion. Judgment and order affirmed, with costs. Order filed.

BENTON, Respondent, v. BENTON, Appellant. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by Aletta T. Benton against Frederick L. Benton. J. H. Corwin, for appellant. J. H. Hazelton, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

BERGMANN, Respondent, v. LEAVITT et al., Appellants. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by George A. Bergmann against Frances L. B. Leavitt, individually, etc. C. F. Brown, for appellants. J. M. Harrington, for respondent.

PER CURIAM. Judgment affirmed, with costs. Order filed.

INGRAHAM and McLAUGHLIN, JJ., dissent, on dissenting opinion in Bergmann v. Leavitt, 113 App. Div. 899, 99 N. Y. Supp. 748.

BIRNBAUM, Appellant, v. SILBERMAN, Respondent. (Supreme Court, Appellate Division, First Department. December 8, 1907.) Action by Isaac Birnbaum against Samuel J. Silberman. C. S. Rosenthal, for appellant. E. P. Mowton, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

BJERS, Respondent, v. ROCHESTER RY. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Gus Bjers against the Rochester Railway Company.

PER CURIAM. Judgment and order reversed, and new trial ordered, with costs to appellant to abide event, unless the appellant within 20 days stipulates to reduce the verdict to the sum of \$50 as of the date of the rendition thereof, in which event the judgment is modified accordingly, and, as so modified, affirmed, without costs of this appeal to either party.

ROBSON, J., dissents, and votes for affirmance.

BLASS, Respondent, v. SLOCUM, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Grant Blass against Joseph J. Slocum, as receiver of the Poughkeepsie & Eastern Railway Company. No opinion. Judgment and order unanimously affirmed, with costs.

BOCKHOLT, Respondent, v. LEVINSON, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Henry A. Bockholt against Solomon Levinson. No opinion. Judgment of the Municipal Court affirmed, with costs.

BOENING, Respondent, v. BOENING, Appellant. (Supreme Court, Appellate Division, Second Department. November 29, 1907.) Action by Carrie C. Boening against William C. Boening. No opinion. Motion denied.

BOENING, Respondent, v. BOENING, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Carrie C. Boening against William C. Boening. No opinion. Judgment affirmed, with costs.

BOSCOWITZ, Respondent, v. SULZBACHER, Appellant. (Supreme Court, Appellate Division, First Department. November 8, 1907.) Action by Jesse L. Boscowitz against Joseph H. Sulzbacher. C. L. Craig, for appellant. E. Goldmark, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

BOPP, Respondent, v. KEIPER, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Gustave Bopp against Charles Keiper. No opinion. Order affirmed, with \$10 costs and disbursements.

BRACKEN-McAVENEY CO., Respondent, v. MILLER et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by the Bracken-McAveney Company against Harry Miller and others. No opinion. Judgment affirmed, with costs.

BRIGGS, Appellant, v. WICKES BROS., Respondent. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Henry C. Briggs against Wickes Bros. No opinion. Judgment of the Municipal Court affirmed, with costs.

BROSSOIT v. EQUITABLE SECURITIES CO. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by Henrietta Brossoit against the Equitable Securities Company. No opinion. Motion granted, with \$10 costs. Order filed.

BROWN et al., Appellants, v. DYCKMAN et al., Respondents. (Supreme Court, Appellate Division, Second Department. November 29, 1907.) Action by Charles A. Brown and another against William L. Dyckman, as executor of Rosalie A. Bleakley, deceased, and others.

PER CURIAM. Judgment and order affirmed, with costs.

HIRSCHBERG, P. J., not voting.

BROWN, Respondent, v. NATIONAL FIRE INS. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. December 4, 1907.) Action by John L. Brown against the National Fire Insurance Company. No opinion. Judgment affirmed, with costs.

BROWN, Respondent, v. UTOPIA LAND CO., Appellant. (Supreme Court, Appellate Division, First Department. January 10, 1908.) Action by Harry Brown against the Utopia

Land Company. E. Jacobus, for appellant. A. H. Parkhurst, for respondent. No opinion. Judgment affirmed, with costs, with leave to defend on amendment to amend on payment of costs. Order filed.

BRUYETTE, Respondent, v. NASSAU ELECTRIC R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Frank Bruyette against the Nassau Electric Railroad Company. No opinion. Judgment of the Municipal Court affirmed, with costs.

BRYAN, Respondent, v. WEISS, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by William Bryan against Samuel Weiss. No opinion. Judgment and order unanimously affirmed, with costs.

BUSH, Respondent, v. INTERNATIONAL PAPER CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. December 6, 1907.) Action by Frank Bush against the International Paper Company.

PER CURIAM. Judgment and order affirmed, with costs.

WILLIAMS, J., not sitting.

BUTLER, Respondent, v. BROOKLYN CITIZEN, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Annie Butler against the Brooklyn Citizen. No opinion. Judgment and order reversed, and new trial granted, costs to abide the event, unless within 20 days plaintiff stipulate to reduce recovery of damages to the sum of \$2,500, in which case the judgment, as modified, and order, affirmed, without costs.

BUTLER v. CLARKSON et al. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by William S. Butler against Sidney A. Clarkson and others. No opinion. Motion denied, without costs, provided the appellant perfect his appeal in time to place the case upon the next calendar of this court and be ready for argument when the case is reached; otherwise, motion granted, with \$10 costs.

CALAHAN, Respondent, v. NEW YORK CITY RY. CO., Appellant. (Supreme Court, Appellate Division, First Department. January 10, 1908.) Action by Lizzie Calahan against the New York City Railway Company. B. H. Ames, for appellant. G. W. Smith, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

CALLAHAN, Respondent, v. ISBRISTER, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Timothy Callahan against John Isbrister.

PER CURIAM. Judgment and order of the County Court of Westchester county affirmed, with costs.

HIRSCHBERG, P. J., not voting.

In re CAMPIGLIO. (Supreme Court, Appellate Division, Second Department. November 29, 1907.) In the matter of the application of Maria Campiglio for the removal of the body of Lorenzo Campiglio (also known as "Lawrence Campbell") from a burial plot in Calvary Cemetery to another plot in the same cemetery. No opinion. Motion denied.

CARPENTER et al., Appellants, v. KLEIN, Respondent. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by Joseph N. Carpenter and others against Josephine Klein. M. Mayer, for appellants. S. Sultan, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

CARPINONE, Appellant, v. GREENSPAN et al., Respondents. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Antonio Carpinone against Jacob Greenspan and another.

PER CURIAM. Judgment of the Municipal Court affirmed, with costs.

HOOKEK, J., dissents. HIRSCHBERG, P. J., not voting.

CASPER et al., Respondents, v. GOLDBERG et al., Appellants. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Max Casper and another against Harris Goldberg and others. No opinion. Judgment affirmed, with costs.

CASS, Respondent, v. STEINER, Appellant. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Action by Peter J. Cass against Max Steiner.

PER CURIAM. Judgment of the Municipal Court affirmed, with costs.

HIRSCHBERG, P. J., not voting.

CHARLES H. BROWN PAINT CO., Respondent, v. COHN et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by the Charles H. Brown Paint Company against Samuel Cohn and another. No opinion. Judgment of the Municipal Court affirmed, with costs.

CIRKOT, Appellant, v. BROWN, Respondent. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Peter Cirkot against Clement H. Brown. No opinion. Judgment of the Municipal Court reversed, and new trial ordered, costs to abide the event, on the authority of *Flanagan v. Fox*, 44 N. Y. 703, 39 N. E. 857.

CITY OF NEW YORK, Respondent, v. HOLZDERBER, Appellant. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by the City of New York against Charles P. Holzderber. W. W. Niles, for appellant. T. Connolly, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed. See 44 Misc. Rep. 509, 90 N. Y. Supp. 68.

CITY OF NEW YORK, Respondent, v. URGALO et al., Appellants. (Supreme Court, Appellate Division, Second Department. December 5, 1907.) Action by the City of New York against Louis Urgalo and another. No opinion. Motion denied, without costs, provided the appellants perfect their appeal in time to place the case upon the next calendar of this court and be ready for argument when the cause is reached; otherwise, motion granted, with \$10 costs.

OLEMENSON, Respondent, v. FRANKLIN L. LEWI CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. December 4, 1907.) Action by Thomas J. Clemenson against the Franklin L. Lewi Company.

PER CURIAM. Judgment and order affirmed, with costs.

WILLIAMS, J., dissents.

COHEN, Respondent, v. ARNSTEIN, Appellant. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by Ben Cohen against Robert Arnstein. M. Feltenstein, for appellant. M. Kronacher, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

COHEN, Respondent, v. REGIERER et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Barney Cohen against Isaac Regierer and another. No opinion. Motion denied, with \$10 costs.

COHN, Respondent, v. PAUL C. KOEBER CO., Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Arthur Cohn against the Paul C. Koerber Company. No opinion. Order modified, by limiting the reference to issues of fact (see Code Civ. Proc. § 1013), and, as thus modified, affirmed, without costs.

COLGATE et al., Appellants, v. NEW YORK CENT. & H. R. R. CO., Respondent. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Susan F. Colgate and others, as trustees, etc., of James B. Colgate, deceased, and James C. Colgate and Austen Colgate, as executors, etc., against the New York Central & Hudson River Railroad Company.

PER CURIAM. Judgment (51 Misc. Rep. 503, 100 N. Y. Supp. 650) modified, so far as to permit the defendant to enforce subdivision "k" of rule 14, on the ground that there is not sufficient evidence to show that said rule is not reasonably necessary to insure the safe management of the defendant's trains, and, as thus modified, the judgment is affirmed, without costs.

HOOKEK, J., votes to affirm without modification.

CONKLIN et al. v. CODDINGTON et al. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by George R. Conklin and another against William H. Coddington and John C. Minturn, subse-

quent Honor. No opinion. Order affirmed, with \$10 costs and disbursements.

CONLEY, Respondent, v. CARNEY et al., Assessors, Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Jefferson B. Conley against Frank Carney and others, individually and as assessors of the town of Hague, county of Warren, state of New York.

PER CURIAM. Order affirmed, with \$10 costs and disbursements.

HIRSCHBERG, P. J., not voting.

CONNELL, Respondent, v. CONNELL, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Mary E. Connell against William F. Connell. No opinion. Order affirmed, with \$10 costs and disbursements.

In re CONOVER ST. BETWEEN WOLCOTT & SULLIVAN STS., IN BOROUGH OF BROOKLYN. (Supreme Court, Appellate Division, Second Department. December 5, 1907.) In the matter of acquiring title to Conover street, between Wolcott and Sullivan streets, in the borough of Brooklyn, duly selected as a site for school purposes according to law. No opinion. Matter referred to James P. Kohler, Esq., for report with his opinion.

COOPER, Appellant, v. JOSEPH et al., Respondents. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Hene Cooper against Samuel Joseph and others. J. A. Seidman, for appellant. A. A. Feinberg, for respondents. No opinion. Judgment affirmed, with costs. Order filed.

CORNWAL v. BELL TELEPHONE CO. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Clara C. Cornwal, as administratrix, etc., against the Bell Telephone Company. No opinion. Plaintiff's exceptions overruled. Motion for new trial denied, with costs, and judgment ordered for defendants on the nonsuit.

COTTLER et al., Appellants, v. WIENER, Respondent. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Louis Cottler and another against Morris Wiener. No opinion. Motion denied, with \$10 costs.

COUTURIER, Respondent, v. TILYOU, Appellant. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by Carter Couturier against George C. Tilyou. O. F. Finnerty, for appellant. L. J. Vorhaus, for respondent. No opinion. Judgment and order reversed, and new trial ordered, costs to appellant to abide event, unless plaintiff stipulates to deduct \$200, with interest thereon, from the judgment, in which event, judgment, as so modified, and order, affirmed, without costs to either party. Settle order on notice.

In re CRAGG et al. (Supreme Court, Appellate Division, Second Department. October 25,

1907.) In the matter of Samuel Cragg and others for an order declaring the nonofficial primary election held by the Independence League of the Sixth assembly district, county of Kings, on the 24th day of September, 1907, null and void, etc.

PER CURIAM. This order strikes from the official ballot the names of certain candidates for office at the ensuing election. The grounds thereof are certain alleged errors and omissions in the party proceedings preliminary to the nomination of these individuals. We think that the Special Term could not make such order, either in the exercise of any inherent power or by virtue of any statutory authority. Section 11 of the primary law (Laws 1899, p. 995, c. 473), which is cited to us by the respondents, does not authorize such procedure, but is limited to the correction of errors and omissions in the primary proceedings, and does not extend to the correction of the ballots. Moreover, in any event, the court did not obtain jurisdiction of two out of the three candidates directly affected by this order. The order is reversed, without costs, and the proceedings dismissed.

CROWE v. HEERMANCE STORAGE CO. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Margaret Crowe, as administratrix, against the Heermance Storage Company. No opinion. Motion denied, with \$10 costs. Order filed.

CURTIN, Respondent, v. CITY OF NEW YORK, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Mary J. Curtin against the city of New York. No opinion. Judgment and order unanimously affirmed, with costs.

DALY v. BUTLER. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Hugh Daly, as administrator, against James Butler. No opinion. Motion denied, with \$10 costs. Order filed.

DALY et al., Appellants, v. STUMPP & WALTER CO., Respondent. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Charles J. Daly and another, doing business under the name of the Long Island Sod Company, against the Stumpp & Walter Company.

PER CURIAM. Judgment of the Municipal Court affirmed, with costs.

HIRSCHBERG, P. J., not voting.

DAVERN v. CITY OF NEW YORK. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by Ellen Davern against the city of New York. No opinion. Motion denied, on condition that appellant be ready for January term. Order filed.

DAVIS, Respondent, v. DODGE, Appellant. (Supreme Court, Appellate Division, Second Department. December 5, 1907.) Action by Robert L. Davis against John L. Dodge. No opinion. Motion denied, without costs, provided the appellant perfect his appeal in time to place the case upon the next calendar of this court and

be ready for argument when the cause is reached; otherwise, motion granted, with \$10 costs.

DAVIS v. WEISBERGER. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by Adolph Davis against Morris Weisberger. No opinion. Motion granted, with \$10 costs. Order filed.

DAY v. DAY. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Harry L. Day against Nancy J. Day.

PER CURIAM. Order affirmed, without costs. See 108 N. Y. Supp. 848.

HOOKER, J., votes to modify, so as to make alimony payable from commencement of the action.

DEARMAN, Respondent, v. FROSSARD et al., Appellants. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Mary Dearman against Anna A. Frossard, individually and as sole executrix, etc., of Sarah A. Dearman, deceased, and another.

PER CURIAM. Judgment affirmed, with costs.

HIRSCHBERG, P. J., not voting.

DEUKER v. NEW YORK CENT. & H. R. R. CO. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by Ernest Deuker, as administrator, against the New York Central & Hudson River Railroad Company. No opinion. Motion denied, with \$10 costs. Order filed.

DICKINSON, Respondent, v. PLATT, Appellant. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Georgia B. Dickinson, as administratrix, etc., against Thomas C. Platt, as president, etc.

PER CURIAM. Judgment and order affirmed, with costs.

McLENNAN, P. J., dissents on the ground that the plaintiff's intestate was not shown to have been free from contributory negligence, for the reasons stated in the opinion of Mr. Justice NASH upon the former appeal in this case, reported at 116 App. Div. 651, 101 N. Y. Supp. 356.

DI PONZIO, Appellant, v. BIANCHI, Respondent. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Rocco Di Ponzio, by guardian, etc., against Nicola Bianchi, by guardian, etc. No opinion. Order affirmed with \$10 costs and disbursements.

DOYLE, Respondent, v. WELSH, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Michael Doyle against Nicholas Welsh. No opinion. Judgment and order of the County Court of Orange county unanimously affirmed, with costs.

DRAKE et al., Respondents, v. LA CHICOTTE et al., Appellants. (Supreme Court, Appellate Division, First Department. January 10, 1908.) Action by John A. Drake and another against Walter B. La Chicotte and another. J. Q. Cohen, for appellants. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

DRAPER v. INTERBOROUGH RAPID TRANSIT CO. (Supreme Court, Appellate Division, First Department. December 8, 1907.) Action by Sarah A. Draper against the Interborough Rapid Transit Company. No opinion. Motion denied, with \$10 costs. Order filed.

DRESS, Appellant, v. BROOKLYN HEIGHTS R. CO., Respondent. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Caroline Dress against the Brooklyn Heights Railroad Company. No opinion. Order affirmed, with \$10 costs and disbursements.

DRISCOLL, Respondent, v. CARROLL, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by George F. Driscoll against James Carroll as trustee, etc. No opinion. Motion denied, provided the appellant pay \$10 costs and perfect the appeal within 10 days; otherwise, motion granted, with \$10 costs.

DUCKWORTH, Respondent, v. DRIVER, Appellant. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Action by Walter F. Duckworth against William S. Driver. No opinion. Judgment of the Municipal Court unanimously affirmed, with costs.

In re **EAST 178th ST.** (Supreme Court, Appellate Division, First Department. January 17, 1908.) In the matter of the opening of East 178th street. No opinion. Motion denied, on payment of \$10 costs, and on condition that appellant be ready for February term. Order filed.

ECKERSON, Respondent, v. PLATT, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Margaret Eckerson against Thomas C. Platt, as president of the United States Express Company. No opinion. Judgment and order of the County Court of Westchester county unanimously affirmed, with costs.

EDELSTEIN et al., Respondents, v. ELIAS, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Henry Edelstein and another against Wolf Elias. No opinion. Judgment affirmed, with costs.

EISELE, Appellant, v. RODGERS, Respondent. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by Frank Eisele, as administrator, against John C. Rodgers. G. D. Lamb, for appellant. F. V. Johnson, for respondent. No opinion. Judgment

ment and order affirmed, with costs. Order filed.

PATTERSON, P. J., and McLAUGHLIN, J., dissent.

EISNER, Respondent, v. JOHNSON, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Lewis Eisner against Charles E. Johnson. No opinion. Judgment and order unanimously affirmed, with costs.

ENGELHARDT CONST. CO., Appellant, v. MANN, Respondent. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by the Engelhardt Construction Company against Jacob Mann. No opinion. Judgment of the Municipal Court affirmed, with costs.

EPSTEIN v. GRANOFF. (Supreme Court, Appellate Division, Second Department. November 29, 1907.) Action by Isidore Epstein against Hyman Granoff. No opinion. Motion denied, with costs.

ERB, Respondent, v. CITY OF NEW YORK, Appellant. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by Adele Mary Erb against the city of New York. Judgment for plaintiff, and defendant appeals. Affirmed.

PER CURIAM. Judgment and order affirmed, with costs.

INGRAHAM, J. (dissenting). I do not concur in the affirmance of this judgment, as I think that the evidence failed to show that the defendant was negligent in failing to prevent the sidewalk upon which the plaintiff fell from becoming slippery. The accident happened on the morning of the 16th of December, 1902, between 9 and 10 o'clock. It appeared that in that year there was a fall of snow on December 5th of about $1\frac{1}{2}$ inches; that on December 7th it rained; on December 11th and 12th it rained with a freezing temperature, so that $1\frac{1}{2}$ inches of ice formed upon the streets; that on the 13th the rain continued until 12 p. m., after which 6 inches of snow fell; that on the 15th it commenced raining at 10 o'clock at night, and continued through the 16th; that frost commenced on the 5th of December, and continued until the 15th, when the temperature rose to 43 degrees and rain commenced, which continued through the 16th. During all of the 16th the temperature was considerably above freezing. The plaintiff testified that she passed these premises six times every day and was familiar with the conditions, and that it had been slippery there for some two weeks prior to the accident. The defendant was not responsible for the formation of ice on this sidewalk resulting from the falling of snow and rain and the freezing weather, as it is quite evident that it would be an absolute impossibility for the city during the winter months in this latitude, with the alternation of rain, snow, and frost, to keep the 1,158 miles of sidewalk, with an area of 27,000,000 square yards, in the city of New York, free from ice, especially in those parts of the city not entirely built up and in front of vacant property of this kind. The snow that fell on

the 18th and 14th would account for the fact that in front of this vacant lot there was more or less packed snow upon the sidewalk, which would necessarily make the sidewalk slippery; and with the heavy rain on the night of the 15th and the morning of the 16th, with a temperature considerably above freezing, the result would necessarily be a slippery sidewalk, for which certainly the city was not responsible. Taylor v. City of Yonkers, 105 N. Y. 202, 11 N. E. 642, 59 Am. Rep. 492; Crawford v. City of New York, 68 App. Div. 107, 74 N. Y. Supp. 261, affirmed 174 N. Y. 518, 66 N. E. 1106; Foley v. City of New York, 95 App. Div. 374, 88 N. Y. Supp. 690. The plaintiff testified that "there was ice and snow which had accumulated on this walk for several days. I should say about two weeks, and then there was a flow of water that went over the lot and went across diagonally across the walk, across the sidewalk, which was flowing very heavily that morning, and I was very cautious to keep down my umbrella and use my umbrella as a cane, and when I came to this spot I fell and my arm went in back of me. * * * The snow and ice that had accumulated on the walk caused me to fall. I could not see it through the water. I could not see whether it was lumpy or whether it was smooth." Thus the plaintiff expressly testified that it was the snow and ice upon the sidewalk for which the city of New York was not responsible that caused her to fall. The fact that there was water on the sidewalk flowing across it from the adjoining lot was not the proximate cause of the accident, and so far as I can see had nothing to do with the plaintiff's slipping. She does not say that she did not see the water running across the sidewalk. She does say that ice and snow was on the sidewalk, and had been for several days prior to the accident, and the presumption is certainly justified that the ice and snow upon which plaintiff fell was caused by the snowstorm two or three days before the accident. It seems to me that the whole case negatives the inference that the water which had been allowed to flow from this vacant lot to the street over the sidewalk had anything to do with the accident, or that any negligence of the city in not preventing this flow of water would impose any liability upon it for this accident. I think, therefore, this judgment should be reversed.

ESTABROOK, Respondent, v. SOMMERVILLE, Appellant. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by William B. Estabrook against William B. Somerville. W. H. Baker, for appellant. W. P. Maloney, for respondent. No opinion. Judgment affirmed, with costs, with leave to defendant to withdraw demurrer and to answer on payment of costs. Order filed.

FERDINAND MUNCH BREWERY, Appellant, v. MULLER et al., Respondents. (No. 1.) (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by the Ferdinand Munch Brewery against Grace Muller and another.

PER CURIAM. Judgment and order affirmed as to each defendant, with costs.

HIRSCHBERG, P. J., not voting.

FERDINAND MUNCH BREWERY, Respondent, v. MULLER et al., Appellants. (No. 2.) (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by the Ferdinand Munch Brewery against Grace Muller and another.

PER CURIAM. Judgment and order affirmed, with costs.

HIRSCHBERG, P. J., not voting.

FIFTH AVE. LIBRARY SOCIETY, Appellant, v. WEIL, Respondent. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by the Fifth Avenue Library Society against Emil Weil. No opinion. Judgment of the Municipal Court affirmed by default, with costs.

FINKELSTEIN, Respondent, v. FUCHS et al., Appellants. (Supreme Court, Appellate Division, Second Department. November 29, 1907.) Action by Max Finkelstein against David Fuchs and another. No opinion. Judgment of the Municipal Court affirmed, with costs.

FISCHER, Appellant, v. KRAMER et al., Respondents. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by David Fischer against Isaac Kramer and others. No opinion. Judgment of the Municipal Court affirmed, with costs.

FITZGERALD, Respondent, v. ST. GEORGE, Appellant. (Supreme Court, Appellate Term. November 29, 1907.) Appeal from Municipal Court, Borough of Manhattan, First District. Action by Mary Fitzgerald, executrix of James M. Fitzgerald, against Henry V. St. George. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered. August P. Wagener, for appellant. Isaac Fromme, for respondent.

PER CURIAM. We are of the opinion that substantial justice requires that there should be a new trial in this case. Judgment reversed, and new trial ordered, with costs to appellant to abide event.

FLYNN, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Daniel Flynn against the Brooklyn Heights Railroad Company.

PER CURIAM. Judgment of the Municipal Court affirmed, with costs.

HIRSCHBERG, P. J., not voting.

FOGARTY, Respondent, v. O'REILLY, Appellant. (Supreme Court, Appellate Division, First Department. January 10, 1908.) Action by William P. Fogarty against Sarah A. O'Reilly, as executrix. E. W. S. Johnston, for appellant. F. H. Mills, for respondent. No opinion. Judgment (107 N. Y. Supp. 234) affirmed, with costs, with leave to defendant to withdraw demurrer and answer on payment of costs. Order filed.

FT. COMFORT INN & REALTY CO., Respondent, v. FORD, Appellant. (Supreme

Court, Appellate Division, Second Department. January 10, 1908.) Action by the Ft. Comfort Inn & Realty Company against Isaac H. Ford. No opinion. Judgment and order affirmed, with costs.

FRANK et al., Appellants, v. GRANT et al., Respondents. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Action by Hyman Frank and others, copartners, etc., against Eugene J. Grant and another.

PER CURIAM. Judgment of the Municipal Court affirmed, without costs. In any event the plaintiffs are entitled to recover the value of the nine doors used by the defendants, upon proof of such value.

FREEMAN, Respondent, v. WYSE, Appellant. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Lewis C. Freeman against Marie S. Wyse. R. T. Greene, for appellant. A. J. Rose, for respondent. No opinion. Judgment and order reversed, and new trial ordered, with costs to appellant to abide event, unless plaintiff stipulates to reduce the judgment as entered to the sum of \$2,138.06, in which event, judgment, as so modified, and order, affirmed, without costs. Settle order on notice.

In re **FREEMAN ST., BETWEEN PROVOST ST. AND WHALE CREEK CANAL, IN SEVENTEENTH WARD OF BOROUGH OF BROOKLYN, CITY OF NEW YORK.** (Supreme Court, Appellate Division, Second Department. November 29, 1907.) In the matter of the application of the city of New York relative to acquiring title, etc., for the purpose of opening Freeman street, between Provost street and Whale Creek Canal, in the Seventeenth Ward of the borough of Brooklyn, city of New York.

PER CURIAM. Order affirmed, with \$10 costs and disbursements.

HIRSCHBERG, P. J., not voting.

FROST, Appellant, v. RICHARDSON, Respondent. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by Leander L. Frost against Charles W. Richardson. T. F. Wentworth, for appellant. W. H. Beam, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

In re **GAFFNEY et al.,** (Supreme Court, Appellate Division, First Department. December 8, 1907.) In the matter of John Gaffney and others. No opinion. Motion granted. Settle order on notice.

In re **GENEY.** (Supreme Court, Appellate Division, First Department. December 13, 1907.) In the matter of H. A. Geney. No opinion. Reference ordered. Settle order on notice.

GERMANIA LIFE INS. CO. v. JOHN V. SGNELL CO. (three cases). (Supreme Court, Appellate Division, First Department. January 17, 1908.) Actions by the Germania Life Insurance Company against the John V. Signell

Company. No opinions. Motions granted, with \$10 costs. Orders filed.

GERZOG DAVIDOFF CONST. CO., Respondent, v. **LEVIN,** Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by the Gerzog Davidoff Construction Company against Jacob Levin. No opinion. Order reversed, with \$10 costs and disbursements, and motion granted, with costs. See *Krainin v. Coffey*, 119 App. Div. 516, 104 N. Y. Supp. 174.

GITTLEMAN, Respondent, v. **FELTMAN** et al., Appellants. (Supreme Court, Appellate Division, Second Department. December 5, 1907.) Action by Eva Gittleman against Charles L. Feltman and others. No opinion. Motion for leave to appeal to the Court of Appeals granted. Settle order before Mr. Justice GAYNOR.

GLOVER, Respondent, v. **UNITED STATES HEALTH & ACCIDENT INS. CO.,** Appellant. (Supreme Court, Appellate Division, Fourth Department. December 6, 1907.) Action by Eliza Glover against the United States Health & Accident Insurance Company. No opinion. Judgment affirmed, with costs.

GOLDEN et al., Respondents, v. **SCHMIDT** et al., Appellants. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Aman Golden and others against Gustav A. Schmidt and another. No opinion. Order affirmed, with \$10 costs and disbursements.

GOLDSBOROUGH, Appellant, v. **HUTCHINSON ACOUSTIC CO.** et al., Respondents. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by W. Elwell Goldsborough against the Hutchinson Acoustic Company and others. W. D. Gaillard, for appellant. J. Quinn, for respondents. No opinion. Judgment affirmed, with costs, with leave to plaintiff to amend on payment of costs. Order filed.

GOULD v. **GOULD.** (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Kathrine C. Gould against Howard Gould. No opinion. Motion denied, with \$10 costs. Order filed.

GOVE, Respondent, v. **TOWER** et al., Appellants. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Le Roy S. Gove, as trustee, against Levi L. Tower and others. C. H. Williams, for appellants. J. R. Abney, for respondent. No opinion. Judgment affirmed, without costs. Order filed.

GOZZETT, Respondent, v. **PLAUT** et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Edward J. Gozzett against Albert Plaut and another. No opinion. Motion denied.

In re **GRADE DAMAGE COMMISSION.** In re **GEISLER.** In re **DE VINNE.** In re **KAHRS.** In re **ASTOR.** In re **PETERSON.**

In re **BURNETT.** In re **GAINSBORG.** (Supreme Court, Appellate Division, First Department. December 13, 1907.) In the matter of the grade damage commission. In the matter of Geisler. In the matter of De Vinne. In the matter of Kahrs. In the matter of Astor. In the matter of Peterson. In the matter of Burnett. In the matter of Gainsborg. No opinions. Applications for extension granted. Settle orders on notice.

GRAY, Respondent, v. **SIEGEL-COOPER CO.,** Appellant. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Mary A. Gray, as administratrix, against the Siegel-Cooper Company. G. G. Battle, for appellant. J. C. Robinson, for respondent. No opinion. Judgment and order reversed, and new trial ordered, costs to appellant to abide event, unless plaintiff stipulates to reduce verdict to \$15,000, together with interest, costs, etc., in which event judgment, as so modified, and order, affirmed, without costs. Settle order on notice. See 111 App. Div. 926, 97 N. Y. Supp. 1135.

GROTE v. **GROTE.** (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by Augustus H. Grote against Ida F. Grote. No opinion. Motion denied, with \$10 costs. Order filed.

GUNDERSON, Respondent, v. **ROEBLING CONST. CO.,** Appellant, et al. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Rosa Gunderson, administratrix, etc., of Peter A. Gunderson, deceased, against the Roebling Construction Company, impleaded with Post & McCord. No opinion. Order affirmed, with costs.

HAACK, Respondent, v. **BROOKLYN LABOR LYCEUM ASS'N,** Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Laura A. Haack against the Brooklyn Labor Lyceum Association. No opinion. Order unanimously affirmed, with costs.

HAACK, Respondent, v. **BROOKLYN LABOR LYCEUM ASS'N,** Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Bruno Haack, an infant, by Laura A. Haack, his guardian ad litem, against the Brooklyn Labor Lyceum Association. No opinion. Order unanimously affirmed, with costs. See 93 App. Div. 491, 87 N. Y. Supp. 814.

HAAS, Appellant, v. **LOEB** et al., Respondents. (Supreme Court, Appellate Division, First Department. January 10, 1908.) Action by Gustavus Haas against Louis L. Loeb and others. N. L. Robinson, for appellant. B. N. Cardozo, for respondents. No opinion. Judgment affirmed, with costs. Order filed.

HACKETT, Appellant, v. **VIEW** et al., Respondents. (Supreme Court, Appellate Division, Fourth Department. September 25, 1907.) Action by Mary E. Hackett against George H. View and others.

PER CURIAM. Upon filing stipulation, and other papers in this action, ordered that all proceedings herein be stayed until 30 days after the hearing and decision by the Court of Appeals of the appeal pending in that court in the action of Emerick v. Hackett, 189 N. Y. —, 2 N. E. 1126.

HAINES, Appellant, v. BARBER et al., Respondents. (Supreme Court, Appellate Division, Second Department. November 29, 1907.) Action by Franklin Haines against Amsi L. Barber and others. No opinion. Judgment affirmed, with costs. See 113 App. Div. 696, 100 N. Y. Supp. 75.

HAIRE v. HUGHES. (Supreme Court, Appellate Division, First Department. January 7, 1908.) Action by Robert J. Haire against Joseph J. Hughes. No opinion. Motion denied, without costs. Order filed.

HALL, Respondent, v. CITY OF NEW YORK, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Jerusha I. Hall against the city of New York. No opinion. Judgment and order unanimously affirmed, with costs.

HALSTED et al., Respondents, v. SILBERSTEIN et al., Appellants. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by John M. Halsted and another against Jacob Silberstein and another. No opinion. Judgment affirmed, with costs.

HAMMOND, Respondent, v. HAMMOND, Appellant. (Supreme Court, Appellate Division, First Department. January 10, 1908.) Action by Mary A. Hammond against Charles L. Hammond. G. S. Keyes, for appellant. D. T. Kimball, for respondent. No opinion. Judgment reversed, and new trial ordered, costs to appellant to abide event, on 103 App. Div. 437, 93 N. Y. Supp. 1. Order filed.

HANNA, Respondent, v. PITT & SCOTT, Limited, Appellant. (Supreme Court, Appellate Division, Second Department. December 5, 1907.) Action by William E. Hanna against Pitt & Scott, Limited. No opinion. Motion for leave to appeal to the Court of Appeals denied, without costs.

HANNA, Respondent, v. SPIEGELBERG et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by John W. Hanna, doing business as Hanna & Co., against Charles S. Spiegelberg and others. No opinion. Order affirmed, with costs.

HARBOR & SUBURBAN BUILDING & SAVINGS ASS'N, Appellant, v. WOOD et al., Respondents. (Supreme Court, Appellate Division, Second Department. December 5, 1907.) Action by the Harbor & Suburban Building & Savings Association against George T. Wood and others. No opinion. Motion denied, without costs.

In re HART. (Supreme Court, Appellate Division, First Department. December 6, 1907.) In the matter of Joseph D. Hart. No opinion. Reference ordered. Settle order on notice.

HAWKINS, Respondent, v. VAN NUYSE, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Annie E. Youngs Hawkins against James O. O. Van Nuyse. No opinion. Judgment and order unanimously affirmed, with costs.

HEBBARD, Com'r, Respondent, v. LOEB, Appellant. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by Robert W. Hebbard, commissioner, against Eugene Loeb. C. Goldzier, for appellant. M. J. Kelly, for respondent. No opinion. Judgment and order affirmed. Order filed.

HEBREW GEMILATH ASS'N, Respondent, v. FREEDMAN, Appellant. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by the Hebrew Gemilath Association against Fritz Freedman. H. W. Pollock, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

HEFFRON, Respondent, v. NEW YORK CITY RY. CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Richard Heffron against the New York City Railway Company. No opinion. Judgment and order unanimously affirmed, with costs.

HEINDEL, Appellant, v. HEINDEL et al., Respondents. (Supreme Court, Appellate Division, First Department. January 10, 1908.) Action by Theresa Heindel against Caroline Heindel and others. F. Weiner, for appellant. C. C. Miller, for respondents. No opinion. Judgment affirmed, with costs. Order filed.

HICKEY, Respondent, v. BLOOMFIELD, Appellant. (Supreme Court, Appellate Division, Second Department. November 29, 1907.) Action by Johanna Hickey against Henry F. Bloomfield. No opinion. Judgment of the Municipal Court affirmed, with costs.

HOBUSCH, Respondent, v. NEW YORK & Q. C. RY. CO., Appellant. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Action by Theodore Hobusch against the New York & Queens County Railway Company. No opinion. Judgment and order unanimously affirmed, with costs.

HOFACKER, Respondent, v. HOFACKER, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Gottfried Hofacker against Victorine Hofacker. No opinion. Motion to open default granted, without costs.

HOHL v. HEWITT MOTOR CO. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by Max P. Hohl against the Hewitt Motor Com-

pany. No opinion. Motion denied, with \$10 costs. Order filed.

HOMNYACK, Respondent, v. **PRUDENTIAL INS. CO. OF AMERICA**, Appellant. (Supreme Court, Appellate Division, Second Department, December 23, 1907.) Action by Andrew Homnyack against the Prudential Insurance Company of America.

PER CURIAM. Judgment and order affirmed, with costs.

HIRSCHBERG, P. J., not voting.

HOPKINS, Respondent, v. **PILGRIM STEAM LAUNDRY CO.**, Appellant. (Supreme Court, Appellate Division, Second Department, January 10, 1908.) Action by Benjamin Hopkins against the Pilgrim Steam Laundry Company. No opinion. Judgment of the Municipal Court affirmed, with costs.

HORNECKER, Respondent, v. **BROOKLYN, Q. C. & S. R. CO.**, Appellant. (Supreme Court, Appellate Division, Second Department, November 22, 1907.) Action by Martin Hornecker against the Brooklyn, Queens County & Suburban Railroad Company. No opinion. Judgment and order of the County Court of Kings county unanimously affirmed, with costs.

HORSMAN, Respondent, v. **EDISON ELECTRIC ILLUMINATING CO. OF BROOKLYN**, Appellant. (Supreme Court, Appellate Division, Second Department, December 6, 1907.) Action by Annie Horsman, as administratrix, etc., of Albert Horsman, deceased, against the Edison Electric Illuminating Company of Brooklyn.

PER CURIAM. Judgment and order affirmed, with costs.

HIRSCHBERG, P. J., not voting.

HORTON, Appellant, v. **ANDRUS et al.**, Com'rs, Respondents. (Supreme Court, Appellate Division, Second Department, November 22, 1907.) Action by Virginia G. Horton against John E. Andrus and others, as commissioners, etc. No opinion. Motion for leave to appeal to the Court of Appeals granted. Questions to be settled before Mr. Justice GAYNOR.

HOSMER, Appellant, v. **TIFFANY et al.**, Respondents. (Supreme Court, Appellate Division, First Department, December 6, 1907.) Action by Edward S. Hosmer, as trustee, against Burnett Y. Tiffany and another. L. M. Berkeley, for appellant. No opinion. Appeal dismissed, with \$10 costs and disbursements. Order filed.

HOTALING v. **HOTALING**. (Supreme Court, Appellate Division, First Department, January 17, 1908.) Action by Clara A. Hotaling against John W. Hotaling. No opinion. Motion granted, with \$10 costs. Order filed.

HOYE, Respondent, v. **PENNSYLVANIA R. CO.**, Appellant, et al. (Supreme Court, Appellate Division, Second Department, December 6, 1907.) Action by Stephen M. Hoyer

against the Pennsylvania Railroad Company and another. No opinion. Motion denied, without costs.

In re **HOYT'S WILL**. (Supreme Court, Appellate Division, Second Department, November 29, 1907.) In the matter of proving the alleged last will and testament of Samuel N. Hoyt, deceased. No opinion. Decree of the Surrogate's Court of Kings county (105 N. Y. Supp. 359) affirmed on argument, with costs.

HUDSON & M. R. CO., Respondent, v. **WENDEL**, Appellant, et al. (Supreme Court, Appellate Division, First Department, December 6, 1907.) Action by the Hudson & Manhattan Railroad Company against Josephine J. S. Wendel, impleaded. L. L. DeLafield, for appellant. F. B. Jennison, for respondent.

PER CURIAM. Judgment modified, by striking from the second paragraph thereof the words "in fee simple," and inserting in lieu thereof the words "for the uses and purposes of the corporation during the continuance of the corporate existence." With this modification of the judgment, the order appealed from is affirmed. Settle order on notice. See 115 App. Div. 168, 100 N. Y. Supp. 737.

HUGOT v. **HARDING**. In re **SCALES**. (Supreme Court, Appellate Division, Second Department, December 23, 1907.) Proceeding by Louis Hugot, judgment creditor, against George E. Harding, judgment debtor. In the matter of the petition of Jefferson Scales. No opinion. Order affirmed, with \$10 costs and disbursements.

HUNTINGTON TUMBLER CO., Respondent, v. **COHEN et al.**, Appellants. (Supreme Court, Appellate Division, Second Department, November 22, 1907.) Action by the Huntington Tumbler Company against Herman Cohen and another. No opinion. Judgment of the Municipal Court affirmed, with costs.

HURN, Appellant, v. **HURN et al.**, Respondents. (Supreme Court, Appellate Division, Fourth Department, December 4, 1907.) Action by Luella Card Hurn against Frank H. Hurn and others. No opinion. Judgment affirmed, with costs.

In re **JACKSON**. (Supreme Court, Appellate Division, Second Department, December 23, 1907.) In the matter of the application of Mary E. Jackson, as plaintiff and judgment creditor, for the examination on supplementary proceedings of Arthur H. Yetman, a person having property of George Edward Harding, defendant and judgment debtor. No opinion. Order affirmed, with \$10 costs and disbursements.

JACOBS, Appellant, v. **CITY OF NEW YORK**, Respondent. (Supreme Court, Appellate Division, Second Department, January 10, 1908.) Action by Annie Jacobs against the city of New York. No opinion. Judgment and orders unanimously affirmed, with costs.

JANN, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. December 4, 1907.) Action by Antoney W. Jann, as administrator, etc., against the New York Central & Hudson River Railroad Company.

PER CURIAM. Judgment and order reversed, and new trial ordered, with costs to appellant to abide event. *Held* that the finding of the jury that plaintiff's intestate was free from contributory negligence was contrary to and against the weight of the evidence.

SPRING, J., dissents.

JAY D. PAGE & CO., Respondent, v. STOCK et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Jay D. Page & Co. against Frederick W. Stock, Sr., and others. No opinion. Judgment and order affirmed, with costs.

J. J. SPURR & SONS, Inc., v. EMPIRE STATE SURETY CO. et al., Defendants. (Supreme Court, Appellate Division, Second Department. October 25, 1907.) Action by J. J. Spurr & Sons, Incorporated, against the Empire State Surety Company and another.

PER CURIAM. The court is unable to decide this motion, as only four justices heard it, and one, on referring to the title of the action in consultation, finds himself disqualified.

J. J. SPURR & SONS, Inc., Respondent, v. EMPIRE STATE SURETY CO., Appellant, et al. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by J. J. Spurr & Sons, Incorporated, against the Empire State Surety Company and another. No opinion. Appeal dismissed, without costs.

J. J. SPURR & SONS, Inc., v. EMPIRE STATE SURETY CO. et al. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by J. J. Spurr & Sons, Incorporated, against the Empire State Surety Company and another. No opinion. The appeal having been determined, it is unnecessary to decide this motion.

JONSSAN, Respondent, v. BROOKLYN, Q. C. & S. R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Christine Jonssan against the Brooklyn, Queens County & Suburban Railroad Company. No opinion. Judgment and order reversed, and new trial granted, costs to abide the event, unless within 20 days plaintiff stipulate to reduce recovery of damages to the sum of \$250, with costs, in which case the judgment, as modified, and the order, are unanimously affirmed, without costs.

JOSEPH, Respondent, v. SANDERS, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Joseph Joseph, as administrator, etc., of Mary Joseph, deceased, against Ray Sanders.

PER CURIAM. Judgment of the Municipal Court reversed, and new trial ordered, costs to abide the event, on the ground that the judg-

ment is against the weight of evidence on the question of a gift causa mortis.

HOOKEE, J., dissents.

JUNGMAN, Respondent, v. PARKER, Appellant. (Supreme Court, Appellate Division, First Department. January 10, 1908.) Action by Charles Jungman against Andrew D. Parker. L. S. Phillips, for appellant. M. Mayer, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

KENNEY, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Catherine Kenney against the Brooklyn Heights Railroad Company. No opinion. Judgment and order unanimously affirmed, with costs.

KIEFER, Appellant, v. VOLCKENING, Respondent. (Supreme Court, Appellate Division, Second Department. December 5, 1907.) Action by May Kiefer against Ann Volckening.

PER CURIAM. Judgment affirmed, with costs.

HIRSCHBERG, P. J., not voting.

KIERNAN v. EIDLITZ. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by Kate Kiernan against Otto M. Eidlitz. No opinion. Motion denied, with \$10 costs. Order filed.

KIPS BAY BREWING & MALTING CO. v. COLETTI et al. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by the Kips Bay Brewing & Malting Company against Gaspare Coletti and others. No opinion. Order affirmed, with \$10 costs and disbursements.

KLIGMAN, Respondent, v. LONG ISLAND R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Philip Kligman against the Long Island Railroad Company. No opinion. Judgment and order affirmed, with costs.

KLUCZEWITZ, Appellant, v. NEW YORK CENT. & H. R. R. CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. December 6, 1907.) Action by Jefferson Kluczewitz against the New York Central & Hudson River Railroad Company.

PER CURIAM. Judgment affirmed, with costs.

SPRING, J., dissents.

KNICKERBOCKER, Respondent, v. BRITTON et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Jessie I. Knickerbocker against Willis N. Britton and another. No opinion. Judgment affirmed, with costs.

KNICKERBOCKER INVESTMENT CO. v. BANKERS' LIFE INS. CO. (Supreme Court, Appellate Division, First Department. December 18, 1907.) Action by the Knickerbocker

Investment Company against the Bankers' Life Insurance Company. No opinion. Motion granted, with \$10 costs. Order filed.

KOEN, Appellant, v. CITY OF NEW YORK, Respondent. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Mary Koen, as administratrix, etc., of Joseph A. Koen, deceased, against the city of New York. No opinion. Judgment and order unanimously affirmed, with costs.

KRANDALL, Respondent, v. SCHMIDT, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Jona Krandall against Gustav A. Schmidt. No opinion. Judgment of the Municipal Court affirmed, with costs.

KREVRUCK, Respondent, v. McLAUGHLIN REAL ESTATE CO., Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Frank Krevoruck against the McLaughlin Real Estate Company. No opinion. Judgment unanimously affirmed, with costs.

KUJAVA, Respondent, v. IRVING, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Frank Kujava against Walter E. Irving. No opinion. Motion denied.

KUNZ, Respondent, v. ASTORIA SILK WORKS, Appellant. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Action by Adam N. Kunz against the Astoria Silk Works. No opinion. Judgment and order unanimously affirmed, with costs.

LA FRANCE, Respondent, v. POST & HENDERSON CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Paul La France against the Post & Henderson Company. No opinion. Judgment and order affirmed, with costs.

LAING v. PELTON WATER WHEEL CO. (Supreme Court, Appellate Division, First Department. January 17, 1908.) Action by William T. Laing against the Pelton Water Wheel Company. No opinion. Motion denied, with \$10 costs. Order filed.

In re LANDS & PREMISES SITUATE ON NORTH SIDE OF ST. MARKS AVE. (Supreme Court, Appellate Division, Second Department. December 5, 1907.) In the matter of acquiring title by the city of New York to certain lands and premises situate on the north side of St. Marks avenue, etc. No opinion. Referee's report confirmed, and order signed.

LANG, Appellant, v. WHEATON, Respondent. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Fred C. Lang, against John W. Wheaton.

No opinion. Order affirmed, with \$10 costs and disbursements.

LANGE, Appellant, v. FIGGE, Respondent. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Adolph Lange against Charles F. Figge. No opinion. Judgment of the Municipal Court affirmed, with costs.

LANTRY v. HOFFMAN et al. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Francis J. Lantry against Samuel V. Hoffman and others. No opinion. Application granted. Order signed.

LAURICELLA, Respondent, v. METROPOLITAN ST. RY. CO., Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Giovanni Lauricella against the Metropolitan Street Railway Company. No opinion. Order affirmed, with \$10 costs and disbursements.

LAVIN, Respondent, v. DEGNON CONTRACTING CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Michael Lavin against the Degnon Contracting Company. No opinion. Judgment and order unanimously affirmed, with costs.

LAW, Appellant, v. SACKEN et al., Respondents. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Charlotte F. Law against Philip E. Sacken and another. No opinion. Judgment of the Municipal Court affirmed, with costs.

In re LAWLOR. (Supreme Court, Appellate Division, Second Department. November 29, 1907.) In the matter of the application of Jeremiah Lawlor for admission to the bar. No opinion. Application granted.

LENNON, Respondent, v. WESER, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Alice Lennon, as administratrix, etc., of John F. Lennon, deceased, against John Weser. No opinion. Judgment and order unanimously affirmed, with costs.

LE ROY PLOW CO., Respondent, v. MILLER, Appellant. (Supreme Court, Appellate Division, Fourth Department. December 6, 1907.) Action by the Le Roy Plow Company against Fred W. Miller. No opinion. Judgment affirmed, with costs.

LESE, Appellant, v. LAMPRECHT, Respondent. (Supreme Court, Appellate Division, First Department. January 10, 1908.) Appeal from Special Term. Action by Louis Lese against Anna Lamprecht, individually and as executrix of the estate of Hugo Lamprecht, deceased, for the specific performance of a contract. From a judgment for defendant, plaintiff appeals. Affirmed. John D. Connolly, for

appellant. Arthur J. Westermayr, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HOUGHTON, J., dissents.

LAMBERT, J. (dissenting). The plaintiff entered into an agreement in writing with Hugo Lamprecht, defendant's testator, on the 17th day of August, 1905, by the terms of which agreement the said Hugo Lamprecht undertook to sell, and the plaintiff to purchase, certain premises, described in the complaint and located at 120th street, for the sum of \$7,500. The vendor agreed to convey the said premises free from all incumbrances, excepting a certain party wall agreement, and to pay the taxes for the year 1905. The plaintiff paid \$500 on account of the purchase price, and agreed to pay the balance of \$7,000 on the delivery of the deed; it being agreed that if the title to the premises proved defective the vendor should restore the \$500 and the contract was to be canceled. The deed was to be delivered at the office of Lese & Connolly, No. 35 Nassau street, New York, on the 5th day of October, 1905, at 11 o'clock a. m. On the day agreed upon the parties met, and there is no dispute that at that time there was no outstanding mortgage of \$2,000 held by the Bowers Savings Bank, and, so far as the record discloses, this mortgage is still outstanding, so that at no time has the vendor been in a position to tender a title free and clear of all incumbrances; but there is a suggestion in the evidence that the understanding between the parties was that this mortgage was to be paid off out of the \$7,000 which the plaintiff had agreed to pay upon the delivery of the deed. While the parties were together on the 5th day of October, 1905, a written agreement was entered into in the following language: "The closing of title under contract dated the 17th day of August, 1905, between Hugo Lamprecht, as vendor, and Louis Lese, as vendee, of the premises No. 514 East 120th street, New York City, is hereby adjourned to November 3, 1905, at 11 o'clock a. m., at the office of Lese & Connolly, No. 35 Nassau street, New York City. It is understood and agreed that the vendee will pay interest on the balance of the purchase money from the date hereof to November 3, 1905, and that the vendor can remain in possession of said premises from November 3, 1905, to December 1, 1905, as a tenant, at a rental of one dollar (\$1.00). Title to be closed as of October 5, 1905. Dated New York, October 5, 1905. [Signed] Hugo Lamprecht." On the 3d day of November, after some preliminary interchange of communications, the parties met at the office of Bowers & Sands, who were conducting negotiations for a loan upon the premises in connection with an adjoining parcel owned by the plaintiff, and the vendor was told that the loan had been arranged and that the money would be forthcoming as soon as the search from the Lawyers' Title Insurance & Trust Company could be procured, which would be upon that day upon the following day. The vendor thereupon refused to delay the closing any longer, and a deed, in form and substance complying with the requirements of the contract, was tendered. This, of course, the plaintiff was unable

to accept at the moment, as he was unprepared to pay over the \$7,000; but Mr. Lamprecht was informed by a Mr. Baskerville, representing Bowers & Sands, that the contract called for a conveyance free of incumbrances, and that this \$2,000 mortgage was outstanding, and told him that if he would clear the title that he would see to it that the money was paid. But Mr. Lamprecht insisted upon a tender of the deed, and upon the plaintiff failing to accept the same the parties retired. Mr. Ball, attorney for the vendor, told Mr. Lese and Mr. Baskerville that he would see what could be done toward bringing about a closing of the transaction, and on the following Monday, November 6th, Mr. Ball and Mr. Lese, one of plaintiff's attorneys, had a conversation over the telephone, in which Mr. Ball was informed that an action was about to be started to compel specific performance of the contract. Mr. Ball asked for delay, and suggested that the parties go to the home of Mr. Lamprecht at 1 o'clock that afternoon and make an effort to close. Plaintiff, or his counsel, suggested that they could not find the necessary parties in time to close at 1 o'clock, but that if the matter could be held until 8 o'clock in the evening he would be on hand. While Mr. Ball did not assume to speak with authority, it was arranged that they should go to the home of Mr. Lamprecht at 8 o'clock that evening, and the vendor was notified by telegraph that the parties would come, and it is clearly shown by the evidence that the parties did meet at Mr. Lamprecht's house at or very near to 8 o'clock that evening, and that they subsequently found him at a neighboring place, where he refused to do any business, saying in substance that it was too late, that he could not do any business after 8 o'clock, and that he had waited at his home until after 8 o'clock. He admitted that he expected the parties at 1 o'clock, and that he would have closed the title if they had produced the cash, so that it appears that up to 1 o'clock of the 6th day of November the vendor was willing to perform, and that he had not up to that time secured the satisfaction piece necessary to convey a clear title, as he had agreed to do under his contract, and his refusal to do business in the evening of the 6th day of November, after being willing to perform at 1 o'clock of that day, was a clear indication that he did not stand upon his tender of a deed made on the 3d day of November, at which time the premises were not free of incumbrances. It is true, of course, that the mere fact of the existence of this outstanding mortgage, which the vendor could have discharged if the plaintiff had paid over the money, was not sufficient to put the defendant in default, without a tender on the part of the plaintiff and a demand for performance. *Higgins v. Eagleton*, 155 N. Y. 468, 473, 50 N. E. 287; *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 443, 55 N. E. 941, 48 L. R. A. 685. But, on the other hand, the defendant could not, by the tender of a deed, with this incumbrance outstanding, put the plaintiff in default, where the latter was proceeding in good faith and with reasonable diligence to perform his contract, and where the delay grew out of circumstances which could not, by the exercise of ordinary vigilance, have been avoided, because time was clearly not of the essence of this

contract. The rule is well established that in actions to compel the specific performance of a contract for the sale of real estate time is not of the essence of the contract, unless in the agreement it is clearly the intent of the parties that it should be so understood. The mere insertion in the contract of a day for the completion does not make such time the essence of the contract, and it will not be implied as essential, except where the subject of the sale has a fluctuating value, or where the object of the contract is a commercial enterprise, or the delay in completion would involve one of the parties in a serious loss. When time is not by stipulation or by implication of the essence of the contract, a court of equity will disregard it, and decree specific performance when an action at law has been lost by default of the party seeking performance, if it be conscientious that the agreement be performed. *Hun v. Bourdon*, 57 App. Div. 351, 354, 68 N. Y. Supp. 112. The original agreement, in connection with the agreement for an adjournment, in which it was provided that the transfer should be made as of the 5th day of October, which was the date mentioned in the original agreement for the completion of title, in connection with the acts of the vendor three days after his tender of the deed, show conclusively that neither party regarded the day of actual performance as of any great importance. It was agreed in the supplemental agreement for adjournment that the plaintiff should pay the interest on the deferred payment during the period of adjournment; that is, that the vendor should have the use of the \$7,000 during that time, the same as he would have had it had the transfer been actually made, and the conveyance was to be the date on which the interest charge or use of the money commenced, so that in equitable contemplation the transfer was made on the 5th day of October, 1905, and the vendor at any time after the 3d day of November, 1905, would have been entitled to recover the sum of \$7,000 on the clearing of the title and tendering a deed of conveyance as provided in the contract. The plaintiff would have been ready to complete his purchase on the 3d day of November, except for the fact that there was a delay in securing the search of the title as the foundation for the proposed loan, which the vendor knew was necessary to the completion of the transaction. He asked for a delay of a day that the matter might be brought about, and it would be most inequitable to hold that the vendor, under the circumstances, could work a forfeiture of the plaintiff's payment of \$500 on the purchase price, together with the expense of searching title, attorney's fees, and other expenses incident to the transaction, by the tender of a deed while yet the incumbrance was upon the title. We are of opinion that under the circumstances the vendor was bound to accept the plaintiff's offer of performance on the 6th day of November, or as soon thereafter as the transaction could be completely closed, and that it was error to dismiss the plaintiff's complaint, entailing losses, where he was willing to perform his contract, and where had made every reasonable effort to perform it within a reasonable time. The vendor, having permitted his attorney to reopen negotiations for the closing of title, and conceding that he would have acted if

the money had been tendered at 1 o'clock on the 6th day of November, may be held to have waived any default on the part of the plaintiff on the 3d day of November. The evidence is decisive and uncontradicted that the vendor stated, when he was requested to perform his contract shortly after 8 o'clock on the evening of the 5th of November, that he could not secure a discharge of the outstanding mortgage at that time in the evening, and the plaintiff then offered to deduct the amount of the mortgage and pay over the balance, and himself obtain a discharge of the mortgage. Thereupon the vendor stated: "You were to be here at 8 o'clock. You were not here, and now you cannot have the property." Here again we have a clear indication that the vendor understood that 8 o'clock on the evening of November 6th was fixed as the time for closing the transaction. It is also manifest that the plaintiff was in good faith offering to perform, and even going beyond the requirements of the contract by offering to assume the burden of obtaining the satisfaction piece of the mortgage. The vendor did not at any time, after negotiations fixing the time of closing on the 6th day of November, tender a deed to the plaintiff and thereby put him in default. On the contrary, he refused to complete his contract, and good conscience, which is at the foundation of equitable jurisdiction, demands that the plaintiff should be granted some measure of relief, the extent of which may be determined upon retrial of the action. The judgment appealed from should be reversed, with costs to appellant to abide the event.

LEVY, Respondent, v. MANES, Appellant. (Supreme Court, Appellate Division, Second Department, November 22, 1907.) Action by Joseph Levy against Max Manes.

PER CURIAM. Judgment of the Municipal Court affirmed, with costs.

HIRSCHBERG, P. J., not voting.

In re LEVY'S ESTATE. (Supreme Court, Appellate Division, First Department, December 6, 1907.) In the matter of Isaac Levy, deceased. No opinion. Order affirmed, with costs and disbursements. Order filed.

LEWIS, Appellant, v. NEW YORK & Q. C. RY. CO., Respondent. (Supreme Court, Appellate Division, Second Department, January 10, 1908.) Action by George A. Lewis against the New York & Queens County Railway Company.

PER CURIAM. Judgment and order affirmed, with costs.

HIRSCHBERG, P. J., not voting.

LEWIS, Appellant, v. NEW YORK & Q. C. RY. CO., Respondent. (Supreme Court, Appellate Division, Second Department, January 10, 1908.) Action by Julia I. Lewis, an infant, by George A. Lewis, her guardian ad litem, against the New York & Queens County Railway Company.

PER CURIAM. Judgment and order affirmed, with costs.

HIRSCHBERG, P. J., not voting.

LEYDEN, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. November 29, 1907.) Action by Gertrude M. Leyden against the Brooklyn Heights Railroad Company.

PER CURIAM. Judgment and order of the County Court of Kings county affirmed, with costs.

WOODWARD and MILLER, JJ., dissent.

LISCHINSKY, Appellant, v. DOELGER, Respondent. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Nochem Lischinsky against Charles A. Doelger. No opinion. Judgment of the Municipal Court affirmed, with costs.

In re LOEW. (Supreme Court, Appellate Division, First Department. December 6, 1907.) In the matter of Herman G. Loew. No opinion. Motion granted, with \$10 costs. Order filed.

LONG, Appellant, v. SEAMAN'S BANK FOR SAVINGS, Respondent. (Supreme Court, Appellate Division, First Department. January 10, 1908.) Action by Bridget Long against the Seaman's Bank for Savings. A. H. Sarason, for appellant. G. Coghill, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

LONGENECKER, Respondent, v. KUHN et al., Appellants. (Supreme Court, Appellate Division, Second Department. November 29, 1907.) Action by David R. Longenecker against John R. Kuhn and others. No opinion. Motion to dismiss appeal dismissed.

LONGENECKER, Respondent, v. KUHN et al., Appellants. (Supreme Court, Appellate Division, Second Department. December 6, 1907.) Action by David R. Longenecker against John R. Kuhn and others. No opinion. Motion denied.

LUIKERT, Respondent, v. LUIKERT et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Victor Luikert against Rosalie Luikert and others. No opinion. Order affirmed, with costs and disbursements.

LUSK, Respondent, v. LEE et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Fred Lusk against Fred Lee and another.

PER CURIAM. Orders affirmed, with \$10 costs and disbursements. Held that under the circumstances of this case it cannot be said that the court abused its discretion in denying the motions.

SPRING and ROBSON, JJ., dissent.

LUTFY, Appellant, v. NASSAR et al., Respondents. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Ac-

tion by Deeb Lutfy against Shakir Nassar and others. No opinion. Order affirmed, with \$10 costs and disbursements.

LYNCH, Respondent, v. NEW YORK CITY RY. CO., Appellant. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Martin Lynch against the New York City Railway Company. B. H. Ames, for appellant. L. S. Posner, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

LYONS BEET SUGAR REFINING CO., Appellant, v. BABCOCK, Respondent. (Supreme Court, Appellate Division, Fourth Department. December 6, 1907.) Action by the Lyons Beet Sugar Refining Company against Frank C. Babcock. No opinion. Order affirmed, with \$10 costs and disbursements.

LYONS BEET SUGAR REFINING CO., Appellant, v. JENKINS, Respondent. (Supreme Court, Appellate Division, Fourth Department. December 6, 1907.) Action by the Lyons Beet Sugar Refining Company against George B. Jenkins. No opinion. Order affirmed, with \$10 costs and disbursements.

LYONS BEET SUGAR REFINING CO., Appellant, v. NEAL, Respondent. (Supreme Court, Appellate Division, Fourth Department. December 6, 1907.) Action by the Lyons Beet Sugar Refining Company against Ellsworth Neal. No opinion. Order affirmed, with \$10 costs and disbursements.

MCCARDELL, Respondent, v. METROPOLITAN ST. RY. CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Frances M. McCardell against the Metropolitan Street Railway Company. No opinion. Reargument ordered, and case set down for Monday, January 13, 1908.

MCCARDELL, Respondent, v. METROPOLITAN ST. RY. CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Roy L. McCardell against the Metropolitan Street Railway Company. No opinion. Reargument ordered, and case set down for Monday, January 13, 1908.

MCCARTHY, Respondent, v. SCHULTZ, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by George T. McCarthy against Gustave Schultz.

PER CURIAM. Judgment and order affirmed, with costs.

HIRSCHBERG, P. J., not voting.

MCCLURE, PHILLIPS & CO., Respondent, v. HOME LIFE PUB. CO., Appellant. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by McClure, Phillips & Co. against the Home Life Publish-

ing Company. L. Weinschenk, for appellant. C. A. Brodek, for respondent.

PER CURIAM. Judgment affirmed, with costs. Order filed.

HOUGHTON, J., dissents.

MCCRISTAL, Respondent, v. MCENANY et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Ellen McCrystal against Nicholas McEnany and others.

PER CURIAM. Judgment affirmed, with costs.

HIRSCHBERG, P. J., not voting.

McCULLOUGH v. McCREADY et al. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by Joseph J. McCullough against Charles McCreedy and another. No opinion. Motion denied, with \$10 costs. Order filed.

MACDONALD v. DAVIDSON et al. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by Ryland H. Macdonald against John A. Davidson and others. No opinion. Motion granted, with \$10 costs. Order filed.

MCGAHIE, Respondent, v. FAHRENHOLZ, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by William J. McGahie against Sarah E. Fahrenholz. No opinion. Judgment of the Municipal Court affirmed, with costs.

MCGUIRK, Respondent, v. CARSTEN OFFERMAN COAL CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Frank McGuirk against the Carsten Offerman Coal Company. No opinion. Judgment and order of the Municipal Court affirmed, with costs.

McHUGH, Respondent, v. INTERSTATE PAVING CO., Appellant. (Supreme Court, Appellate Division, Second Department. December 5, 1907.) Action by Maria McHugh against the Interstate Paving Company. No opinion. Motion for reargument denied, with \$10 costs. See 106 N. Y. Supp. 165.

McMILLAN, Appellant, v. LEAMAN, Respondent. (Supreme Court, Appellate Division, First Department. December 8, 1907.) Action by John McMillan against Leonard Leaman. A. R. Hager, for appellant. L. H. Beers, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed. See 101 App. Div. 438, 91 N. Y. Supp. 1055.

McNEIL, Appellant, v. LACKAWANNA STEEL CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. December 4, 1907.) Action by Martin McNeil against the Lackawanna Steel Company. No opinion. Judgment and order affirmed, with costs.

McNULTY, Respondent, v. LUDWIG & CO., Appellants. (Supreme Court, Appellate Division, Second Department. November 22, 1907.)

Action by Bernard McNulty against Ludwig & Co. No opinion. Appellants' default opened, on condition that they put the case upon the next calendar of this court, and be ready for argument when the cause is reached, and pay the respondent \$10 costs.

MAHR, Appellant, v. LIVINGSTON, Respondent. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by Caroline S. Mahr against William H. Livingston. A. Thain, for appellant. B. L. Kraus, for respondent. No opinion. Judgment affirmed, with costs. Order filed. See 106 N. Y. Supp. 808.

MANEELY v. CITY OF NEW YORK. (Supreme Court, Appellate Division, First Department. January 17, 1908.) Action by Francis J. Maneely against the city of New York. No opinion. Motion granted, on terms stated in memorandum. Settle order on notice. See 119 App. Div. 376, 105 N. Y. Supp. 976.

MARSHALL v. STARKEY. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by David D. Marshall against William B. Starkey. No opinion. Motion granted, with \$10 costs. Order filed.

MARVIN, Appellant, v. FENTON, Respondent. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by George H. Marvin against Jas. Fenton. No opinion. Judgment affirmed, with costs.

MARX, Respondent, v. NEW YORK CITY RY. CO., Appellant. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Minnie Marx against the New York City Railway Company. B. H. Ames, for appellant. F. Pierce, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

MASSACHUSETTS CHEMICAL CO. v. AUSTIN. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by the Massachusetts Chemical Company against George E. Austin. No opinion. Motion granted, with \$10 costs. Order filed.

MATHES et al., Respondents, v. MCCARTHY, Appellant. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Benjamin C. Mathes and others against Ella C. McCarthy.

PER CURIAM. Judgment and order affirmed, with costs.

WILLIAMS and ROBSON, JJ., dissent.

MATTHEWS, Respondent, v. HOFFMEISTER, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Samuel L. Matthews against Alfred Hoffmeister.

PER CURIAM. Plaintiff does not ask for specific performance. Order reversed, with \$10 costs and disbursements, and motion granted, with costs, upon the authority of Klim v. Sachs, 102 App. Div. 44, 92 N. Y. Supp. 107, and

Krainin v. Coffey, 119 App. Div. 516, 104 N. Y. Supp. 174.

MATTISON, Respondent, v. MATTISON, Appellant (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by Richard V. Mattison, Jr., against Agnes C. Mattison. E. Hymes, for appellant. E. K. Jones, for respondent. No opinion. Order modified, as stated in order, and, as modified, affirmed, with \$10 costs and disbursements to the appellant. Order filed.

In re MAYOR, ETC., OF CITY OF NEW YORK. In re **AMERICAN ICE CO.** (Supreme Court, Appellate Division, First Department. January 10, 1908.) In the matter of the mayor, etc., of the city of New York. In the matter of the American Ice Company. No opinion. Motion for leave to appeal to Court of Appeals granted, and question certified. Order filed.

M. E. BLAZIER MFG. CO., Respondent, v. DELAWARE, L. & W. R. CO., Appellant (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by the M. E. Blazier Manufacturing Company against the Delaware, Lackawanna & Western Railroad Company. No opinion. Judgment affirmed, with costs.

MECHANICS' & TRADERS' BANK, Appellant, v. STETTHEIMER, Respondent (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by the Mechanics' & Traders' Bank against Ludwig Stetthelmer. C. Strauss, for appellant. S. H. Guggenheimer, for respondent.

PER CURIAM. Judgment and order affirmed, with costs on opinion in 116 App. Div. 198, 101 N. Y. Supp. 513. Order filed.

McLAUGHLIN, J., dissents, on memorandum on former appeal.

MEEKER, Respondent, v. TOWN OF BOONVILLE, Appellant (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by William H. Meeker against the town of Boonville.

PER CURIAM. Judgment and order reversed, and new trial ordered, with costs to the appellant to abide the event. *Held* that as matter of law upon the evidence the highway commissioner was not guilty of negligence, and that the verdict of the jury that the plaintiff was free from contributory negligence was contrary to and against the weight of the evidence.

SPRING, J., votes for reversal on the ground that the verdict of the jury was contrary to and against the weight of the evidence on both questions.

MEIMANN, Respondent, v. LE BOWSKI, Appellant (Supreme Court, Appellate Term. November 29, 1907.) Appeal from Municipal Court, Borough of Manhattan, Tenth District. Action by Charles Meimann against Jacob I. Le Bowski. From a judgment for plaintiff, defendant appeals. Reversed, and new trial or-

dered. Henry Fluegelman, for appellant. I. Henry Harris, for respondent.

PER CURIAM. This action is predicated upon a verified complaint setting forth in substance that the defendant received from one Nosser the sum of \$110, which the defendant promised to repay to him, and that before this action had been commenced he had duly assigned the claim for value to the plaintiff. The plaintiff had a judgment for the sum of \$71.70 damages, besides costs. Neither the existence of any debt nor the assignment of any claim was shown upon the trial. The judgment rendered is without evidence to support it. Judgment reversed, with costs, and new trial ordered.

MENDELSON, Respondent, v. FELDMAN et al., Appellants (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Abraham Mendelson against Max Feldman and others. No opinion. Judgment and order unanimously affirmed, with costs.

MEXICO ONYX QUARRY CO. v. KELLEY. (Supreme Court, Appellate Division, First Department. January 17, 1908.) Action by the Mexico Onyx Quarry Company against David J. Kelley. No opinion. Motion denied, without costs. Order filed.

MILLER, Respondent, v. JACOB et al., Appellants (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Jacob G. Miller against Charles Jacob and another.

PER CURIAM. Judgment and order affirmed, with costs.

HIRSCHBERG, P. J., not voting.

MOELLHAUSEN, Appellant, v. LIPSCHITZ, Respondent (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Rene Moellhausen against Samuel Lipschitz.

PER CURIAM. This is a motion to vacate a judgment in the Municipal Court of the city of New York presided over by Justice Rosenthal, for the reason that the court stenographer who took the testimony, John Norton, is permanently too ill to write out his notes, and that his notes were so badly taken that neither himself nor any one else can accurately read them. We cannot vacate the judgment for such a reason. It is the duty of the justice to make up a case as best he can and he should not neglect that duty. This failure to produce the stenographer's minutes in this same court has now persisted for more than a year and a half, as appears by motions to dismiss appeals made to this court, and if further persisted in we shall feel it our duty to appoint a referee to take proof of the causes of these delays. Let the attorney for the appellant apply to the justice to make a return here and if he neglects it for five days let the matter be brought to our attention.

MONAHAN, Respondent, v. THOMPSON-STARRETT CO., Appellant, et al. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Michael Mona-

han against the Thompson-Starrett Company, impleaded with the Wells & Newton Company.

PER CURIAM. Judgment and order affirmed, with costs.

HIRSCHBERG, P. J., not voting.

MORLEY v. CASTOR. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Edward Morley against George A. Castor. No opinion. Motion granted. Settle order on notice.

MORRISON v. ANDREWS. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by Lewis J. Morrison against Edward L. Andrews. No opinion. Motion dismissed. Order filed.

MOSES v. BAUERDORF et al. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Raphael J. Moses against Charles F. Bauerdorf and another. H. M. J. Wood, for plaintiff. R. E. Deyo, for defendants. No opinion. Exceptions overruled, and motion for new trial denied, with costs. Settle order on notice.

MOTT, Respondent, v. COLLIN, Appellant. (Supreme Court, Appellate Division, Fourth Department. December 4, 1907.) Action by Charles Mott against Charles L. Collin.

PER CURIAM. Judgment and order reversed, and new trial ordered, with costs to the appellant to abide event. Held that the court committed reversible error in refusing to charge, as requested by defendant's counsel, in effect that if the dogs had at any time chased and worried sheep they had no value.

KRUSE, J., dissents.

MOTT, Respondent, v. MOTT, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Augustus Mott against Katherine S. Mott. No opinion. Order affirmed, without costs.

In re MULIERI. (Supreme Court, Appellate Division. First Department. December 6, 1907.) In the matter of Giuseppe A. Mulieri. No opinion. Reference ordered. Settle order on notice.

MULLIN, Respondent, v. NOLAN, Appellant. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Action by Mary E. Mullin, as administratrix, etc., of John P. Mullin, deceased, against Patrick Nolan. No opinion. Judgment unanimously affirmed, with costs.

MULSTAY v. CARLIN. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Eugene J. Mulstay against Patrick J. Carlin. No opinion. Motion granted, with \$10 costs. Order filed.

MUNRO et al., Respondents, v. BROOKLYN ICE SKATING CO., Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Henrietta E. Munro and others against the Brooklyn Ice

Skating Company. No opinion. Judgment of the Municipal Court affirmed by default, with costs.

MURRAY HILL IRON WORKS CO., Respondent, v. HANOVER THEATER CO. et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by the Murray Hill Iron Works Company against the Hanover Theater Company and others.

PER CURIAM. Judgment affirmed, with costs.

HIRSCHBERG, P. J., not voting.

NADLER et al., Appellants, v. GORDON et al., Respondents. (Actions Nos. 1 & 2.) (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Actions by Bernard Nadler and another against Morris Gordon and another. No opinions. Judgments of the Municipal Court affirmed, with costs.

NEARY, Appellant, v. CITIZENS' R. LIGHT & POWER CO., Respondent. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Sarah Neary, as administratrix of Michael Neary, deceased, against the Citizens' Railroad, Light & Power Company.

PER CURIAM. Order affirmed, with costs. See 110 App. Div. 769, 97 N. Y. Supp. 420.

HIRSCHBERG, P. J., not voting.

NESBIT et al., Respondents, v. BRAKER, Appellant. (Supreme Court, Appellate Division, First Department. January 10, 1908.) Appeal from Special Term. Action by David M. Nesbit and another against Henry J. Braker. Judgment for plaintiffs, and defendant appeals. Affirmed. Anson M. Beard, for appellant. Frank M. Avery, for respondents.

PER CURIAM. Judgment affirmed, with costs.

McLAUGHLIN, J. (dissenting). I am unable to agree with the other members of the court that the judgment, in so far as it disallows the first counterclaim pleaded, should be affirmed. There have been two trials of the action. At the first trial this counterclaim was disallowed, but on appeal the judgment was reversed as against the evidence and a new trial ordered Nesbit v. Braker, 104 App. Div. 393, 93 N. Y. Supp. 856. Mr. Justice Hatch, in delivering the opinion for a majority of the court, referring to this counterclaim, said: "Aside from mere oral proof, however, stand certain physical conditions which are much more important and satisfactory in the establishment of facts than oral statements can possibly be. All of the doors cracked and checked and otherwise fell apart in a uniform manner. There was no difference in them, save in slight degree. It is an affront to common sense to conclude upon such facts that each door absorbed the same amount of moisture at the same time, and was subjected to the same amount of heat at the same time; and yet such must be the conclusion if we attribute the condition of these doors to the absorption of moisture and the application

of heat. The fact that they all cracked alike is controlling evidence that the same infirmity practically existed in each door, and this result could only be obtained by the same kind of a defect in each. Manifestly such condition could not be produced by the accidental absorption of moisture. Some of the doors had not even been placed where dampness could be absorbed, assuming that others might have been exposed thereto. The action of heat and moisture accidentally received or applied does not manifest itself in this uniform way. So that not only does the oral testimony in this case predominate in favor of the defendant's contention, but the physical conditions are conclusive of it. And when this is coupled with the fact that the burden of showing performance of the contract rested upon the plaintiffs, and that substantial performance only was found by the court, it is clear that the plaintiffs failed to establish facts authorizing a recovery for the doors and panels." The evidence at the second trial, bearing on this subject, was substantially the same in all respects as that offered on the former trial. This fact is not disputed. It was the duty of the learned trial justice, therefore, to have given effect to the decision of this court, instead of ignoring it. The evidence was the same as it was on the first trial, and therefore, our former decision was not only binding, but controlling, on the second trial. That decision was deliberately made. It is not claimed that any fact was overlooked or that a rule of law was erroneously applied. The orderly administration of justice requires that the decision of an appellate court shall be followed by the trial court. It also requires the appellate court to follow its own decisions, unless it is made to appear that the former decision was erroneously made, either upon the facts or the law. The fact that the personnel of the court has changed since the former decision was made is no reason whatever why such former decision should not be followed. I think the judgment appealed from, so far as it relates to this counterclaim, should be reversed, and a new trial ordered, with costs to appellant to abide event.

NEUBARTH, Appellant, v. NEW YORK CENT. & H. R. R. CO., Respondent. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by William R. Neubarth against the New York Central & Hudson River Railroad Company. S. Sultan, for appellant. R. A. Kutschback, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

In re NEWCOMB'S ESTATE. (Supreme Court, Appellate Division, First Department. December 20, 1907.) In the matter of Josephine L. Newcomb, deceased. No opinion. Decree affirmed, with costs. Order filed.

NISSEN, Respondent, v. LANGAN, Appellant. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by John Nissen against Joseph Langan. A. G. Loomis, for appellant. C. Fischer, for respondent. No opinion. Judgment affirmed, with

costs, with leave to defendant to withdraw demurrer and to answer on payment of costs. Order filed.

NIXSON, v. REILLY. (Supreme Court, Appellate Term. December 12, 1907.) Appeal from Municipal Court, Borough of Manhattan, Fourteenth District. Action by Ralph L. Nixon against John J. Reilly. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered. R. W. Keene, for appellant. Breen Bros., for respondent.

PER CURIAM. This action is brought to recover a balance due for work, labor, and services in the installation of an elevator. The agreement was in writing, and by its terms the plaintiff guaranteed its operation for a year. The defendant produced evidence tending to show that the elevator was not properly installed and was constantly out of repair, that the plaintiff failed to make the necessary repairs, and that the defendant did so at his own cost and expense. The trial court found that the elevator was accepted by the defendant and that there was no legal evidence that the sums expended by him in making repairs within the year were the fair and reasonable value of such repairs. We are of the opinion, after a careful review of the evidence, that the ends of justice will be best subserved by a new trial, when all the facts may be properly placed before the court. Judgment reversed, and new trial ordered, with costs to abide the event.

In re NORTHAM. (Supreme Court, Appellate Division, Fourth Department. December 4, 1907.) In the matter of the general assignment for the benefit of creditors of Wallace G. Northam to Lewis Northam. No opinion. Motion for leave to appeal to the Court of Appeals granted, and questions to be reviewed certified.

NORTON et al., Respondents, v. KAIN, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Samuel J. L. Norton and another against Louis Kain, sued as Louis Kane. No opinion. Motion for reargument denied, with costs. See 106 N. Y. Supp. 129.

NOVITZ, Respondent, v. LEVINSON, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Morris Novitz against Joseph Levinson. No opinion. Judgment of the Municipal Court affirmed by default, with costs.

O'GRADY, Respondent, v. McDONOUGH, Appellant. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Action by Cornelius E. O'Grady against Patrick H. McDonough. No opinion. Judgment and order affirmed, with costs.

In re O'KEEFE. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) In the matter of the application of James Bernard O'Keefe for admission to the bar. No opinion. Application granted, and order signed.

OLSON et al., Appellants, v. MILES, Respondent. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by John Olson and another against Laura M. Miles. No opinion. Judgment and orders affirmed, with costs.

OPPENHEIM v. THANASOULI. (Supreme Court, Appellate Division, First Department. December 8, 1907.) Action by William Oppenheim against A. Thanasouli. No opinion. Motion granted, without costs. Settle order on notice.

OPPENHEIMER, Respondent, v. ABRAHAM, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Elias Oppenheimer against Albert Abraham. No opinion. Judgment and order unanimously affirmed, with costs.

OPPENHEIMER, Respondent, v. ABRAHAM, Appellant. (Supreme Court, Appellate Division, Second Department. December 8, 1907.) Action by Elias Oppenheimer against Albert Abraham. No opinion. Motion denied.

O'REILLY, Appellant, v. NEW YORK LIFE INS. CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. December 6, 1907.) Action by Denis T. O'Reilly against the New York Life Insurance Company. No opinion. Judgment affirmed, with costs.

O'SHEA et al., Respondents, v. MORITZ, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Walter L. O'Shea and another against Isaac Moritz. No opinion. Motion to require Justice Rosenthal to make a return on appeal granted. See memorandum in Moellhausen v. Lipschitz (filed herewith) 107 N. Y. Supp. 1137.

PARSONS et al., Appellants, v. GARDNER et al., Respondents. (Supreme Court, Appellate Division, Fourth Department. December 6, 1907.) Action by Henry H. Parsons and another, as receivers, etc., against William H. Gardner and others. No opinion. Motion for leave to appeal to Court of Appeals denied, with \$10 costs.

PATURZO, Respondent, v. VERONE et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Antonio Paturzo against Matteo Verone and another. No opinion. Judgment of the Municipal Court affirmed, with costs.

PAULUS, Respondent, v. HORTON, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by John J. Paulus against George K. Horton. No opinion. Judgment of the County Court of Dutchess county affirmed, without costs.

PECK v. PECK. (Supreme Court, Appellate Division, First Department. January 17,

1908.) Action by Samuel W. Peck against Josephine Peck. No opinion. Motion denied, with \$10 costs. Order filed.

PEELER, Respondent, v. INTERNATIONAL AL RY. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Mary Peeler against the International Railway Company.

PER CURIAM. Order reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs to abide the event.

ROBSON, J., dissents.

PEOPLE v. ACKRON. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Proceedings by the people of the state of New York against Charles E. Ackron. No opinion. Motion denied, on condition that appellant be ready for February term. Order filed.

PEOPLE, Respondent, v. CHRISTIAN, Appellant. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Appeal from Court of Special Sessions. Eugene Christian was convicted of unlawfully practicing medicine, and appeals. Reversed. Gardenheier & Wetmore (Samuel M. Gardenheier of counsel), for appellant. Wm. Travers Jerome, Dist. Atty. (Robert S. Johnstone, of counsel), for respondent.

PER CURIAM. The information accused the defendant of the crime of practicing medicine without lawful authorization and registration. We have carefully examined the record in this case, and have reached the conclusion that upon the facts presented the defendant had not committed the crime charged. In *People v. Allcutt*, 117 App. Div. 548, 102 N. Y. Supp. 678 (affirmed 189 N. Y. —, 81 N. E. 1171), this court said: "It may be difficult by a precise definition to draw the line between where nursing ends and the practice of medicine begins, and the court should not attempt, in construing this statute, to lay down in any case a hard and fast rule upon the subject, as the courts have never undertaken to mark the limits of the police power of the state or to precisely define what constitutes fraud. What the courts have done is to say that given legislation was or was not within the limits of the police power or that certain actions were or were not fraudulent." We thereupon proceeded to review all of the facts in that case, and drew the conclusion therefrom that Allcutt came within the purview of the statute prohibiting the practice of medicine without being lawfully authorized and registered, and sustained the conviction. In the case at bar the learned district attorney has collated certain of the facts which were similar to those presented in the Allcutt Case, and upon them urges that the judgment should be affirmed. But there were other facts of great importance to the conclusion reached in the Allcutt Case not present here. It would serve no useful purpose to set forth the evidence, because, as we have said, the court declines to lay down a hard and fast rule in such cases. As upon the whole case we find that no crime was committed and that

the defendant was improperly convicted, the judgment appealed from should be reversed.

PEOPLE v. HENRY. (Supreme Court, Appellate Division, First Department. December 3, 1907.) Proceedings by the people of the state of New York against Walter Henry. No opinion. Motion denied, on condition that appellant be ready for January term. Order filed.

PEOPLE v. JACKSON. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Proceedings by the people of the state of New York against Cornelius A. Jackson. No opinion. Motion denied, on condition that appellant be ready for February term. Order filed.

PEOPLE, Respondent, v. KRONENBERG, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Proceedings by the people of the state of New York against Herman Kronenberg. No opinion. Judgment of the Court of Special Sessions affirmed.

PEOPLE, Respondent, v. NASH et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. December 4, 1907.) Proceedings by the people of the state of New York against William G. Nash and others. No opinion. Judgment of conviction affirmed.

PEOPLE, Appellant, v. NASH, Respondent. (Supreme Court, Appellate Division, Fourth Department. December 4, 1907.) Proceedings by the people of the state of New York against William Nash.

PER CURIAM. Judgment and order affirmed, with costs.

SPRING, J., dissents, upon the ground that the verdict was contrary to and against the weight of the evidence.

PEOPLE v. SHEEHAN. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Proceedings by the people of the state of New York against William Sheehan. No opinion. Motion granted. Order filed.

PEOPLE v. SMITH. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Proceedings by the people of the state of New York against Frederick Smith. No opinion. Motion granted. Order filed.

PEOPLE v. TRINGALI. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Proceedings by the people of the state of New York against Gaetano Tringali. No opinion. Motion granted. Order filed.

PEOPLE v. WADE. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Proceedings by the people of the state of New York against Henry R. Wade. No opinion. Motion granted. Order filed.

PEOPLE, Respondent, v. WILLIAMS, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Pro-

ceedings by the people of the state of New York against Bertha Williams. No opinion. Motion denied, on condition that defendant perfect her appeal and put her case at the foot of the present calendar, to be ready for argument when reached, or if moved by the district attorney after two weeks from the date of this order.

PEOPLE v. ZEIS. (Supreme Court, Appellate Division, First Department. January 17, 1908.) Proceedings by the people of the state of New York against Tillie Zeis. No opinion. Motion granted. Order filed.

PEOPLE ex rel. BAUM v. BUTLER, Com'r. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Proceedings by the people of the state of New York, on the relation by Joseph Baum, against Edmond J. Butler, commissioner. No opinion. Motion denied. Order filed.

PEOPLE ex rel. DELETT, Appellant, v. BOARD OF HEALTH OF CITY OF NEW YORK, Respondent. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Proceedings by the people of the state of New York, on the relation of Augustus R. Dellett, against the board of health of city of New York. E. S. Griffing, for appellant. T. Connolly, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed. See 106 N. Y. Supp. 923.

PEOPLE ex rel. ELIAS BREWING CO. v. GASS, Register. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Proceedings by the people of the state of New York, on the relation of the Elias Brewing Company, against Frank Gass, register. No opinion. Motion granted. Settle order on notice.

PEOPLE ex rel. FLYNN v. BINGHAM, Com'r, Respondent. (Supreme Court, Appellate Division, First Department. January 10, 1908.) Proceedings by the people of the state of New York, on the relation of William J. Flynn, against Theodore A. Bingham, as commissioner. M. Weill, for relator. T. Connolly, for respondent. No opinion. Writ dismissed, and proceedings affirmed, with \$50 costs and disbursements. Order filed.

PEOPLE ex rel. MANHATTAN RY. CO., Appellant, v. WELLS et al., Respondents. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Proceedings by the people of the state of New York, on the relation of the Manhattan Railway Company, against James L. Wells and others. J. T. Davies, for appellant. C. A. Peters, for respondents. No opinion. Order affirmed, with costs and disbursements. Order filed.

PEOPLE ex rel. MORAN v. SNIFFEN et al. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Proceedings by the people of the state of New York, on the relation of James H. Moran, against Elliott H. Sniffen and others, as inspectors of election in and for the Fourth Ward of the village of

White Plains, and Peter Paulding, as clerk of the village of White Plains. No opinion. There being no apparent reason for the decision of this appeal out of its order, it will be heard on reargument January 6, 1908, so that it may be decided with the other appeals in the same matter to be heard on that day.

PEOPLE ex rel. PETERS, Respondent, v. ADAM et al., Appellants (two cases). (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Proceedings by the people of the state of New York, on the relation of Edward D. Peters, against Robert B. Adam and others, constituting the civil service commission of the city of Buffalo. No opinion. Order affirmed, with costs, on opinion of WOODWARD, J., delivered at Special Term. 106 N. Y. Supp. 158.

PEOPLE ex rel. REITH v. HAYES, Fire Com'r. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Proceedings by the people of the state of New York, on the relation of Charles Reith, against Nicholas J. Hayes, as fire commissioner, etc. No opinion. Reargument ordered, and case set down for January 13, 1908.

PHILLIPS, Respondent, v. MAHLER, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Frederick Phillips against Charles Mahler. No opinion. Judgment and order of the County Court of Queens county unanimously affirmed, with costs.

POEL et al., Respondents, v. ARANA et al., Appellants. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Frank Poel and others, copartners, etc., against Julio C. Arana and others, copartners, etc. No opinion. Judgment and order unanimously affirmed, with costs.

POMERANZ, Appellant, v. P. M. FLETCHER CO., Respondent. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Victor E. Pomeranz against the P. M. Fletcher Company. No opinion. Order of the Municipal Court unanimously affirmed, with costs.

POST, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. December 5, 1907.) Action by Richard T. Post against the Brooklyn Heights Railroad Company. No opinion. Motion denied, without costs.

POST, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. November 29, 1907.) Action by Richard T. Post against the Brooklyn Heights Railroad Company.

PER CURIAM. Judgment and order affirmed, with costs.

HIRSCHBERG, P. J., not voting.

POST v. INGRAHAM. (Supreme Court, Appellate Division, First Department. January 17, 1908.) Action by George W. Post, Jr., against Henry C. M. Ingraham. No opinion. Motion for leave to go to Court of Appeals granted, and question certified. Order filed.

POTTS, Respondent, v. McCLINTIC-MARSHALL CONST. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. December 6, 1907.) Action by Lulu M. Potts, as administratrix, etc., against the McClintic-Marshall Construction Company. No opinion. Judgment and order affirmed, with costs.

PRATIE et al., Respondents, v. BUTLER et al., Appellants. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by William Pratie and another against James J. Butler and others. M. Meyer, for appellants. M. O. Katz, for respondents. No opinion. Judgment and order affirmed, with costs. Order filed.

PRIOLO v. SOUTHARD. (Supreme Court, Appellate Division, First Department. January 17, 1908.) Action by Giuseppe Priolo against Charles H. Southard. No opinion. Order reversed.

In re PRITCHETT. (Supreme Court, Appellate Division, First Department. October 18, 1907.) In the matter of Thomas J. Pritchett. No opinion. Respondent to be heard on third Friday of present term.

RAHM, Appellant, v. NEW YORK CENT. & H. R. CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. December 4, 1907.) Action by Theresa Rahm, as administratrix, etc., against the New York Central & Hudson River Railroad Company. No opinion. Motion for leave to appeal to the Court of Appeals denied, with \$10 costs.

RAINO, Appellant, v. CAMARDELLA et al., Respondents. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Action by Annie Raino, as administratrix, etc., of George Raino, deceased, against James V. Camardella and another, etc.

PER CURIAM. Judgment affirmed, with costs.

HIRSCHBERG, P. J., not voting.

In re RANDEL. (Supreme Court, Appellate Division, First Department. January 17, 1908.) In the matter of William F. Randel. No opinion. Application denied.

REEHIL, Respondent, v. FRAAS, Appellant. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Action by Edward Reehil against John Fraas.

PER CURIAM. Order affirmed, with costs.

HIRSCHBERG, P. J., not voting.

REILLY, Respondent, v. STEINHART, Appellant. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Ac-

tion by Hugh J. Reilly against Frank Steinart. D. T. Davis, for appellant. H. Wetherorn, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

RESNICOFF, Respondent, v. **BLICK**, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Max Resnicoff against Samuel Blick. No opinion. Motion denied, with \$10 costs.

In re **REUBEL**. (Supreme Court, Appellate Division, First Department. December 20, 1907.) In the matter of Henry Reubel, as administrator. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed. See 103 N. Y. Supp. 804.

REYNOLDS, Respondent, v. **BROOKLYN HEIGHTS R. CO.**, Appellant. (No. 2.) (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Patrick J. Reynolds against the Brooklyn Heights Railroad Company. No opinion. Judgment of the Municipal Court unanimously affirmed, with costs.

RICH, Appellant, v. **BROOKLYN, Q. C. & S. R. CO.**, Respondent. (Supreme Court, Appellate Division, Second Department. November 29, 1907.) Action by David Rich against the Brooklyn, Queens County & Suburban Railroad Company. No opinion. Judgment of the Municipal Court affirmed by default, with costs.

RICHARD DEEVES & SON v. MANHATTAN LIFE INS. CO. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Richard Deeves & Son against the Manhattan Life Insurance Company. No opinion. Motion denied, with \$10 costs. Order filed.

RICHARDS Respondent, v. **CANDEE & KREKELER CO.**, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Alfred Richards against the Candee & Krekeler Company.

PER CURIAM. Judgment of the Municipal Court affirmed, with costs.

HOOVER, J., dissents.

RICHBURG, Respondent, v. **RICHBURG**, Appellant. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Jennie D. Richburg against Frederick Richburg.

PER CURIAM. Judgment affirmed, with costs. Held that a judgment of divorce was properly awarded, and, while the amount of alimony fixed by the decree seems large, in view of the property of the defendant and his ability to earn money, still he has his remedy, under the provisions of the Code of Civil Procedure, to annul, modify, or vary the decree in that respect by motion at Special Term, where the Special Term may, if he shows a disposition to pay what he fairly can, afford him such relief as may seem proper.

RIDGELY, Respondent, v. **BERGSTROM** et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Albert N. Ridgely against Oscar B. Bergstrom and another. No opinion. Judgment and order affirmed, with costs.

RIESENBERGER et al., Respondents, v. **RASMUSSEN** et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Irving Riesenberger and another against Robert T. Rasmussen and another. No opinion. Judgment of the Municipal Court affirmed, with costs.

ROBINSON, Appellant, v. **UNION RY. CO. OF NEW YORK CITY**, Respondent. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by William Robinson against the Union Railway Company of New York City. No opinion. Motion for leave to appeal to the Court of Appeals denied.

ROCK, Appellant, v. **UNION RY. CO. OF NEW YORK**, Respondent. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by James A. Rock against the Union Railway Company of New York. A. A. Colnon, for appellant. B. H. Ames, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

ROESLER, Respondent, v. **SHILLING**, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Bernard Roesler against George B. Shilling. No opinion. Judgment of the Municipal Court affirmed, with costs.

ROGERS, Respondent, v. **COLEMAN** et al., Appellants. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by Charles P. Rogers against Nathan Coleman and another. F. M. Avery, for appellants. R. Gibson, Jr., for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

ROMANO, Respondent, v. **CONCORDIA FIRE INS. CO.**, Appellant. (Supreme Court, Appellate Division, Second Department. November 29, 1907.) Action by Salvatore Romano against the Concordia Fire Insurance Company. No opinion. Motion granted, without costs.

ROMEO, Respondent, v. **SHOLL**, Appellant, et al. (Supreme Court, Appellate Division, First Department. January 10, 1908.) Action by Francis Romeo against Edward P. Sholl, impleaded. F. Grady, for appellant. R. C. Beatty, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

RUMPF et al. v. **BUHLER** et al. (Supreme Court, Appellate Division, First Department. January 17, 1908.) Action by William Rumpf and another against Emma Buhler and others. No opinion. Motion granted, with \$10 costs. Order filed.

RUSSELL HARDWARE & IMPLEMENT MFG. CO., Respondent, v. **UTICA DROP FORGE & TOOL CO.**, Appellant. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by the Russell Hardware & Implement Manufacturing Company against the Utica Drop Forge & Tool Company. No opinion. Judgment affirmed, with costs. See 112 App. Div. 703, 98 N. Y. Supp. 777.

SALEEBY, Respondent, v. **NUSSER et al.**, Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Samuel Saleeby against Joseph Nussner and another. No opinion. Judgment and order of the Municipal Court affirmed, with costs.

SAMULSKY, Respondent, v. **RAMAPO FOUNDRY & WHEEL WORKS**, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Joseph Samulsky against the Ramapo Foundry & Wheel Works. No opinion. Order affirmed, with \$10 costs and disbursements.

SAPHIR, Respondent, v. **TERRY & TENCH CO.**, Appellant. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by Rika Saphir against the Terry & Tench Company. O. N. Brown, for appellant. J. P. Donellan, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

SOHLANSKY, Respondent, v. **HARRISON et al.**, appellants. (Supreme Court, Appellate Term. December 20, 1907.) Appeal from Municipal Court, Borough of the Bronx, First District. Action by Moses Schlansky against Pinucus Harrison and Barney Somergrad. Judgment for plaintiff, and defendants appeal. Judgment as to Somergrad reversed, and as to Harrison affirmed. Meyer London, for appellants. Willoughby B. Dobbs, for respondent.

PER CURIAM. This action was brought to recover for broker's commissions, claimed to have been earned by the plaintiff in selling property owned by the defendants. There is no evidence whatever to connect the defendant Somergrad with the ownership of the property sold, or the employment of the plaintiff to sell the same. As to the employment of the plaintiff by the defendant Harrison there is no dispute, and as to whether or not his efforts resulted in making the sale there was sufficient testimony upon which to find that he was the procuring cause, and therefore the judgment against Harrison should be affirmed. Judgment as to the defendant Somergrad reversed, and complaint dismissed, with costs. Judgment as to defendant Harrison affirmed, with costs.

SCHLESINGER, Respondent, v. **BORGENICHT et al.**, Appellants. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Leo Schlesinger, as receiver of the Federal Bank of New York, against Louis Borgenicht and another. No

opinion. Order affirmed, with \$10 costs and disbursements.

SCHLESINGER, Respondent, v. **BORGENICHT et al.**, Appellants. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Leo Schlesinger, as receiver of the Federal Bank of New York, against Louis Borgenicht and another. No opinion. Motion denied, without costs.

SCHMIDT, Respondent, v. **JEWETT et al.**, Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Melina P. Schmidt, as executrix, etc., against Elise M. Jewett and others. No opinion. Motion granted, without costs.

SCHNEIDER v. SCHNEIDER. (Supreme Court, Appellate Division, First Department. January 17, 1908.) Action by Gottfried Schneider against Anna M. Schneider. No opinion. Motion denied. Settle order on notice. See 107 N. Y. Supp. 792.

SCHNITZER, Respondent, v. **PRICE**, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Barnett Schnitzer against Joseph Price. No opinion. Appeal dismissed, without costs.

SCHNITZER, Respondent, v. **PRICE**, Appellant. (Supreme Court, Appellate Division, Second Department. December 5, 1907.) Action by Barnett Schnitzer against Joseph Price. No opinion. Motion denied, without costs.

In re **SCHOOL SITE IN CITY OF NEW YORK**. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) In the matter of acquiring title by the city of New York to premises on the southeasterly corner of Sutter avenue and Grafton street, borough of Brooklyn, duly selected as a site for school purposes. No opinion. Motion granted, and order of reference made to Charles M. Stafford, Esq.

SCHWALENBERG et al., Appellants, v. **DUNN et al.**, Respondents. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Louisa Schwalenberg and others against Margaret M. Dunn and others. No opinion. Judgment affirmed, with costs.

SCOTT, Respondent, v. **INTERNATIONAL PAPER CO.**, Appellant. (Supreme Court, Appellate Division, Fourth Department. December 6, 1907.) Action by William J. Scott against the International Paper Company.

PER CURIAM. It appearing that the justices qualified to sit in this appeal are equally divided and unable to render a decision herein, said appeal is ordered transferred to the Appellate Division of the Third Judicial Department, to be there heard and determined, pursuant to section 231 of the Code of Civil Procedure.

WILLIAMS, J., not sitting.

SCOTT, Respondent, v. SPENCER et al., Appellants. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Alexander J. Scott, as administrator, etc., of Joseph J. Scott, deceased, against Nina Spencer and others.

PER CURIAM. Judgment affirmed, with costs.

HIRSCHBERG, P. J., not voting.

SCUDDER, Respondent, v. KENNAHAN, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Townsend Scudder against John C. Kennahan. No opinion. Interlocutory judgment affirmed, with costs.

SEELEY et al., Respondents, v. OSBORNE, Appellant. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Action by Lewis S. Seeley and another against Dean C. Osborne.

PER CURIAM. Judgment and order affirmed, with costs.

HIRSCHBERG, P. J., not voting.

SEELEY et al., Respondents, v. OSBORNE, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Lewis S. Seeley and another against Dean C. Osborne. No opinion. Motion for reargument denied, with costs.

SEIFFERT, Appellant, v. BUNGER, Respondent. (Supreme Court, Appellate Division, First Department. December 8, 1907.) Action by Herman Seiffert against William Bungler. J. J. Hindes, for appellant. J. E. Ruston, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

SELNER, Appellant, v. HELFSTEIN, Respondent. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Gustave Selner against Max Helfstein. No opinion. Order of the Municipal Court reversed, with \$10 costs and disbursements, and judgment modified, by striking out the provision herein "on the merits," and, as modified, affirmed, without costs.

In re SEXTON. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) In the matter of the application of Michael A. Sexton for admission to the bar. No opinion. Application granted.

SHEEHAN v. MARTIN et al. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Dennis E. Sheehan against Joseph Martin and another. No opinion. Motion denied, with \$10 costs. Order led.

SHEFTMAN, Respondent, v. SCHREIBER, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Aaron Sheftman against Isaac Schreiber. No opinion. Motion denied. See memorandum in Moellhausen v. Lipschitz (filed herewith) 107 N. Y. Supp. 1137.

SHERWOOD, Appellant, v. RULON, Respondent. (Supreme Court, Appellate Division, Second Department. December 6, 1907.) Action by M. Cecilia Sherwood, as trustee, etc., against Carrie M. Rulon.

PER CURIAM. This motion will be disposed of when the appeal comes up for argument.

SIGRETT, Respondent, v. NATIONAL TRADING CO., Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Joseph Siggretto against the National Trading Company. No opinion. Judgment and order affirmed, with costs.

SIMPSON, Respondent, v. McBERTY, Appellant. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by Howard S. Simpson against Frank S. McBerty. S. Davis, for appellant. E. S. Griffling, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

SKELLY, Respondent, v. CATHOLIC WOMEN'S BENEVOLENT LEGION, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by George E. Skelly against the Catholic Women's Benevolent Legion. No opinion. Judgment and order unanimously affirmed, with costs.

SMITH, Respondent, v. HAFKE, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by James H. Smith against Frederick Hafke. No opinion. Judgment affirmed, with costs.

SMITH, Appellant, v. NEW YORK CENT. & H. R. R. CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. December 4, 1907.) Action by Ralph T. Smith, as administrator, etc., against the New York Central & Hudson River Railroad Company.

PER CURIAM. Judgment reversed, and new trial ordered, with costs to appellant to abide event. *Held*, that the case should have been submitted to the jury.

McLENNAN, P. J., dissents.

SOMMERS, Respondent v. BROOKLYN CEDAR WARE WORKS, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Bernard Sommers, by Kate Sommers, his guardian ad litem, suing as a poor person, against the Brooklyn Cedar Ware Works. No opinion. Judgment and order unanimously affirmed, with costs.

SOUVENIR POST CARD CO., Appellant, v. BANGERT, Respondent. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Action by the Souvenir Post Card Company against Louis Bangert. No opinion. Judgment of the Municipal Court affirmed, with costs.

STAEBLER, Respondent, v. TISDALE, Appellant. (Supreme Court, Appellate Division, Second Department. December 5, 1907.) Action by Herman Staebler against Josiah B. Tisdale. No opinion. We think the verdict in this case was clearly against the weight of evidence. Judgment and order of the County Court of Queens county reversed, and new trial ordered, costs to abide the event.

STAPLES, Appellant, v. CORNWALL et al., Respondents. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Oren G. Staples against Andrew C. Cornwall and others. No opinion. Judgment affirmed, with costs. See 114 App. Div. 596, 99 N. Y. Supp. 1009.

STARKMAN, Respondent, v. MARSHALL, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Frank Starkman against Sadie E. Marshall. No opinion. Motion to dismiss appeal denied, provided the appellant pay \$10 costs and file her case within 10 days; otherwise, motion granted, with \$10 costs.

STATE BOARD OF PHARMACY v. GASAU. (Supreme Court, Appellate Division, First Department. January 17, 1908.) Action by the State Board of Pharmacy against Fred Gasau. No opinion. Motion for leave to appeal to Court of Appeals granted. Order filed.

STATE BOARD OF PHARMACY v. MATTHEWS. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by the State Board of Pharmacy against Gardner D. Matthews. No opinion. Motion granted. Order filed.

STATE OF NEW JERSEY, Respondent, v. LIMBURG et al., Appellants. (Supreme Court, Appellate Division, First Department. December 20, 1907.) Action by the state of New Jersey against Herbert R. Limburg and others. H. R. Limburg, for appellants. M. C. Fleming, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed. See 105 N. Y. Supp. 1016.

STATE REALTY CO. v. VILLAUME et al. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by the State Realty Company against Henry Villaume and others. No opinion. Motion denied, with \$10 costs. Order filed.

STAUNTON, Respondent, v. STEYRER, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by May Estelle Staunton against Anthony Steyrer.

PER CURIAM. Order affirmed, with \$10 costs and disbursements.

HIRSCHBERG, P. J., not voting.

STEINMAN v. STEINMAN. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Theresa Steinman against Sigmund B. Steinman. No opinion. Motion granted, with \$10 costs. Order filed.

STEPHENS, Appellant, v. FLAMMER et al., Respondents. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Thomas C. Stephens against John J. Flammer and others. J. E. Carpenter, for appellant. S. Levy, for respondents. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

STEPHENSON et al., Respondents, v. BRUSH, Appellant. (Supreme Court, Appellate Division, Second Department. December 5, 1907.) Action by Theodore A. Stephenson and another against Edward F. Brush. No opinion. Judgment and order affirmed by default, with costs.

STERN v. STERN. (Supreme Court, Appellate Division, First Department. January 17, 1908.) Action by Benjamin Stern against Sara Stern. No opinion. Motion denied, with \$10 costs. Order filed.

STICHT, Appellant, v. BUFFALO CEREAL CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. December 6, 1907.) Action by John Sticht against the Buffalo Cereal Company.

PER CURIAM. Judgment and order affirmed, with costs. See 116 App. Div. 632, 101 N. Y. Supp. 905.

SPRING and KRUSE, JJ., dissent.

STRASBURGER et al., Respondents, v. JANOWITZ, Appellant. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Bessie Strasburger and another against Julius Janowitz. B. D. Eisler, for appellant. C. L. Hoffman, for respondents. No opinion. Judgment affirmed, with costs. Order filed.

STRATTON, Respondent, v. DELAWARE & E. R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by William D. Stratton against the Delaware & Eastern Railroad Company.

PER CURIAM. Order affirmed, with \$10 costs and disbursements.

HIRSCHBERG, P. J., not voting.

STRATTON, Respondent, v. DELAWARE & E. R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. November 29, 1907.) Action by William D. Stratton against the Delaware & Eastern Railroad Company.

PER CURIAM. Order affirmed, with \$10 costs and disbursements.

HIRSCHBERG, P. J., not voting.

STRATTON, Respondent, v. DELAWARE & E. R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by William D. Stratton against the Delaware & Eastern Railroad Company. No opinion. Motion denied, with \$10 costs.

STRAUSS, Appellant, v. STRAUSS, Respondent. (Supreme Court, Appellate Division,

... by Alice K. Strauss against Leo Strauss.
N. Jacobson, for appellant. O. Goldzier, for
respondent. No opinion. Order affirmed, with
10 costs and disbursements. Order filed. See
107 N. Y. Supp. 842.

SWAIN v. PRICE. LOWENBERG v. GERSHEL. CLAUSEN v. VONNOH. PAGE v. ANDELARIA, ETC., CO. BIEN v. FERGUSON. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Actions by Harold Swain against James K. Price, by Max Lowenberg against Abraham Gershel, by William Clausen against Robert W. Vonnoh, by William H. Page against the Candelaria, etc., company, and by Franklin Bien against Julius M. Ferguson. No opinions. Applications for leave to appeal from Appellate Term to Appellate Division denied, with \$10 costs in each case. Orders signed. See 55 Misc. Rep. 220, 105 N. Y. Supp. 102.

SWEENEY v. O'DWYER. (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by John Sweeney against Edward F. O'Dwyer. No opinion. Motion denied, with \$10 costs. Order filed.

SWEENEY v. SWEENEY. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Eugenia E. Sweeney against William Sweeney. No opinion. Motion granted, with \$10 costs. Order filed.

SWEET, Respondent, v. PERKINS et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. December 4, 1907.) Action by Oscar H. Sweet against Charles H. Perkins and others.

PER CURIAM. Judgment and order affirmed, with costs.

McLENNAN, P. J., dissents, upon the grounds stated in the opinion of **NASH, J.,** upon the former appeal in this case, reported in 115 App. Div. 784, 101 N. Y. Supp. 163.

TANNER, Respondent, v. THOMAS KELLS SONS' CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Nellie Tanner, an infant, by Peter Tanner, her guardian ad litem, against Thomas Kells Sons' Company. No opinion. Judgment and order unanimously affirmed, with costs.

TAYLOR, Respondent, v. BROOKLYN, Q. C. & S. R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Action by Henry Taylor against the Brooklyn, Queens County & Suburban Railroad Company.

PER CURIAM. Judgment and order affirmed, with costs.

HIRSCHBERG, P. J., not voting.

TAYLOR, Respondent, v. KREISCHER, Appellant. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Action by Francis B. Taylor, as receiver, etc., against Stephen N. Kreischer. No opinion.

TAYLOR, Respondent, v. LISMAN, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Elizabeth R. Taylor against Lisman, doing business under the name of Anthony A. Lisman & Co. No opinion for leave to appeal to the Court of Appeals.

THEDFORD, Appellant, v. HERBERT, Respondent. (Supreme Court, Appellate Division, First Department. January 10, 1908.) Action by James Thedford against Herbert G. H. Fletcher, for appellant. L. Warren, for respondent. No opinion affirmed, with costs, on opinion of **Herbert, 118 App. Div. 183, 108 N. Y. Supp. 1083.** Order filed.

THEDFORD, Appellant, v. HERBERT, Respondent. (Supreme Court, Appellate Division, First Department. January 10, 1908.) Action by James Thedford against Henry G. H. Fletcher, for appellant. L. Warren, for respondent. No opinion. Order with \$10 costs and disbursements. See 118 App. Div. 181, 102 N. Y. Supp. 1083.

TIFFANY, Respondent, v. ELLIS, Appellant, et al. (Supreme Court, Appellate Division, Fourth Department. December 13, 1907.) Action by Henry C. Tiffany against Ellis, impleaded. No opinion. Leave to appeal to Court of Appeals questions for review to be settled by **LIAMS, J.,** upon two days' notice.

TIMONY, Respondent, v. COBURN, Appellant. (Supreme Court, Appellate Division, Second Department. November 10, 1907.) Action by Anthony Timony against Cord Meyer Company.

PER CURIAM. Judgment of the Court reversed, and new trial ordered, on the ground that the defendant violated the plaintiff.

HOOKE and RICH, JJ., dissent.

TORONTO, Respondent, v. HOUSE, CHURCH & CO., Appellant. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Toronto, as administratrix, against House, Church & Co. L. S. Carrer, for appellant. H. L. Moses, for respondent. Judgment and order affirmed. Order filed.

TREADWELL v. CLARK. (Supreme Court, Appellate Division, First Department. January 17, 1908.) Action by George A. Treadwell against William A. Clark. No opinion granted, on conditions stated in the opinion. Settle order on notice. See 118 App. Div. 493, 100 N. Y. Supp. 1.

TROY, Respondent, v. ACHESON, Appellant. (Supreme Court, Appellate Division, Second Department. December 5, 1907.) Action by Andrew C. Troy against Edward C. Acheson. No opinion. Order reversed on argument, with \$10 costs and disbursements, and motion granted, with \$10 costs.

TULIN, Respondent, v. WEISBERG, Appellant, et al. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by William I. Tulin, as a director of the Virginia Peanut Product Company, against Ben. C. Weisberg, impleaded with another. No opinion. Order affirmed, with \$10 costs and disbursements.

TUTTLE, Respondent, v. LAKE SHORE & M. S. RY. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Catherine Tuttle, as administratrix, etc., against the Lake Shore & Michigan Southern Railway Company. No opinion. Order reversed, without costs, and motion for commission denied, without costs, upon the condition that the defendant on the trial of the action produce the three witnesses, Welsh, Weber, and Sutter, and in case of failure of the defendant so to do the trial shall be suspended for a sufficient length of time to enable the plaintiff to procure the evidence of those witnesses.

TWARDOWSKI, Respondent, v. INTERNATIONAL RY. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Kaiser Twardowski against the International Railway Company. No opinion. Order affirmed, with \$10 costs and disbursements.

TYRRELL, Appellant, v. LONG ISLAND CITY, Respondent (two cases). (Supreme Court, Appellate Division, Second Department. November 28, 1907.) Actions by Edward M. Tyrrell against Long Island City. No opinion. Reargument ordered, and cases set down for Tuesday, December 3, 1907.

TYRRELL, Appellant, v. LONG ISLAND CITY, Respondent (two cases). (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Actions by Edward M. Tyrrell against Long Island City. No opinion. Orders affirmed on reargument, with costs, on the authority of *Burke v. Baker*, 104 App. Div. 26, 93 N. Y. Supp. 215.

TYSON v. BOARD OF EDUCATION. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Frank L. Tyson against the board of education. No opinion. Motion denied, with \$10 costs. Order filed.

UHRLAUB, Respondent, v. REGENSBURG, Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by John C. Uhrlaub against Isaac Regensburg. No opinion. Judgment and orders unanimously affirmed, with costs.

UNION TRANSIT CO., Respondent, v. ERIE R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. December 6, 1907.) Action by the Union Transit Company against the Erie Railroad Company. No opinion. Interlocutory judgment affirmed, with costs, with leave to the defendant plead over upon payment of the costs of demurrer and of this appeal. See 52 Md. Rep. 298, 102 N. Y. Supp. 149.

UNION WINDING CO., Limited, Appellant, v. D. P. WINNE & CO., Respondents. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by the Union Winding Company, Limited, against D. P. Winne & Co. E. W. Drucker, for appellant M. Mackenzie, for respondents. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

UNITED STATES INDEPENDENT TELEPHONE CO., Respondent, v. CENTURY TELEPHONE CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. December 6, 1907.) Action by the United States Independent Telephone Company against the Century Telephone Company. No opinion. Judgment affirmed, with costs.

UNIVERSAL BLDG. & CONST. CO., Appellant, v. WAISMAN et al., Respondents. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by the Universal Building & Construction Company against Morris Waisman and others. M. Schleimer, for appellant. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

VACARO, Respondent, v. POLLAK, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Paolo Vacaro against Markus Pollak. *PER CURIAM*. Judgment and order affirmed, with costs.

HIRSCHBERG, P. J., not voting.

VAN KANNEL DOOR CO. v. W. & J. SLOANE. (Supreme Court, Appellate Division, First Department. January 17, 1908.) Action by the Van Kannel Door Company against W. & J. Sloane. No opinion. Motion denied, without costs. Order filed.

VAN NESS, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Russell Van Ness against the Brooklyn Heights Railroad Company. No opinion. Judgment and orders unanimously affirmed, with costs.

VAN NESS, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. December 5, 1907.) Action by Russell Van Ness against the Brooklyn Heights Railroad Company. No opinion. Motion for reargument denied, with costs.

VARONE, Respondent, v. CLARKE, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Angelo Varone against Audley Clarke. No opinion. Motion to withdraw the appeal granted, on condition that the appellant pay \$10 costs.

VILLAGE OF MEDINA, Respondent, v. RAVES et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by the village of Medina against Burt Graves and others. No opinion. Order affirmed, with \$10 costs and disbursements.

VOUGHT v. BLAINE et al. (Supreme Court, Appellate Division, First Department. January 17, 1908.) Action by Harry H. Vought against James Blaine and another. No opinion. Motion granted, on payment of \$10 costs. Settle order on notice.

WAGNER v. WHITCOMB. (Supreme Court, Appellate Division, First Department. December 18, 1907.) Action by Otto Wagner against James A. Whitcomb. No opinion. Motion granted, with \$10 costs. Order filed.

WAINSTEIN et al., Respondents, v. ROSENBLUTH et al., Appellants. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Abraham Weinstein and another, as administrators, etc., against Mina Rosenbluth and another, impleaded.

PER CURIAM. Judgment of the Municipal Court affirmed, with costs.

HIRSCHBERG, P. J., not voting.

WARNER, Appellant, v. HOLMES, Respondent. (Supreme Court, Appellate Division, Second Department. November 29, 1907.) Action by Ellen E. Warner against Franklin Holmes. No opinion. Judgment affirmed, with costs.

WATSON, Respondent, v. BROOKS, Appellant, et al. (Supreme Court, Appellate Division, Second Department. November 22, 1907.) Action by Alma Grace Watson against William Brooks and others. No opinion. Motion for discontinuance granted, without costs.

WATSON, Respondent, v. HOOVER et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Hiram R. Watson against Margaret Hoover and others.

PER CURIAM. Judgment affirmed, with costs.

WILLIAMS and KRUSE, JJ., dissent, upon the ground that there was an equitable assignment by the deceased to the appellant creditor \$500 of the insurance moneys, held by the

plaintiff as trustee and to which claim.

WEBER, Respondent, v. CREDI Appellant. (Supreme Court, Appellate Division, First Department. December 1907.) Action by Joseph Weber against Office. W. C. Shoup, for appellant for respondent.

PER CURIAM. Judgment affirmed, with leave to defendant to demur and to answer on payment. Order filed. See 108 N. Y. Supp. 5.

LAUGHLIN, J., dissents.

WEBER, Respondent, v. INTERNATIONAL RY. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. November 6, 1907.) Action by Katherine against the International Railway Company. No opinion. Motion for stay granted, payment by the appellant of \$12 within 10 days.

WEBER, Respondent, v. INTERNATIONAL RY. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. November 6, 1907.) Action by Katherine against the International Railway Company. No opinion. Motion to dismiss the appeal unless the appellant pay to the respondent \$10 within 10 days for service of a copy of this order with entry thereof, in which event the dismissal the appeal is denied.

WEBER, Respondent, v. SMITH Appellants. (Supreme Court, Appellate Division, Second Department. November 1907.) Action by Emanuel Weber against Smith and another, impleaded with Condensed Milk Company. No opinion. Motion and order unanimously affirmed, with costs.

WELLS, Appellant, v. WESTINGHOUSE, CHURCH, KERR & CO., Respondents. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Action by Frank E. Wells against Westinghouse, Church, Kerr & Co.

PER CURIAM. Order affirmed, with costs and disbursements.

HIRSCHBERG, P. J., not voting.

WELSH, Respondent, v. MEAD, Appellant. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Action by Nicholas Welsh against Lemoine C. Mead, administratrix, etc., of Josiah Mead.

PER CURIAM. Judgment and order affirmed, with costs.

HIRSCHBERG, P. J., not voting.

WHITE et al., Appellants, v. LOOMIS Respondents. (Supreme Court, Appellate Division, Second Department. December 23, 1907.)

sion, Fourth Department. December 4, 1907.) Action by William N. White and others against Leslie G. Loomis and others.

PER CURIAM. Judgment and orders affirmed, with costs.

ROBSON, J., not voting.

WHITE v. WHITE. (Supreme Court, Appellate Division, First Department. December 8, 1907.) Action by Josephine B. White against Charles H. White. No opinion. Motion granted, with \$10 costs. Order filed.

WHITNEY, Respondent, v. GARSON, Appellant. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Anna Whitney against Moses Garson. No opinion. Judgment affirmed, with costs.

WILLIAM A. THOMAS CO. v. GORDON-HEITZNER CONST. CO. et al. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Action by the William A. Thomas Company against the Gordon-Heitzner Construction Company and others. No opinion. Motion denied, without costs.

WM. K. VOORHEES GRAIN CO., Respondent, v. LLOYD, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by the Wm. K. Voorhees Grain Company against Thomas Lloyd. No opinion. Judgment of the Municipal Court affirmed, with costs.

WILSON v. BLELOCH et al. (Supreme Court, Appellate Division, Second Department. December 23, 1907.) Action by Edward C. Wilson against William A. Bleloch and another. No opinion. Oral argument ordered, and case set down for Tuesday, January 7, 1908.

WILSON, Respondent, v. UTICA GAS & ELECTRIC CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. December 4, 1907.) Action by John Wilson against the Utica Gas & Electric Company. No opinion. Motion for leave to appeal to the Court of Appeals denied, with \$10 costs.

WILSON et al., Respondents, v. WEIDMANN et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Actions by Francis F. Wilson, Jr., and another, against Paul Weidmann and another. No opinion. Judgment affirmed, with costs.

WILSON, Respondent, v. WILSON, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Delia Wilson against Alice Wilson. No opinion. Judgment of the Municipal Court affirmed, with costs.

WINGELS, Respondent, v. BUILDERS PLANING MILL CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Casper Wingels against the Builders' Planing Mill Company. No opinion. Judgment and order reversed, a new trial ordered, with costs to appellant as abide event. Held, that the plaintiff failed to establish actionable negligence against the defendant, and that the proof shows that the accident occurred through his own negligence or that of his co-employees, or the negligence of both.

WOERISHOFFER, Respondent, v. PEOPLES, Appellant. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Anna Woerishoffer against Sydney W. Peoples. F. M. Cothren, for appellant. L. P. Marvin, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed. See 120 App. Div. 319, 105 N. Y. Supp. 506.

WOLF, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by John Wolf against the Brooklyn Heights Railroad Company.

PER CURIAM. Judgment and order affirmed, with costs.

HIRSCHBERG, P. J., not voting. MILLER, J., dissents.

WOODMAN, Appellant, v. BROOKLYN HEIGHTS R. CO., Respondent. (Supreme Court, Appellate Division, Second Department. January 10, 1908.) Action by Aaron J. Woodman against the Brooklyn Heights Railroad Company. No opinion. Order modified, so as to grant a new trial, on condition that the defendant pay the costs and disbursements of the trial; otherwise, motion denied, with \$10 costs and, as thus modified, affirmed, without costs.

WOODRUFF, Appellant, v. SQUIER, Respondent. (Supreme Court, Appellate Division, First Department. January 17, 1908.) Action by Amos E. Woodruff against Elinor W. Squier. A. E. Woodruff, for appellant. W. A. Shepard, for respondent.

PER CURIAM. Order affirmed with \$10 costs and disbursements. Order filed.

HOUGHTON, J., dissents.

WORMSER v. GEHRI. (Supreme Court, Appellate Division, First Department. December 6, 1907.) Action by Samuel Wormser against William Gehri. No opinion. Motion denied, on condition that appellant be ready for January term. Order filed.

WORMSER v. GEHRI. (Supreme Court, Appellate Division, First Department. Janu-

MEMORANDUM DECISIONS.

ary 17, 1908.) Action by Samuel Wormser against William Gehri. No opinion. Motion granted, on terms stated in memorandum. Settle order on notice.

In re WRIGHT. (Supreme Court, Appellate Division, Second Department. November 29, 1907.) In the matter of the accounting of Garrett P. Wright, as executor of Garrett P. Wright, deceased. No opinion. Motion granted, and order amended.

WRIGHT et al. v. WHITLOCK (Supreme Court, Appellate Division, First Department. December 13, 1907.) Action by William Wright and others against Edgar Whitlock, individual-

ly, etc. No opinion. Motion granted. Costs. Order filed.

ZIEMS, Appellant, v. UNITED VILLE CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. November 27, 1907.) Action by Marine the United Vaudeville Company.

PER CURIAM. Interlocutory judgment reversed, with costs, and demurrer overruled, with leave to the defendant to answer within 20 days upon payment of the costs of this appeal. His complaint alleges facts constituting a cause of action on the part of the defendant.

McLENNAN, P. J., and ROBERTSON, J., concur.

END OF CASES IN VOL. 107.

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§ 2. Death of party and revival of action.

*Under Code Civ. Proc. § 758, a cause of action held to have survived notwithstanding the death of a coplaintiff.—Hawkes v. Claffy (Sup.) 334.

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An action for an accounting held to survive the death of plaintiff.—Robinson v. Thomas (Sup.) 1110.

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*Refusal of a motion to consolidate two libel actions held improper.—*Cohalan v. Press Pub. Co.* (Sup.) 962.

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*To charge an owner with negligence in failing to make repairs and prevent injury to an adjoining owner he must have notice, either express or implied, of the existence of the defective condition and a reasonable time thereafter to remedy the same.—*Fitzgerald v. Goldstein* (Sup.) 614.

*An owner of real estate held not negligent in failing to make repairs, and thereby prevent injury to an adjoining owner, within a reasonable time after notice of the defective condition causing the injury.—*Fitzgerald v. Goldstein* (Sup.) 614.

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*Point annotated. See syllabus.

p. 173, c. 297, and Laws 1900, p. 1471, c. 677, art. 11, §§ 197, 199, the State Board of Pharmacy *held* entitled to prosecute a merchant for selling cream of tartar not coming up to the standard of purity defined in section 197.—*State Board of Pharmacy v. Gasau* (Sup.) 409.

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*In an action for injuries inflicted by defendant's horse *held* not necessary to show scienter in order to hold defendant liable for negligence.—*Farber v. Roginsky* (Sup.) 755.

ANNULMENT.

Of marriage, see "Marriage."

*Point annotated. See syllabus.

ANSWER.

In pleading, see "Pleading," § 2.

APOTHECARIES.

See "Druggists."

APPEAL.

See "Certiorari"; "New Trial."

Costs, see "Costs," § 3.

Review of assessment of taxes, see "Taxation,"

§ 1.

Review of criminal prosecutions, see "Criminal Law," § 7.

Review of judgments of municipal courts, see "Courts," § 6.

§ 1. Nature and form of remedy.

*The right of appeal is statutory and can only be taken from such judgment as the statute authorizes.—Jones v. Sabin (Sup.) 508.

§ 2. Nature and grounds of appellate jurisdiction.

*Under Municipal Court Act, Laws 1902, p. 1578, c. 580, § 310, a Municipal Court judgment, though rendered without jurisdiction, is appealable.—Barron v. Feist (Sup.) 494.

§ 3. Decisions reviewable.

*Defendants not served with process are entitled to the relief, against a default, afforded by an appeal.—Moss Realty Co. v. Di Crisci (Sup.) 49.

No appeal having been taken from an order denying defendant's motion to open his default on which judgment had been rendered, an order denying defendant's motion to modify the judgment was not appealable.—Seymour v. Feigl (Sup.) 94.

*Under Const. art. 6, § 9, and Code Civ. Proc. §§ 190, 191, the Court of Appeals held without jurisdiction of an appeal from an order of reversal by the Appellate Division of a judgment and order of the trial court denying a motion for new trial made on the minutes, on grounds other than exceptions or in addition to exceptions, under Code Civ. Proc. § 999, unless it affirmatively appears that the Appellate Division affirmed on the facts, and hence an order of reversal of the Appellate Division of a judgment and an order denying a motion for a new trial, made on all grounds specified in section 999, was not appealable to the Court of Appeals.—Brennan v. City of New York (Sup.) 455.

Code Civ. Proc. § 1209, relating to final judgments dismissing the complaint either before or after trial, construed, and such judgments held final and appealable, within section 1346.—Jones v. Sabin (Sup.) 508.

*A judgment of dismissal authorized by Code Civ. Proc. § 3277, held not appealable within section 1346.—Jones v. Sabin (Sup.) 508.

*Order amending summons by changing date of issue is not appealable, and could only be reviewed by appeal from a judgment under Munic-

ipal Court Act, Laws 1902, p. 1578, c. 580, § 311.—City of New York v. Burns (Sup.) 742.

*An appeal lies from an order denying defendant's motion to open a default, on which plaintiffs have entered a judgment.—Talty v. Strauss (Sup.) 819.

Under Code Civ. Proc. § 1294, a judgment debtor permitting the rendition of a default order adjudging him guilty of contempt for disobeying an order in supplementary proceedings held not entitled to appeal from the judgment.—G. W. Jones Lumber Co. v. Fulton (Sup.) 942.

§ 4. Right of review.

*Where an order denying an application to vacate and set aside a verdict and the judgment entered thereon was entered upon defendant's motion, he cannot appeal therefrom.—Josias v. Nivois (Sup.) 19.

A judgment which has been set aside is not reviewable.—Oppenheimer v. Demuth Glass Mfg. Co. (Sup.) 29.

*A party cannot appeal from an order of vacatur entered on his own motion.—Oppenheimer v. Demuth Glass Mfg. Co. (Sup.) 29.

*Under Code Civ. Proc. § 1296, a person not a party to a proceeding and having no interest therein cannot appeal.—Ziegler v. George Schleicher Co. (Sup.) 85.

*A trustee holding funds in trust for a purchaser from the judgment debtor held "a party aggrieved" within Code Civ. Proc. § 1294, and entitled to appeal from an order in proceedings supplementary to execution directing him to pay the funds to judgment creditors.—Ghersin v. Thuor (Sup.) 195; Blechner v. Same, Id.; Gould v. Same, Id.; Cohen v. Same, Id.

Appeal by plaintiff from order setting aside the verdict held precluded by his counsel receiving and retaining the costs imposed by the order.—Applebaum v. Bonagur (Sup.) 635.

§ 5. Presentation and reservation in lower court of grounds of review.

*Where no exception was taken in the trial court to the charge, it cannot be reviewed.—Edel v. Hillenbrand (Sup.) 30.

*Where no exception is taken to the exclusion of evidence, no question for review is presented.—Gorlitzer v. Levenson (Sup.) 130.

*Where no objection is made in the trial court that the motion for a new trial was not made in time, the question cannot be raised on appeal.—Paster v. Meyer (Sup.) 736.

*A question not raised on the trial will not be considered for the first time on appeal.—National Soc. of United States Daughters of 1812 v. American Surety Co. of New York (Sup.) 820.

*The general rule is that a party who has acquiesced in the trial of an action on a certain theory will not be heard to assert for the first time on appeal that there was error in adopting that theory.—National Soc. of United States Daughters of 1812 v. American Surety Co. of New York (Sup.) 820.

*Point annotated. See syllabus.

*A question not raised in the trial court *held* not reviewable on appeal.—*Israel v. MacDonald* (Sup.) 826.

§ 6. Parties.

*Where an action abated by the death of plaintiff, no appeal could be taken or prosecuted until the action was revived.—*Robinson v. Thomas* (Sup.) 1109.

§ 7. Requisites and proceedings for transfer of cause.

*A notice of appeal from an unappealable judgment *held* not to authorize the review of intermediate orders specified in the notice of appeal.—*Jones v. Sabin* (Sup.) 508.

§ 8. Effect of transfer of cause or proceedings therefor.

*The removal of a judgment to the United States Supreme Court by writ of error, and its affirmance by that court, *held* no bar to a motion for a new trial for newly discovered evidence.—*James McCreery Realty Corp. v. Equitable Nat. Bank of New York* (Sup.) 1080.

§ 9. Supersedeas or stay of proceedings.

Under Code Civ. Proc. § 1310, an appeal to the Court of Appeals from an order of the Appellate Division directing the board of railroad commissioners to issue a certificate of public convenience and necessity, pursuant to Railroad Law, Laws 1892, p. 1395, c. 676, § 59, *held* to operate as a stay, on service and filing of a notice of appeal and the giving of the undertaking required by section 1326.—*Erie R. Co. v. Rochester-Corning-Elmira Traction Co.* (Sup.) 940.

§ 10. Record and proceedings not in record.

Where, on appeal from two judgments, in the Municipal Court, the minutes are transposed, the returns must be sent back to the Municipal Court for correction; the Appellate Term having no power to change them.—*Wilke v. New York City Ry. Co.* (Sup.) 8.

*Where a paper admitted in evidence and marked as an exhibit is not attached to the return on appeal, and the case cannot be determined without it, the return will be remitted to the files of the court.—*Golstein v. Korol* (Sup.) 27.

*The exclusion of papers offered in evidence will not be reviewed where such papers were not marked for identification and printed in the record so that their relation to the issue in the action could be ascertained.—*Gorlitzer v. Levenson* (Sup.) 130.

*The court on appeal *held* not entitled to consider the question whether a seller elected a particular remedy for the buyer's breach of an executory contract of sale.—*Isaacs v. Terry & Tench Co.* (Sup.) 136.

Defendants *held* entitled to have certain colloquy between the court and counsel on the trial appear in the case on appeal.—*Moroney v. Cole* (Sup.) 214.

*Notice of protest, appearing in the record on appeal from Municipal Court, but not

shown to have been introduced by the minutes, *held* not a part of the record, furnishing proof that notice of protest was duly given the indorser.—*Siegel v. Dubinsky* (Sup.) 678.

A return on appeal is conclusive on an appellate court, and affidavits to strengthen it will not be considered.—*Duryee v. Hunt* (Sup.) 734.

*The appellate term is bound by the record as it is filed, and where the return of the justice of the Municipal Court contains nothing in support of defendant's contention that the dismissal of the complaint was based upon plaintiff's failure to proceed with the action, the question cannot be reviewed.—*Gross v. Gorach* (Sup.) 806.

*Where a *lis pendens* filed in court was inadvertently not offered in evidence, the court on the settlement of the proposed case should have considered it as in evidence, or set aside the judgment and reopened the case to permit its introduction, and then re-enter the judgment.—*Miller v. Norcross* (Sup.) 854.

To sustain a judgment for plaintiff on conflicting evidence, the record of the trial must show with a reasonable degree of certainty that he is entitled to the judgment rendered.—*Tankins v. Berger* (Sup.) 873.

§ 11. Review.

*That plaintiff recovers on a mistaken view of the character of the agreement upon which the suit is based is not ground for reversal, where he is entitled to recover in any event.—*American Structural Steel Co. v. Rush* (Sup.) 3.

*A person having objected to and procured exclusion of evidence as immaterial *held* estopped on appeal to assail a finding as erroneous in disregarding the matters so excluded.—*American Structural Steel Co. v. Rush* (Sup.) 3.

*Where there is sufficient evidence to sustain the finding of the jury, it is not reviewable on appeal.—*Hann v. Brettler* (Sup.) 78.

*A verdict returned against the overwhelming weight of evidence will not be permitted to stand.—*Berkowich v. Kommel* (Sup.) 119.

*The exclusion of evidence offered by the plaintiff is not prejudicial in the absence of proof of his right to recover.—*Gorlitzer v. Levenson* (Sup.) 130.

*Where plaintiffs failed to prove the cause of action alleged, and proper objections were made by defendants on the trial, and no amendment of the complaint was asked for, a judgment for plaintiffs on a cause of action not alleged could not be sustained on appeal.—*Epstein v. Cohen* (Sup.) 148.

The question whether the verdict is contrary to and unsupported by the evidence comes up on a motion to set aside the verdict and for a new trial.—*Lang v. Minck* (Sup.) 172.

*The setting aside of a verdict, as a general rule, will not be interfered with, but there must be something to justify the same beyond the fact that the trial judge does not agree with the jury.—*Dallin v. Mayer* (Sup.) 316.

*Point annotated. See syllabus.

*The question of additional allowance, being largely within the discretion of the trial court, will not be reviewed on appeal, except in cases where a clear abuse of that discretion appears.—*Haggoods v. Lusch* (Sup.) 331.

Where a referee erroneously regarded incompetent evidence as material and considered it in plaintiff's favor in determining the crucial question of fact in the case, the admission of such evidence was reversible error.—*Gherky v. State Line Telephone Co.* (Sup.) 420.

On appeal from a nonappealable judgment, intermediate orders specified in the notice of appeal *held* not reviewable notwithstanding Code Civ. Proc. § 1316.—*Jones v. Sabin* (Sup.) 508.

*Exclusion of evidence *held* harmless.—*Sheppard v. New York City Ry. Co.* (Sup.) 553.

In an action to recover a deposit made to insure performance of a contract to install windows, in which the defense was a failure to complete the contract in time, the exclusion of certain evidence *held* prejudicial error.—*Cox v. Mankin* (Sup.) 586.

*Application for adjournment on grounds not absolutely requiring it *held* addressed to the court's discretion.—*Burnstine v. Reddy* (Sup.) 628.

*Scope of review, where an appeal from a judgment on a referee's report does not disclose the evidence, defined.—*Moore v. Martine* (Sup.) 652.

Though a referee's findings are apparently inconsistent, on appeal they should be reconciled, if possible, and effect given the referee's real intent in making them.—*Moore v. Martine* (Sup.) 652.

*On appeal in an action for money loaned, an objection that a finding is not within the pleadings *held* not tenable.—*Moore v. Martine* (Sup.) 652.

*A verdict against the weight of evidence will not be permitted to stand on appeal.—*Samiehoff v. New York & Q. C. Ry. Co.* (Sup.) 774.

*Where the jury on conflicting evidence found for plaintiff, plaintiff's version will be accepted on appeal.—*Haigh v. Edelmeyer & Morgan Hod Elevator Co.* (Sup.) 936.

On appeal from the judgment alone, and not from the order denying a new trial, the appellate court is confined to a consideration of alleged errors of law.—*Bernreither v. City of New York* (Sup.) 1006.

§ 12. Determination and disposition of cause.

*Where the record on appeal is so unintelligible that the judgment cannot be said to be consistent with any aspect of the evidence, the judgment will be reversed for a new trial.—*Alpern v. Hirsch* (Sup.) 8.

*Where the only competent evidence as to the value of fruit, for the conversion of which plaintiff sued, fixed it at a certain amount, a recovery of a greater sum will be reduced to that sum on appeal.—*Vick v. Bleecker* (Sup.) 29.

*Point annotated. See syllabus.

*Where a verdict for attorney's services indicated an overestimate of the value thereof, the judgment would be reversed in the absence of a stipulation to reduce the verdict to a proper amount.—*Smith v. Hoctor* (Sup.) 33.

Where plaintiff appeals from the vacation of an order amending a judgment in his favor by inserting a clause for the arrest of defendant, the Appellate Court may reinsert such provision if the facts justify such relief.—*Musica v. Amalfitano* (Sup.) 179.

*Under the facts, *held* on appeal that a new trial should be granted in the interest of justice.—*Mandel v. Consolidated Feed Co.* (Sup.) 554.

In an action involving the question whether certain unpaid tax assessments were incumbrances against property conveyed with covenant against incumbrances, a certificate of sale for such assessments, not showing on its face that the property described was that to which the covenants related, *held* insufficient to sustain the judgment; the question of identity of property not having been litigated in the trial court.—*Knight v. Sherwood* (Sup.) 562.

The record on appeal from an order denying a motion to open a default *held* insufficient to raise the question upon appeal.—*Weinberg v. Klauber* (Sup.) 578.

*Where the trial court inadvertently rendered judgment for more than the proper amount, the Supreme Court on appeal will properly modify the judgment and affirm it as modified.—*R. M. Gilmour Mfg. Co. v. Johnson* (Sup.) 627.

A judgment properly awarding relief to the successful party will not be reversed because the court made unnecessary findings and embodied them in the judgment, but that part of the judgment will be stricken from it.—*American Radiator Co. v. City of New York* (Sup.) 1008.

APPEARANCE.

*Code Civ. Proc. § 424, formulating the rule that a voluntary appearance in an action is equivalent to personal service of process within the jurisdiction of the court, is declaratory of the common law.—*Strauss v. Strauss* (Sup.) 842.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 4.

APPLICATION.

For discovery, see "Discovery," § 1.

APPOINTMENT.

Of executor or administrator, see "Executors and Administrators," § 2.

Of guardian, see "Guardian and Ward," § 1.

Of municipal agents, see "Municipal Corporations," § 1.

Power of appointment under will, see "Wills," § 8.

ARBITRATION AND AWARD.

See "Reference."

§ 1. Award.

*A separate defense of arbitration and award held too indefinite to be sufficient on demurrer.—*Koewing v. Thalman* (Sup.) 1042.

ARCHITECTS.

Approval of performance of contract, see "Contracts," § 8.

ARGUMENT OF COUNSEL.

In civil actions, see "Trial," § 3.

In criminal prosecutions, see "Criminal Law," § 6.

ARREST.

False arrest, see "Malicious Prosecution," § 2.

§ 1. In civil actions.

*Where, in an action in which an order of arrest is obtained, judgment is for defendant for costs, damages may be recovered on the undertaking given to procure the order of arrest for counsel fees in attempting to vacate the order, in securing bail, in the trial of the case, and for loss of earnings during imprisonment, etc., as well as for costs.—*McLean v. Fidelity & Deposit Co. of Maryland* (Sup.) 907.

That an assignee of an undertaking given to procure an order of arrest, in an action in which judgment was for defendant for costs, has not pressed a claim for damages nor asked to be made a party to an action by the assignee of the judgment for costs against the surety on the undertaking, held not to show that he had no right to recover on the undertaking for the damages covered thereby.—*McLean v. Fidelity & Deposit Co. of Maryland* (Sup.) 907.

The assignee of a judgment for defendant for costs, in an action in which there was an order of arrest, held entitled at most to only an equitable interest, limited by the judgment for costs, in any sum that might be recovered in an action on the undertaking given to procure the arrest, in which all interested claimants were parties.—*McLean v. Fidelity & Deposit Co. of Maryland* (Sup.) 907.

A surety on an undertaking given to procure an arrest, is liable but for one cause of action thereon if judgment was for defendant for costs, and the rights of any persons to damages or costs under the bond, however acquired, must be fixed and determined in one action in which all the claimants in the subject-matter are made parties.—*McLean v. Fidelity & Deposit Co. of Maryland* (Sup.) 907.

§ 2. On criminal charges.

*One charged with larceny from the person, which is a felony, may be lawfully arrested either with or without a warrant.—*People v. Warden of City Prison of City of New York* (Sup.) 1103.

ASSAULT AND BATTERY.

Consolidation of actions for libel, see "Action," § 1.

Liability of carrier for assault on passenger, see "Carriers," § 2.

§ 1. Civil liability.

That relator came between complainant and another officer who was assaulting him held not to constitute an assault by relator on complainant.—*People v. Bingham* (Sup.) 1055.

§ 2. Criminal responsibility.

The seizing by police officers of one accused while on bail, in order to take his photograph and measurements for the Bertillon system, held an assault for which they were subject to criminal prosecution under Pen. Code, § 219.—*Gow v. Bingham* (Sup.) 1011.

ASSESSMENT.

Of compensation for property taken for public use, see "Eminent Domain," § 3.

Of damages, see "Damages," § 3.

Of expenses of public improvements, see "Municipal Corporations," § 2.

Of tax, see "Taxation," § 1.

ASSIGNMENTS.

For benefit of creditors, see "Assignments for Benefit of Creditors."

Fraud as to creditors, see "Fraudulent Conveyances."

In bankruptcy, see "Bankruptcy," § 1.

Right of assignee of judgment to execution, see "Execution," § 1.

Transfers of particular species of property, rights, or instruments.

See "Judgment," § 11.

Corporate shares, see "Corporations," § 2.

Lease, see "Landlord and Tenant," § 3.

Market stall permit, see "Municipal Corporations," § 4.

Option to hold tenant to new lease, see "Landlord and Tenant," § 3.

§ 1. Requisites and validity.

Delivery of accounts of a debtor to a bank by indorsers of a check of the debtor, in consideration of the bank paying the check, though it had not sufficient funds of the debtor therefor, is not an assignment of the account, where it does not appear that such delivery was authorized by or known to the debtor, and he subsequently repudiated the whole transaction.—*Jefferson Bank v. Starr* (Sup.) 532.

§ 2. Operation and effect.

The rule that the transfer of a principal debt carries with it all collaterals held not applicable in a certain case where the judgment for costs only, rendered in favor of defendant in an action in which there was an order of arrest, was assigned to plaintiff, who seeks to enforce his rights against the surety on the undertaking given to procure the arrest order.—*McLean v. Fidelity & Deposit Co. of Maryland* (Sup.) 907.

*Point annotated. See syllabus.

§ 3. Rights and liabilities of parties.

*Where an assignor of a debt gives a release to the debtor for a valuable consideration, the debtor not having notice of the assignment, the release will be a bar in an action by the assignee against the debtor.—*Hann v. Brettler* (Sup.) 78.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy," § 1.

§ 1. Rights and remedies of creditors.

Determination of proper disposition of surplus proceeds of stocks owned by customers of insolvent broker pledged by him to secure loan to himself.—*In re Mills* (Sup.) 1057.

ASSOCIATIONS.

See "Beneficial Associations"; "Trade Unions."

Mutual benefit insurance associations, see "Insurance," § 4.

Playing baseball on Sunday on ground of athletic association, see "Sunday."

ASSUMPSIT, ACTION OF.

See "Money Lent"; "Money Received"; "Work and Labor."

ATTACHMENT.

See "Execution."

§ 1. Proceedings to procure.

*A debt owing by a nonresident maintaining an office in New York to a foreign corporation, arising out of a transaction consummated in New York, *held* subject to attachment in an action against such corporation in that state.—*Flynn v. White* (Sup.) 860.

§ 2. Claims by third persons.

Under Code Civ. Proc. §§ 657, 658, authorizing a jury to try the claim of a third person to property attached, and permitting the sheriff to deliver the property to the claimant unless an indemnifying undertaking is given, plaintiff in attachment can, by giving a satisfactory undertaking, recover the property.—*Shaw v. Dunn* (Sup.) 777.

There is no provision of law allowing a review by motion or otherwise of the action of a sheriff's jury impaneled to try the validity of claim of a third person to property attached.—*Shaw v. Dunn* (Sup.) 777.

ATTESTATION.

Of will, see "Wills," § 2.

ATTORNEY AND CLIENT.

Argument and conduct of counsel at trial in civil actions, see "Trial," § 3.

*Point annotated. See syllabus.

Argument and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 6.

Attorneys in fact, see "Principal and Agent."

Change of venue in action by attorney for services, see "Venue," § 1.

Counsel fees as element of damages in action on injunction bond, see "Injunction," § 6.

Counsel fees in suits for divorce, see "Divorce," § 3.

Determination and disposition of cause on appeal in action for attorney's services, see "Appeal," § 12.

Disobedience of orders as contempt, see "Contempt," § 1.

Oral agreements with attorneys, see "Stipulations."

§ 1. The office of attorney.

*An attorney's negotiation for work to be done in a law suit is the act of an agent for a known principal, and for the expense thereof he does not become personally responsible.—*Argus Co. v. Hotchkiss* (Sup.) 138.

*A statement by counsel in negotiations for printing of a case *held* insufficient to render him personally responsible therefor.—*Argus Co. v. Hotchkiss* (Sup.) 138.

*Whether at the time of making a contract by counsel for printing a case in a divorce suit he disclosed the nature of the cause and his interest therein, yet the case when sent to the printer is a fair notice that the suit is one for divorce and a purely personal action, in which counsel could only be interested as such.—*Argus Co. v. Hotchkiss* (Sup.) 138.

An attorney *held* guilty of misconduct requiring his disbarment.—*In re O'Sullivan* (Sup.) 462.

§ 2. Duties and liabilities of attorney to client.

An attorney *held* not liable as an insurer upon depositing money belonging to his clients in his own bank account.—*In re Stanley* (Sup.) 913.

§ 3. Compensation and lien of attorney.

An attorney *held* to have a lien, under Code Civ. Proc. § 66, on the proceeds of a verdict, etc., in favor of an estate, where his client was the administrator.—*In re Ross* (Sup.) 899.

An attorney's contract for fees to be paid by his clients *held* not to prohibit him from receiving in addition an allowance made in litigation and paid by the adverse party.—*In re Stanley* (Sup.) 913.

*An attorney *held* entitled to recover the reasonable value of his services.—*Ross v. Bayer-Gardner-Hines Co.* (Sup.) 1063.

ATTORNEY GENERAL.

Right to bring action to vacate patent granted by state as affecting right of individual to maintain action to quiet title, see "Quieting Title," § 1.

AUTHORITY.

Of agent, see "Principal and Agent," §§ 1, 2.
Of justice of the peace, see "Justices of the Peace," § 1.

AUTOMOBILES.

Liability of owner for injuries to third person by act of chauffeur, see "Master and Servant," § 9.
Negligence of driver as imputable to passenger, see "Negligence," § 2.

AVOIDANCE.

Pleading matter in avoidance, see "Pleading," § 2.

AWARD.

See "Arbitration and Award," § 1.

BAGGAGE.

Of passenger, see "Carriers," § 2.

BAILMENT.

Variance between pleading and proof on contract of, see "Pleading," § 9.

Particular species of bailments, and bailments incident to particular occupations.

See "Banks and Banking," § 1; "Innkeepers"; "Warehousemen."

*Notwithstanding a general rule stated, plaintiff held not entitled to recover for work done on defendants' material destroyed on plaintiff's premises, though he is blameless for the loss.—*Stern v. Rosenthal* (Sup.) 772.

BANKRUPTCY.

See "Assignments for Benefit of Creditors."

§ 1. Assignment, administration, and distribution of bankrupt's estate.

*The right of a trustee in bankruptcy to set aside fraudulent transfers by the bankrupt under Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], is not restricted by section 87e (30 Stat. 564 [U. S. Comp. St. 1901, p. 3419]), to transfers made within the four months' period, but extends to any transfer which any creditor could set aside, etc.—*Thomas v. Roddy* (Sup.) 473.

*An assignment or transfer of property by a bankrupt within four months prior to the filing of a bankruptcy petition is a constructive fraud on Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], as preventing the due operation of the act on the bankrupt's property.—*Thomas v. Roddy* (Sup.) 473.

*Transfers by a bankrupt within four months prior to filing of a bankruptcy petition are pre-

sumed to be fraudulent under Bankr. Act July 1, 1898, c. 541, § 87e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]; the bankrupt's purpose or intent in making them being immaterial.—*Thomas v. Roddy* (Sup.) 473.

Under Bankr. Act July 1, 1898, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], a bankrupt's trustee held entitled to avoid fraudulent transfers by the bankrupt more than four months before the filing of a bankruptcy petition without showing that a creditor between the transfer and the filing of the bankruptcy petition had placed himself in a position to set aside such transfer.—*Thomas v. Roddy* (Sup.) 473.

That creditors of a bankrupt had acquired a lien and were in a position to set aside fraudulent transfers made more than four months before the filing of a petition in bankruptcy does not deprive the bankrupt's trustee from maintaining a suit for similar relief.—*Thomas v. Roddy* (Sup.) 473.

*Where the tenant of a building placed fixtures therein, the purchaser from his trustee in bankruptcy acquired only such right to remove the fixtures as the tenant may have.—*Jacob v. Kellogg* (Sup.) 713.

§ 2. Rights, remedies, and discharge of bankrupt.

*A discharge in bankruptcy is an absolute bar to all demands that were provable in the proceedings, and the burden rests upon a party attacking it to show why it is not effectual.—*Meyer v. Bartels* (Sup.) 778.

*Under the direct provisions of Personal Property Law, Laws 1897, p. 510, c. 417, art. 2, § 21, a new promise to pay a debt discharged in bankruptcy must be in writing.—*Meyer v. Bartels* (Sup.) 778.

*A partial payment on a debt which has been discharged in bankruptcy is not sufficient to renew the original indebtedness, or create a new obligation of the debtor to pay the balance due.—*Meyer v. Bartels* (Sup.) 778.

BANKS AND BANKING.

Deposits in trust, see "Trusts," §§ 1, 6.

Gift of bank deposit, see "Gifts," § 1.

Gift of bank deposit by husband to wife, see "Husband and Wife," § 1.

§ 1. Functions and dealings.

*In an action by a bank depositor to recover an alleged deposit, evidence held insufficient to authorize a finding that plaintiff made the deposit sued for.—*Lemon v. Mechanics' & Traders' Bank* (Sup.) 9.

Under contract between plaintiff and defendant, money deposited in bank in defendant's name held to be the property of plaintiff.—*Straight v. Shaw* (Co. Ct.) 1036.

BAR.

Of action by former adjudication, see "Judgment," § 8.

Of action for breach of covenant in lease, see "Landlord and Tenant," § 5.

*Point annotated. See syllabus.

BASEBALL.

Playing on Sunday, see "Sunday."

BATTERY.

See "Assault and Battery."

BENEFICIAL ASSOCIATIONS.

Mutual benefit insurance associations, see "Insurance," § 4.

A sick benefit society whose physician on notice, failed to attend a member, *held* liable for value of services of a physician procured by him.—*Geraci v. Italian Ass'n St. Bartholomew Eoliana of Mut. Aid of New York* (Sup.) 557.

Under the by-laws of a sick benefit, *held*, the member could recover benefits after the time he was given his "diary" by the physician, who wrote therein that he was not yet recovered.—*Geraci v. Italian Ass'n St. Bartholomew Eoliana of Mut. Aid of New York* (Sup.) 557.

BENEFITS.

Acceptance of, as ground of ratification, see "Principal and Agent," § 2.

Acceptance of, as waiver of right to appeal, see "Appeal," § 4.

Deduction from damages for taking property for public use, see "Eminent Domain," § 2.

BEQUESTS.

See "Wills."

BERTILLON SYSTEM.

Mandamus to compel destruction of measurements illegally taken, see "Mandamus," § 1. Measurements of persons accused of offense and admitted to bail as interfering with personal liberty and security, see "Constitutional Law," § 3.

Taking unlawful measurements as libel, see "Libel and Slander," § 3.

BIAS.

Of juror, see "Jury," § 2.

Of witness, see "Witnesses," § 3.

BILL OF EXCHANGE.

See "Bills and Notes."

BILL OF PARTICULARS.

See "Divorce," § 2; "Pleading," § 6.

BILLS AND NOTES.

Action on lost note, see "Lost Instruments."

Computation of period of limitations on, see "Limitation of Actions," § 1.

Guaranty of bills or notes, see "Guaranty," § 1. Liability of corporation for note executed by officer, see "Corporations," § 5.

Limitation of action on note, as affected by part payment, see "Limitation of Actions," § 2.

Note as payment of subscription for corporate stock, see "Corporations," § 2.

Notes for insurance premiums, see "Insurance," § 1.

Pleading and evidence of limitations in action on note, see "Limitation of Actions," § 3.

§ 1. Requisites and validity.

Under Negotiable Instruments Law, Laws 1897, p. 727, c. 612, § 51, a note given in payment of a pre-existing debt is given for value.—*Bigelow Co. v. Automatic Gas Producer Co. (City Ct.)* 894.

§ 2. Rights and liabilities on indorsement or transfer.

*Facts *held* to show that the payees of a check were holders in due course under sections 91, 95, 96, of the Negotiable Instruments Law, Laws 1897, p. 732, c. 612.—*Siegmester v. Lispenard Realty Co. (Sup.)* 158.

§ 3. Presentment, demand, notice, and protest.

*Demand *held* not necessary to a right of action on a demand note.—*Church v. Stevens (Sup.)* 310.

*A mere provision for interest in a demand note does not make demand necessary to a right of recovery.—*Church v. Stevens (Sup.)* 310.

Failure to exhibit a demand note to the maker when demanding payment is no defense.—*Church v. Stevens (Sup.)* 310.

*Failure to prove notice of protest to an indorser is fatal to recovery against the indorser.—*Siegel v. Dubinsky (Sup.)* 678.

Under the express provisions of Negotiable Instruments Law, Laws 1897, p. 741, c. 612, § 174, a notice of protest made by mail must be deposited in the post office in time to reach the indorser on the day following.—*Siegel v. Dubinsky (Sup.)* 678.

§ 4. Actions.

On an issue as to the good faith purchase of a check, evidence that the purchaser of the check filed a petition in bankruptcy two months after the purchase is immaterial and outside the issue.—*Siegmester v. Lispenard Realty Co. (Sup.)* 158.

Failure of a complaint to set forth the date of a written promise to pay money *held* not to furnish ground for denial of recovery nor to justify a dismissal of the complaint, under Negotiable Instruments Law, Laws 1897, p. 723, c. 612, § 25.—*Church v. Stevens (Sup.)* 310.

A complaint on a note need only state facts sufficient to make out a cause of action, and a defense set up in the answer may be met by proof.—*Church v. Stevens (Sup.)* 310.

Presumption of due diligence in the service of a notice of protest may be rebutted whether or not an affidavit has been served under

*Point annotated. See syllabus.

Code Civ. Proc. § 923.—Siegel v. Dubinsky (Sup.) 678.

*Evidence in an action on a note *held* not to show the giving of notice of protest to an indorser in a manner sufficient to charge her.—Siegel v. Dubinsky (Sup.) 678.

BLASTING.

See "Explosives."

BOARDS.

Municipal boards, see "Municipal Corporations," § 2.

Of railroad commissioners, see "Railroads," § 1.
State board of pharmacy, see "Adulteration."

BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see "Bills and Notes," § 2.

BONDS.

Mortgage bonds, see "Mortgages," §§ 2, 3.
Of municipal corporation, see "Municipal Corporations," § 2.
Sureties on bonds, see "Principal and Surety."

Bonds in judicial proceedings.

See "Injunction," § 6; "Replevin," § 3.
To procure arrest, see "Arrest," § 1.

BOOKS OF ACCOUNT.

False entries, see "Forgery."

BREACH.

Of contract, see "Vendor and Purchaser," § 1.
Of contract in general, see "Contracts," § 3.
Of contract of sale, see "Sales," § 4.
Of warranty, see "Sales," §§ 5, 7.

BROKERS.

See "Factors"; "Principal and Agent."

Applicability of instructions to evidence in action for broker's commissions, see "Trial," § 5.

Disposition of surplus proceeds of stocks pledged by insolvent broker, see "Assignments for Benefit of Creditors," § 1.

Excessive damages for breach of contract, see "Damages," § 2.

Parol evidence to vary contract, see "Evidence," § 5.

Sale by broker of corporate stock held as security, see "Corporations," § 2.

§ 1. Compensation and lien.

*A real estate broker *held* not entitled to recover commissions where the purchaser procured by him refused to accept the contract of purchase proposed.—Behrmann v. Marcus (Sup.) 12.

An employment agency, having obtained a temporary position for defendant, *held* entitled to 10 per cent. of his salary under the contract and under the employment agency law, Laws 1917, p. 589, c. 327, § 5.—Haggoods v. Lynch (Sup.) 20.

*A real estate broker *held* not entitled to commissions under the facts shown.—Schano v. Storch (Sup.) 28.

*A real estate broker acting for both vendor and purchaser without the knowledge of the vendor is not entitled to receive a commission on the sale.—Hann v. Brettler (Sup.) 78.

*Where there was no meeting of minds between defendant and the purchaser of defendant's property proposed by plaintiff by reason of defendant's refusal to warrant the title of a portion of the premises covering an old street, plaintiff *held* not entitled to recover commissions.—Hess v. Bloch (Sup.) 86.

A real estate broker *held* entitled to a commission for procuring a proposed purchaser, though such purchaser canceled his agreement to buy because of the vendor's defective title.—Strout v. Kenny (Sup.) 92.

*A broker *held* entitled to recover commissions for sale of real estate, the sale falling through only because of the owner's misrepresentations as to the annual rental.—Goodman v. Hess (Sup.) 112.

*A real estate broker employed to procure a purchaser *held* entitled to his commissions under the facts shown.—Frank v. Connor (Sup.) 132.

*In an action for broker's commissions, an instruction that, if certain contracts were the result of the negotiations started by plaintiff, he should recover, *held* erroneous.—Blumberg v. Sterling Bronze Co. (Sup.) 142.

*In an action for commission for procuring a purchaser for certain property, plaintiff *held* entitled to recover.—Brand v. Nagle (Sup.) 156.

*A real estate broker is not entitled to commissions for procuring a purchaser where the owner sold the premises before the broker produced his customer.—Hodge v. Appeltes (Sup.) 170.

*Where plaintiff, an attorney, negotiated a sale of real estate to his client for the benefit of a corporation, in which plaintiff was a director, he could not recover commissions from the seller without proof that his contract was consented to by the purchaser.—Nekarda v. Presberger (Sup.) 897.

*Contract giving broker sole agency for sale of realty *held* not to entitle him to commission on sale by owner without his assistance.—Davis v. Van Tassel (Sup.) 910.

§ 2. Actions for compensation.

In an action by a real estate broker for commissions for procuring a purchaser, certain evidence *held* admissible.—Behrmann v. Marcus (Sup.) 12.

In an action for brokers' commissions on an agreement for exchange of lands, that defendant refused to carry out, evidence that plaintiff had

*Point annotated. See syllabus.

received commissions from defendant for disposing of the same property to another purchaser *held* inadmissible.—*Goodman v. Linetsky* (Sup.) 50.

Evidence as to whether a broker was acting for both parties *held* sufficient to take the question to the jury.—*Hann v. Brettler* (Sup.) 78.

*A broker in an action for commission *held* not required to prove the financial ability of a prospective purchaser, where defendant had accepted such purchaser and made an agreement as to the terms and time of signing a formal contract.—*Brand v. Nagle* (Sup.) 156.

*A real estate broker *held* not entitled to commissions.—*Hodge v. Appelles* (Sup.) 170.

*In an action for commissions on merchandise, whether a custom existed as to time of payment of commissions, and whether the parties contracted with reference thereto, *held* for the jury.—*Sawyer v. Deicken* (Sup.) 560.

*Evidence as to customary time of paying commissions on sales of merchandise *held* admissible.—*Sawyer v. Deicken* (Sup.) 560.

*In an action by a broker for commissions, evidence examined, and *held* sufficient to sustain the finding of the jury that plaintiff was employed by the defendant as broker to effect a sale of certain premises, and that he was the procuring cause of the sale.—*Lifshitz v. Schwartz* (Sup.) 579.

In an action for commission for procuring a purchaser of realty, the refusal to give a charge submitting defendant's defense *held* erroneous.—*Jacobson v. Fraade* (Sup.) 706.

*In an action for real estate broker's commissions, evidence *held* insufficient to sustain a verdict for plaintiff.—*Osorio v. Burlington Realty & Construction Co.* (Sup.) 745.

In an action by a broker to recover a balance of commissions due him, evidence *held* sufficient to show that he had been paid in full.—*Moore v. Simpson* (Sup.) 803.

Commissions sued for by a broker *held* payable only on the happening of a condition precedent, which was not sufficiently alleged by an averment that the sum "became due" on a given date.—*Nekarda v. Presberger* (Sup.) 897.

BUILDING CONTRACTS.

Performance by state, see "States," § 1.

BURGLARY.

Evidence of acts and statements of accomplices, see "Criminal Law," § 5.

BY-LAWS.

Of corporation, see "Corporations," § 3.
Of mutual benefit society, see "Beneficial Associations."

CALENDARS.

Of causes for trial, see "Trial," § 1.

*Point annotated. See syllabus.

CANALS.

Assessments by municipal corporation for dredging, see "Municipal Corporations," § 2.

CANCELLATION OF INSTRUMENTS.

See "Quieting Title."

Extra allowances in suit under contract illegally canceled by state, see "Costs," § 2.

Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 1.

Grounds for cancellation or rescission of particular instruments.

See "Lis Pendens."

Contracts for sale of goods, see "Sales," § 3.

Insurance policy, see "Insurance," § 1.

CANDIDATES.

For office, see "Elections," § 1.

CARRIERS.

Contradiction of witness in action for injuries to passenger, see "Witnesses," § 3.

Jurisdiction of municipal court of action for assault on passenger, see "Courts," § 3.

§ 1. Control and regulation of common carriers.

One not shown to be a street car passenger in good faith may not recover from the company a penalty for refusing a transfer.—*Wilke v. Forty-Second St., M. & St. N. Ave. R. Co.* (Sup.) 56.

§ 2. Carriage of passengers.

*A person who boards a street car and tenders the conductor a transfer in payment of his fare is a passenger, although the conductor refuses to accept the transfer, and the carrier is liable for an assault upon him by the conductor.—*Lewyt v. Dry Dock, E. B. & B. R. Co.* (Sup.) 14.

Where, in an ordinary baggage case, there was no affirmative proof that plaintiff's agent, to whom the carrier's receipt was delivered, was ignorant of its contents, the refusal to charge that the burden was on plaintiff to establish such ignorance was reversible error.—*Feld v. Platt* (Sup.) 21.

Evidence of an assault by a conductor on a passenger *held* admissible under a complaint charging that the conductor caused the passenger's arrest; the court having power to order the complaint amended to allege such assault to conform to the proof.—*Baumstein v. New York City Ry. Co.* (Sup.) 23.

*A carrier is absolutely liable as an insurer for injuries to a passenger for an aggravated assault perpetrated by the carrier's conductor followed by the passenger's arrest.—*Baumstein v. New York City Ry. Co.* (Sup.) 23.

*Where a street car was slackened in response to plaintiff's signal to stop, but before a full stop had been made the speed was accelerated with a jerk and plaintiff was thrown into the

street, the railway was negligent.—*Garner v. Forty-Second St., M. & St. N. Ave. Ry. Co.* (Sup.) 134.

In an action for injuries to a passenger against a carrier who maintains a system of reporting by employes of accidents and of claims against it therefor, the carrier may show that its employes did not report to it the happening of any accident, and that the first notice of the claim was from plaintiff.—*Sturgis v. Fifth Ave. Coach Co.* (Sup.) 270.

*A passenger riding on the rear bumper of a crowded street car and injured by the sudden slipping of the trolley pole from the wire held negligent as a matter of law.—*Feldheim v. Brooklyn, Q. C. & S. R. Co.* (Sup.) 413.

*Where a passenger on a crowded street car was injured by the slipping of the trolley pole from the wire, he could not recover in the absence of some additional proof that such occurrence was caused by some negligent act of the carrier.—*Feldheim v. Brooklyn, Q. C. & S. R. Co.* (Sup.) 413.

Under Railroad Law, Laws 1892, p. 1406, c. 676, § 104, a street railway passenger held entitled to a certain transfer, not being limited to a transfer in the same general direction in which he started.—*Wells v. New York City Ry. Co.* (Sup.) 430.

*A carrier held not absolved from liability for negligence of its conductor, resulting in injury to a passenger, on the ground of its being an emergency action, for the benefit of the passenger, who was in danger.—*Sheppard v. New York City Ry. Co.* (Sup.) 553.

*In an action against a carrier for assault on a passenger, defendant held not liable; the contract of carriage having ceased when the assault was committed.—*Brown v. Interborough Rapid Transit Co.* (Sup.) 629.

In an action against a street railroad, evidence held insufficient to show that the driver of defendant's car intentionally pushed plaintiff's intestate from the platform.—*Dubnow v. New York City Ry. Co.* (Sup.) 729.

*Facts held not to show a street railroad company liable for the death of one who was pushed from the platform of a horse car.—*Dubnow v. New York City Ry. Co.* (Sup.) 729.

*A street railway company held not liable for injuries sustained by a passenger in alighting, where the signal to the motorman to start was given by another passenger.—*Wagner v. New York City Ry. Co.* (Sup.) 807.

*A carrier's liability for baggage checked held not lessened because the baggage did not go by the same train the passenger did.—*Moffat v. Long Island R. Co.* (Sup.) 1113.

A carrier need not notify a passenger of the arrival of his trunk, in order to terminate its obligation as common carrier.—*Moffat v. Long Island R. Co.* (Sup.) 1113.

*Rule as to a railway company's liability for baggage stated.—*Moffat v. Long Island R. Co.* (Sup.) 1113.

*In an action against a carrier for the value of articles stolen from a passenger's trunk after its arrival at its destination, held a question for the jury whether plaintiff called for the trunk within a reasonable time.—*Moffat v. Long Island R. Co.* (Sup.) 1113.

CASE ON APPEAL

Making and settlement, see "Appeal," § 10.

CATTLE

See "Animals."

CAUSE OF ACTION.

See "Action."

CERTIFICATE.

Architects certificate as to performance of contract, see "Contracts," § 3.
Certified copies, see "Evidence," § 4.
Liquor tax certificate, see "Intoxicating Liquors," § 1.
Mutual benefit insurance certificates, see "Insurance," § 4.
Of public necessity and convenience under railroad law, see "Railroads," § 1.
Receiver's certificates, see "Receivers," § 1.
Restraining threatened proceedings under certificate of public convenience and necessity issued under railroad law, see "Injunction," § 1.

CERTIORARI.

Review of special assessments, see "Municipal Corporations," § 2.
Review of tax assessments, see "Taxation," § 1.
§ 1. **Nature and grounds.**
On a hearing on certiorari held substantial relief could not be granted, and the court might refuse to review.—*People v. Bogart* (Sup.) 831.

CHALLENGE.

To juror, see "Jury," § 2.

CHANGE OF VENUE.

Of civil action, see "Venue," § 1.

CHARGE.

Of legacies on property by will, see "Wills," § 10.
To jury in civil actions, see "Trial," § 5.

CHARITIES.

Restriction on devises and bequests for charitable purposes, see "Wills," § 1.

§ 1. **Creation, existence, and validity.**

*Where money was donated for the relief of sufferers in a certain disaster, if the money

*Point annotated. See syllabus.

should prove more than sufficient for the purpose, the surplus would revert to the donors, if ascertainable; otherwise to the state.—*Boenhardt v. Loch* (Sup.) 786.

*A devise to the trustees of a university, to be used for the purposes of female education of a high grade in the city in which the university was located, was not void for indefiniteness as to the uses of the gift.—*In re Durand* (Sur.) 393; *In re Morgan's Will*, Id.

§ 2. Construction, administration, and enforcement.

Where a fund is in the hands of a committee appointed to accept donations for relief of sufferers in a certain steamboat disaster, its distribution will not be directed regardless of the exercise of good faith by such committee.—*Boenhardt v. Loch* (Sup.) 786.

CHARTER.

Of corporation, see "Corporations," § 7.
Of municipal corporation, see "Municipal Corporations," §§ 2, 3, 5.

CHattel MORTGAGES.

§ 1. Rights and liabilities of parties.

*Effect of a breach of a chattel mortgagor's covenants stated.—*Kraus v. Black* (Sup.) 609.

§ 2. Rights and remedies of creditors.

*Creditor of chattel mortgagor obtaining judgment *held* entitled to attack the mortgage as fraudulent.—*Burmeister v. Koster* (Sup.) 636.

*Chattel mortgage *held* void as to creditors of mortgagee as to property acquired by mortgagor between the date of the mortgage and the taking possession by the mortgagee.—*Burmeister v. Koster* (Sup.) 636.

§ 3. Foreclosure.

Vendor of a piano *held* entitled to foreclosure of a purchase price mortgage as against the wife, notwithstanding the husband executed the same, where the piano is in her possession.—*Wuertz v. Braun* (Sup.) 429.

*A chattel mortgagee *held* not to waive his right to foreclose without first demanding the property.—*Kraus v. Black* (Sup.) 609.

CHEAT.

See "False Pretenses"; "Fraud."

CHECKS.

See "Bills and Notes."

Acceptance of, as satisfaction of account, see "Accord and Satisfaction."

Action for money received on check, see "Money Received."

Evidence of payment by in action for money lent, see "Money Lent."

*Point annotated. See syllabus.

CHILDREN.

See "Guardian and Ward."

CHOSE IN ACTION.

Assignment, see "Assignments."

CHURCHES.

See "Religious Societies."

CITATION.

See "Process."

CITIES.

See "Municipal Corporations."

CITIZENS.

Equal protection of laws, see "Constitutional Law," § 4.

CIVIL RIGHTS.

See "Constitutional Law," §§ 3, 4.

CIVIL SERVICE.

See "Municipal Corporations," § 1.

CLAIM AND DELIVERY.

See "Replevin."

CLAIMS.

Against estate assigned for creditors, see "Assignments for Benefit of Creditors," § 1.

Against estate of decedent, see "Executors and Administrators," § 4.

To property levied on, see "Attachment," § 2.

CLOUD ON TITLE

See "Quieting Title."

COLLATERAL ATTACK.

On judgment, see "Judgment," § 7.

COLLATERAL INHERITANCE TAXES.

See "Taxation," § 2.

COLLATERAL UNDERTAKING.

See "Frauds, Statute of," § 1; "Guaranty."

COLLECTION.

Of costs, see "Costs," § 4.
Of estate of decedent, see "Executors and Administrators," § 3.

COLLEGES AND UNIVERSITIES.

Charitable gifts to, see "Charities," § 1.
Devises to, see "Wills," § 8.
Power to take under will, see "Wills," § 1.

COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

COMBINATIONS.

See "Conspiracy"; "Monopolies," § 1.

COMITY.

Between courts, see "Courts," § 8.

COMMERCE.

Carriage of goods and passengers, see "Carriers."

COMMERCIAL PAPER.

See "Bills and Notes."

COMMISSION.

Delegation of legislative power to commission of gas and electricity, see "Constitutional Law," § 2.
Laws creating gas and electricity commission as denying due process of law, see "Constitutional Law," § 5.
Laws creating gas and electricity commission as denying equal protection of law, see "Constitutional Law," § 4.
Of gas and electricity, see "Gas."
To take testimony, see "Depositions."

COMMISSIONERS.

Highway commissioners, see "Highways," § 1.
In condemnation proceedings, see "Eminent Domain," § 3.
Mandamus to compel highway commissioners to remove obstruction from highway, see "Mandamus," § 2.
Railroad commissioners, see "Railroads," § 1.

COMMISSION MERCHANTS.

See "Factors."

COMMISSIONS.

Applicability of instructions to evidence in action for broker's commissions, see "Trial," § 5.

Examination of witness in action for, see "Witnesses," § 2.
Of broker, see "Brokers," §§ 1, 2.
Of executor or administrator, see "Executors and Administrators," § 6.
Of trustee, see "Trusts," § 5.

COMMITMENT.

On charge of crime, see "Criminal Law," § 4.

COMMITTEE.

For administration of charity, see "Charities," § 2.

COMMON CARRIERS.

See "Carriers."

COMMON LAW.

Right of adjoining landowners to lateral support, see "Adjoining Landowners."
Right to inspect corporate records, see "Corporations," § 3.
Voluntary appearance as waiver of process, see "Appearance."
Writ of habeas corpus, see "Habeas Corpus," § 1.

COMPENSATION.

For performance of contract, see "Contracts," § 2.
For property taken for public use, see "Eminent Domain," § 2.
Of particular classes of officers or other persons.
See "Brokers," §§ 1, 2; "Executors and Administrators," § 6.
Attorney, see "Attorney and Client," § 3.
County supervisors, see "Counties," § 1.
Municipal officers, see "Municipal Corporations," § 1.
Servant, see "Master and Servant," § 2.
Trustee, see "Trusts," § 5.

COMPETENCY.

Of jurors, see "Jury," § 2.
Of witnesses in general, see "Witnesses," § 1.

COMPLAINT.

In criminal prosecution, see "Criminal Law," § 4; "Indictment and Information."

COMPROMISE AND SETTLEMENT.

See "Accord and Satisfaction"; "Release."

COMPUTATION.

Of period of limitation, see "Limitation of Actions," § 1.

*Point annotated. See syllabus.

CONCLUSION.

of witness, see "Evidence," § 6.

CONCURRENT JURISDICTION.

of courts, see "Courts," § 8.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONAL SALES.

See "Sales," § 8.

CONDITIONS.

In contracts and conveyances.

See "Chattel Mortgages," § 1; "Guaranty," § 3.
Contract of sale, see "Sales," § 1.

Precedent to actions or other proceedings.
For breach of contract of sale, see "Sales," § 6.

CONFLICT OF LAWS.

Conflicting jurisdiction of courts, see "Courts," § 8.

CONSIDERATION.

Of bill of exchange or promissory note, see "Bills and Notes," § 1.
Of contract in general, see "Contracts," § 1.
Of mortgage, see "Mortgages," § 1.

CONSIGNMENT.

See "Factors."

CONSOLIDATION.

Of actions, see "Action," § 1.

CONSPIRACY.

Combinations to monopolize trade, see "Monopolies," § 1.
Evidence of acts and declarations of conspirators, see "Criminal Law," § 5.
Restraining by injunction, see "Injunction," § 2.

§ 1. Civil liability.

*Circumstantial evidence of ratification by a trade union of acts of violence during a strike by its members, when conspiracy is alleged, must be tantamount to direct proof.—*Thomas Russell & Sons v. Stampers & Gold Leaf Local Union No. 22* (Sup.) 303.

*A conspiracy cannot be sustained by proof to establish separate causes of action against separate defendants.—*Thomas Russell & Sons v. Stampers & Gold Leaf Local Union No. 22* (Sup.) 303.

*Point annotated. See syllabus.

CONSTITUTIONAL LAW.

Provisions relating to particular subjects.

See "Appeal," § 3; "Eminent Domain," § 1; "Jury," § 1.

Enactment and validity of statutes, see "Statutes," § 1.

§ 1. Construction, operation, and enforcement of constitutional provisions.

*While it lies primarily within the discretion of a legislative body to determine what laws are appropriate and proper in the exercise of the police power of the state, the duty remains in the courts, when called upon, to scrutinize the measures sought to be enforced, to see whether they really fall within the limitations of the police power.—*City of New York v. M. Wineburgh Advertising Co.* (Sup.) 478; *Kobbe Co. v. City of New York* (Sup.) 489.

§ 2. Distribution of governmental powers and functions.

The power to establish a tariff of rates for a public service corporation is a legislative function.—*Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.* (Sup.) 341.

*The legislative function of fixing a tariff of rates for a public service corporation may be delegated to an administrative body, with power to fix rates in conformity with a standard established by the Legislature.—*Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.* (Sup.) 341.

Laws 1905, p. 2092, c. 737, establishing a commission of gas and electricity, with power to fix the maximum price for gas and electricity furnished by any public service corporation, *held* not invalid as delegating to the commission legislative discretion.—*Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.* (Sup.) 341.

*The Legislature has the power to authorize the commission of gas and electricity, created by Laws 1905, p. 2092, c. 737, to hear ex parte and hearsay evidence and base its decision thereon in fixing rates for gas and electricity furnished by any public service corporation.—*Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.* (Sup.) 341.

The act of declaring what temporary invasions of liberty and personal immunity are necessary in the exercise of the police power is solely a legislative act, not within the jurisdiction of a city's police force exercising a portion of the state's executive powers.—*Gow v. Bingham* (Sup.) 1011.

Rule of a police department providing for measurement of and photographing of such suspected persons as the officials of the department shall determine *held* invalid as an exercise of judicial powers by executive and administrative officers.—*Gow v. Bingham* (Sup.) 1011.

§ 3. Personal, civil, and political rights.

The right of personal liberty exists independent of express provision of law, and includes

preservation of the person from attack, or compulsory stripping or exposure of the person.—*Gow v. Bingham* (Sup.) 1011.

*Const. art. 1, §§ 1, 6, preserving private rights from interference, are not the sources of such rights, but are in the nature of a shield against unwarrantable interference by any department of the government.—*Gow v. Bingham* (Sup.) 1011.

Under Pen. Code, § 379a, and Greater N. Y. Charter, Laws 1901, pp. 116, 136, 143, c. 466, §§ 272, 315, 338, and Code Cr. Proc. §§ 165, 172, 303, the police department of the city of New York has no authority, after a person accused of an offense has been admitted to bail, to take him into custody and photograph and measure him in accordance with the Bertillon system.—*Gow v. Bingham* (Sup.) 1011.

Members of a police department held civilly liable for damages for arresting an accused person, who was on bail before trial, and compelling him to submit to have his photograph and measurements taken for the Bertillon system.—*Gow v. Bingham* (Sup.) 1011.

§ 4. Equal protection of laws.

*Laws 1905, p. 2092, c. 737, creating the commission of gas and electricity, with power to fix rates for gas and electricity furnished by any public service corporation, held not invalid as denying to such a corporation the equal protection of the laws.—*Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.* (Sup.) 341.

§ 5. Due process of law.

To make effectual the constitutional guaranty of due process of law, one must have the right to appeal to the court whenever it is claimed that his constitutional rights are invaded.—*Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.* (Sup.) 341.

*Laws 1905, p. 2092, c. 737, creating the commission of gas and electricity, with power to fix maximum rates for gas and electricity furnished by any public service corporation held not invalid as depriving a corporation of its property without due process of law, though the remedy of appeal from any order of the commission is inadequate.—*Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.* (Sup.) 341.

A judgment of dismissal of a complaint for the failure of plaintiff to give an additional undertaking, as required by an order of the court, held not to violate his property rights under Const. U. S. Amend. 14.—*Jones v. Sabin* (Sup.) 508.

CONTEMPT.

Review of default judgment for contempt, see "Appeal," § 3.

Disobedience to particular writs, mandates, orders, or judgments.

For payment of alimony, see "Divorce," § 3.

For payment of costs by attorney, see "Costs," § 4.

In supplementary proceedings, see "Execution," § 4.

§ 1. Acts or conduct constituting contempt of court.

Under Code Civ. Proc. § 2281, held, that an attorney could not be punished for contempt for disobeying an order to pay costs, when it did not appear that his act prejudiced the rights of the complaining party.—*Obermeyer & Liebman v. Adisky* (Sup.) 949.

Under Code Civ. Proc. §§ 779, 2007, held, that an attorney could not be punished for contempt for disobeying an order to personally pay costs.—*Obermeyer & Liebman v. Adisky* (Sup.) 949.

§ 2. Punishment.

*Under Code Civ. Proc. § 2284, providing for a fine to indemnify creditors for loss or injury, a fine cannot be imposed as indemnity only without proof of actual loss or injury.—*Bernstein v. McCahill* (Sup.) 161.

CONTINGENT REMAINDERS.

Creation, see "Wills," § 7.

CONTINUANCE.

Of summary proceeding to recover leased premises, see "Landlord and Tenant," § 7.

CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."

Alteration, see "Alteration of Instruments."

Assignment, see "Assignments."

Excessive damages for breach, see "Damages."

§ 2.

Extra allowances in suit under contract illegally canceled by state, see "Costs," § 2.

Impeachment of witness in action on, see "Witnesses," § 3.

Judgment in action on contract as bar to subsequent action, see "Judgment," § 8.

Parol or extrinsic evidence, see "Evidence," § 5.

Specific performance, see "Specific Performance."

Variance between pleading and proof in action on, see "Pleading," § 9.

Contracts of particular classes of persons.

See "Husband and Wife," § 1; "Master and Servant"; "Municipal Corporations," § 2; "States," § 1; "Warehousemen."

Contracts relating to particular subjects.

Erection of party wall, see "Party Walls." Ground for mechanics' liens, see "Mechanics' Liens," § 1.

Particular classes of express contracts.

See "Bailment"; "Bills and Notes"; " Chattel Mortgages"; "Covenants"; "Guaranty"; "Insurance"; "Joint Adventures"; "Partnership"; "Sales."

Agency, see "Principal and Agent."

Employment, see "Master and Servant."

Leases, see "Landlord and Tenant."

Mutual benefit insurance, see "Insurance," § 4.

Sales of realty, see "Vendor and Purchaser."

*Point annotated. See syllabus.

Separation agreements, see "Husband and Wife," § 2.

Stipulations in actions, see "Stipulations."
Suretyship, see "Principal and Surety."

Particular classes of implied contracts.

See "Money Lent"; "Money Received"; "Work and Labor."

Particular modes of discharging contracts.

See "Accord and Satisfaction"; "Release."

§ 1. **Requisites and validity.**

In an action on a contract, plaintiff's evidence held to establish a partial failure of consideration, which was a complete defense to the action.—*Gilmartin v. Van Horn* (Sup.) 131.

§ 2. **Construction and operation.**

*A contractor's right to additional compensation for work done under a contract to improve a creek channel stated.—*First Nat. Bank v. City of Syracuse* (Sup.) 646.

*In an action on a contract between defendant and a third person, whereby the former agreed to pay for goods purchased from plaintiff by the latter, evidence held to show facts entitling plaintiff to recover.—*Spiegelberg v. Schoenberg* (Sup.) 718.

*Contract construed, and held to be several, entitling a party to sue for breach without joining his co-parties.—*Villard v. Moyer* (Sup.) 1064.

§ 3. **Performance or breach.**

*In an action for extra work, etc., on a building contract providing that payments shall be made only upon architect's certificates, evidence of the extra work is incompetent in the absence of the certificates.—*Bjorkgren v. Kirk* (Sup.) 34.

*Where a contract provided that work should be done to the satisfaction of certain city departments, and no certificates were shown from the departments that the work was satisfactory to them, held, that there could be no recovery.—*Galef v. Standard Fish Co.* (Sup.) 43.

*A contract not having been substantially complied with, held, that there could be no recovery thereon.—*Conrady v. V. Loewer's Gambrinus Brewery Co.* (Sup.) 94.

*Where a person only partially performs a contract to construct a sidewalk, his recovery is limited to the contract price less such a sum as would be required to complete the work.—*Kennelly v. Walker* (Sup.) 95.

*Substantial performance of a contract held not to warrant recovery of the full contract price.—*Frank v. Mandel* (Sup.) 116.

In an action to recover a deposit made to assure performance of a contract to install windows, in which the defense was a failure to complete the contract in time, the exclusion of certain evidence held prejudicial error.—*Cox v. Rankin* (Sup.) 586.

The price which one was to receive for the making of garments for another must be reduced by the amount it cost the latter to complete the work which the former should have done

but failed to do.—*Levin v. Hendelman* (Sup.) 618.

A defendant held entitled to a reduction from the regular price of certain labor for payments made in completing unfinished work.—*Porus v. Hendelman* (Sup.) 619.

§ 4. **Actions for breach.**

In an action for breach of contract to pay for a secret formula for making artificial champagne, certain testimony held insufficient to authorize a judgment for damages.—*Lang v. Minck* (Sup.) 172.

Evidence, in an action to recover for services rendered and materials furnished, held to show that defendants were the real parties in interest, notwithstanding the addition of the words for another "trustee" to the signature of one of the defendants to the agreement.—*Lo Greci v. Solomon* (Sup.) 611.

CONTRADICTION.

Of witness, see "Witnesses," § 3.

CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 2.

Of passenger, see "Carriers," § 2.

Of person injured by wrongful use of street, see "Municipal Corporations," § 4.

Of person killed in operation of railroad, see "Railroads," § 3.

Of person killed or injured by operation of street railroad, see "Street Railroads," § 1.

Of servant, see "Master and Servant," §§ 7, 8.

CONVERSION.

Wrongful conversion of personal property, see "Trove and Conversion."

*Will held to work equitable conversion of realty into personalty.—*Toher v. Crounse* (Sup.) 990.

CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."

Particular classes of conveyances.

See "Assignments"; "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds"; "Mortgages."

CORPORATIONS.

Conflicting jurisdiction of United States courts, and state courts in appointment of receiver of domestic corporation, see "Courts," § 8.

Conversion of corporate property, see "Trove and Conversion," § 2.

Jurisdiction of municipal court of action by non-resident against foreign corporation, see "Courts," § 3.

Jurisdiction of United States court to appoint receiver of domestic corporation, see "Courts," § 7.

*Point annotated. See syllabus.

Laws creating gas and electricity commission to fix rates for public service corporations as denying equal protection of law, see "Constitutional Law," § 4.

Laws creating gas and electricity commission to fix rates for public service corporations as due process of law, see "Constitutional Law," § 5.

Legislative power to establish rates for public service corporations, see "Constitutional Law," § 2.

Mandamus, see "Mandamus," §§ 2, 3.

Power to take under will, see "Wills," § 1.

Particular classes of corporations.

See "Beneficial Associations"; "Municipal Corporations"; "Railroads"; "Religious Societies"; "Street Railroads."

Banks, see "Banks and Banking."

Insurance companies, see "Insurance."

§ 1. Corporate existence and franchise.

*Persons sued by a corporation, where the action is *ex contractu* as well as where it is *ex delicto*, are debarred from setting up the defense that the corporation was not legally organized; that being a question for the state.—National Soc. of United States Daughters of 1812 v. American Surety Co. of New York (Sup.) 820.

§ 2. Capital, stock, and dividends.

Where part of the consideration for defendant's note was the issue of certain preferred stock of plaintiff corporation and the stock was issued without the required payment of 10 per cent., its issue was invalid, and the note void and unenforceable in the hands of plaintiff.—Hapgoods v. Lusch (Sup.) 331.

*Statutes, and not common-law principles, regulate contracts for shareholding in corporations, and the omission to obey a statutory requirement of a payment in cash upon a stock subscription makes the subscription invalid.—Hapgoods v. Lusch (Sup.) 331.

*Defendant's giving of his note as payment for 10 per cent. of the value of stock purchased by him was not equivalent to the cash payment of 10 per cent. required by Stock Corporation Law, Laws 1892, p. 1835, c. 688, § 41; the transaction not constituting a payment, but merely a promise to pay.—Hapgoods v. Lusch (Sup.) 331.

In an action to recover the purchase price paid for stock on the ground of fraudulent representations of the seller, the complaint *held* to state a cause of action on the theory of rescission.—Stern v. Stern (Sup.) 900.

Where stock is held by a broker as security for margins, a tender of the amount due and a demand for the delivery of the stock terminates the right of the broker to keep the security, and vests the right of possession in the owner.—In re Mills (Sup.) 1057.

§ 3. Members and stockholders.

*The right to inspect the general books of a corporation is founded on the common law, and rests in the discretion of the court, while the right to inspect the stock book is statutory and

absolute.—Althaus v. Giroux (Sup.) 191; Same v. Giroux Consol. Mines Co., Id.

*A stockholder desiring to transcribe corporate records for purposes not connected with the business of the corporation, but for his private ends, *held* not entitled to recover the penalty given by stock corporation Law, Laws 1892, p. 1840, c. 688, § 53, for its refusal.—Althaus v. Giroux (Sup.) 193; Same v. Giroux Consol. Mines Co., Id.

Complaint, in an action by stockholder on behalf of the corporation for breach of contract by a promotor, *held* sufficient as against a demurrer.—Cummings v. Yates & Porterfield Trading Co. (Sup.) 498.

*Where by-laws of a membership corporation did not provide for notice of meetings, an annual meeting held at the usual time and place was not illegal because it was held without notice.—New York Electrical Workers' Union v. Sullivan (Sup.) 886.

*Where a meeting for the election of officers and directors of a membership corporation after termination of membership proceedings was held without notice, and members were denied the right to participate, the election should be set aside and a new one held after notice, under General Corporation Law, Laws 1892, p. 1810, c. 687, § 27.—New York Electrical Workers' Union v. Sullivan (Sup.) 886.

*The common-law rule that, where a body is composed of an indefinite number of persons, a quorum consists of those who assemble at any meeting regularly called and warned, does not apply to a membership corporation the by-laws of which attempt to provide for a quorum.—New York Electrical Workers' Union v. Sullivan (Sup.) 886.

*Where two of the by-laws of a membership corporation providing for a quorum were conflicting, the question of quorum should be determined by Membership Corporation Law, Laws 1895, p. 333, c. 559, art. 1, § 8.—New York Electrical Workers' Union v. Sullivan (Sup.) 886.

§ 4. Officers and agents.

In an action against directors of a membership corporation, an answer *held* pleaded as a complete defense, and is insufficient on demurrer under Membership Corporation Law, Laws 1895, p. 335, c. 559, § 11.—Thistle v. Jones (Sup.) 840.

The liability of a corporation *held* a liability within Membership Corporation Law, Laws 1895, p. 335, c. 559, § 11, relating to the liability of directors of a membership corporation for a debt of the corporation.—Thistle v. Jones (Sup.) 840.

Allegations in a complaint by a corporation against one of its officers for paying out money of plaintiff without authority *held* not to state a cause of action.—Mutual Life Ins. Co. of New York v. Granniss (Sup.) 926.

§ 5. Corporate powers and liabilities.

*Service of process on a person as an individual is not service on a company of which he is

*Point annotated. See syllabus.

president.—*Ziegler v. George Schleicher Co.* (Sup.) 85.

*In an action against a corporation and its directors, brought under Code Civ. Proc. § 1782, the court has authority, under section 1810, to appoint a temporary receiver of the corporation.—*People v. Hasbrouck* (Sup.) 257.

*In a proceeding by a railroad company to condemn land, plaintiff's incorporation, alleged in its petition, and not affirmatively controverted by the answer, as required by Code Civ. Proc. § 1776, held admitted.—*Erie & J. R. Co. v. Brown* (Sup.) 983.

*Corporation held liable on a note signed by its president, the benefits of which it has received.—*Bigelow Co. v. Automatic Gas Producer Co.* (City Ct.) 894.

§ 6. Insolvency and receivers.

The power and duty of a receiver, under Code Civ. Proc. § 1788, to "preserve the property," is no less in sequestration proceedings than in foreclosure.—*Rochester Trust & Safe Deposit Co. v. Oneonta & M. V. R. Co.* (Sup.) 237.

*The appointment of a receiver of a corporation by a court of equity at the instance of a creditor gives to the receiver only its temporary management under the direction of the court, and is merely incidental to the principal relief sought, but the corporate existence continues.—*People v. New York City Ry. Co.* (Sup.) 247.

§ 7. Dissolution and forfeiture of franchise.

*A corporation can only cease to exist by a surrender, forfeiture, or repeal of its charter, and a surrender can only be made to the state which grants it, whose courts also have exclusive jurisdiction of actions to revoke or forfeit its charter and franchises.—*People v. New York City Ry. Co.* (Sup.) 247.

The power of a federal court to appoint receivers of a corporation is an incident of its equitable jurisdiction, while the jurisdiction of the state courts to forfeit corporate franchises is statutory.—*People v. New York City Ry. Co.* (Sup.) 247.

The appointment pendente lite of receivers of a street railway corporation held to practically amount to a transfer of its franchise.—*People v. New York City Ry. Co.* (Sup.) 247.

In proceedings for the dissolution of a corporation, a claim held not reduced by the taking by the claimant of the note of a third party to cover loss arising on the claim.—*People v. Federal Bank of N. Y.* (Sup.) 811; *In re Selma Nat. Bank, Id.*

Under Laws 1902, pp. 115, 116, c. 60, §§ 5, 6, 8, it was the duty of the receiver in proceedings for the dissolution of a corporation to call the court's attention to the fact that a claimant had had no opportunity to review the determination of a referee rejecting his claim.—*People v. Federal Bank of N. Y.* (Sup.) 811; *In re Selma Nat. Bank, Id.*

Under Laws 1902, pp. 115, 116, c. 60, §§ 5, 6, 8, the determination of a referee appointed to

determine disputed claims in proceedings for the dissolution of a corporation held not final, and claimant held not precluded by the order approving the receiver's accounts.—*People v. Federal Bank of N. Y.* (Sup.) 811; *In re Selma Nat. Bank, Id.*

Under Sup. Ct. Rule 30, a claimant whose claim was rejected by a referee appointed to determine disputed claims in proceedings for the dissolution of a corporation held to have followed the proper practice in filing exceptions to the referee's report and bringing the same to a hearing at Special Term.—*People v. Federal Bank of N. Y.* (Sup.) 811; *In re Selma Nat. Bank, Id.*

§ 8. Foreign corporations.

*Plaintiff corporation held not doing business in the state within the meaning of Gen. Corp. Law. § 15, Laws 1892, p. 1805, c. 637, as amended by the substituted provisions of Laws 1901, p. 1326, c. 538.—*Novelty Tufting Mach. Co. v. Hutkoff* (Sup.) 88.

A stockholder held to have a right to make a transcript of the list of stockholders, under Stock Corporation Law, Laws 1892, p. 1840, c. 688, § 53, where his motives are legitimate.—*Althaus v. Giroux* (Sup.) 191; *Same v. Giroux Consol. Mines Co.* (Id.)

*Under Code Civ. Proc. § 1779, a foreign corporation may be sued in the same manner as a domestic corporation except as otherwise provided; the restriction in the statute being limited to actions against a foreign corporation by a nonresident.—*Flynn v. White* (Sup.) 860.

CORRECTION.

Of assessment of taxes, see "Taxation," § 1.

Of judgment, see "Judgment," § 4.

Of record on appeal, see "Appeal," § 10.

CORROBORATION.

Of accomplice, see "Criminal Law," § 5.

COSTS.

Disobedience of order to pay costs as contempt, see "Contempt," § 1.

In municipal court, see "Courts," § 4.

Review of taxation of costs in municipal court, see "Courts," § 6.

§ 1. Nature, grounds, and extent of right in general.

*Plaintiff's claim for \$57.50 being conceded, and defendants having established a counterclaim for \$15.50 and deposited in court \$42.50 without interest or costs, plaintiff should have recovered judgment for \$42 and costs, under Municipal Court Act, Laws 1902, p. 1537, c. 580, § 148.—*Rosenblatt v. Villamena* (Sup.) 91.

*Payment of money into the Municipal Court held not regulated by Code Civ. Proc. §§ 731-734, 3347, subd. 6, but by Municipal Court Act,

*Point annotated. See syllabus.

Laws 1902, p. 1537, c. 580, § 148.—Levy v. Loew (Sup.) 620.

*Under the express provisions of Code Civ. Proc. § 3232, where issues of law and of fact are joined between the same parties to the same action, and the issue of fact remains undisposed of, the awarding of costs upon an interlocutory judgment on demurrers is within the court's discretion.—Mutual Life Ins. Co. of New York v. Granniss (Sup.) 926.

§ 2. Amount, rate, and items.

In an action against the State to recover for work performed under contract illegally canceled, where several lienors established their liens against the state for labor, the usual course will be allowed attorneys for each lienor represented up to the time of the trial, and one trial fee.—J. J. Newman Lumber Co. v. Wemple (Sup.) 327.

*Plaintiff in action against the state to recover for services under a contract illegally canceled by the state *held* entitled to an extra allowance.—J. J. Newman Lumber Co. v. Wemple (Sup.) 327.

The court has no power, under Code Civ. Proc. §§ 3251, 3367, 3369, to make an extra allowance of costs to a successful defendant in condemnation proceedings.—Erie & J. R. Co. v. Brown (Sup.) 989.

§ 3. On appeal or error, and on new trial or motion therefor.

*Where an appeal was not dismissed upon notice previously given, but only after it was called in its regular order on the calendar, costs before and after notice of argument were properly taxed against appellant.—Dooley v. Union Ry. Co. of New York City (Sup.) 882.

§ 4. Payment and remedies for collection.

*Failure to pay costs on dismissal of a former action *held* ground for stay of a subsequent action between the same parties on the same cause of action, under Code Civ. Proc. § 779.—Wilner v. Independent Order Ahawas Israel (Sup.) 497.

*An attorney *held* not punishable for contempt for failure to obey order to pay costs to his client's opponent when the matter was adjudicated between the parties in their settlement.—Obermeyer & Liebman v. Adisky (Sup.) 949.

Where plaintiff is unsuccessful, and costs are awarded defendant, another action to recover upon the same cause of action cannot be maintained until the costs are paid.—Singer v. Garlick (Sup.) 972.

CO-TENANCY.

See "Tenancy in Common."

COUNTERFEITING.

See "Forgery."

*Point annotated. See syllabus.

COUNTIES.

See "Municipal Corporations."

§ 1. Government and officers.

Under County Law, Laws 1892, p. 1750, c. 686, § 23, county supervisors *held* not entitled to compensation for services rendered pursuant to a general understanding.—Wallace v. Jones (Sup.) 288.

Under County Law, Laws 1892, pp. 1745, 1750, c. 686, §§ 10, 23, *held* county supervisors are not entitled to mileage for each day's actual attendance at sessions of their boards.—Wallace v. Jones (Sup.) 288.

*The illegal action of a board of supervisors in allowing compensation to a member for unauthorized services *held* not sustainable on the theory of ratification.—Wallace v. Jones (Sup.) 288.

County Law, Laws 1892, p. 1756, c. 686, § 50, requiring clerks to record proceedings of boards of supervisors, contemplates that the boards shall keep books of record of their proceedings for public information and as a source of authentic evidence.—Wallace v. Jones (Sup.) 288.

In an action against members of a board of supervisors for collusion in conjointly auditing their illegal claims for compensation, a judgment cannot be had against them severally for moneys illegally received by each.—Wallace v. Jones (Sup.) 288.

Under Taxpayer's Act, Laws 1881, p. 709, c. 531, as amended by Laws 1887, p. 885, c. 673, and Laws 1892, p. 620, c. 301, proof required to hold supervisors personally liable for an illegal audit of bills stated.—Wallace v. Jones (Sup.) 288.

*A board of supervisors in auditing claims against a county exercise a judicial function, and if they act within their jurisdiction they may not, in the absence of fraud and collusion, be *held* personally liable for their audits.—Wallace v. Jones (Sup.) 288.

COUNTY BOARD.

See "Counties," § 1.

COURTS.

Contempt of court, see "Contempt."
Ground for equitable relief against judgment of municipal court, see "Judgment," § 6.
Justices' courts, see "Justices of the Peace."
Removal of judgment to United States by writ of error and its affirmance as bar to motion for new trial, see "Appeal," § 8.
Review of decisions, see "Appeal."
Right to trial by jury, see "Jury," § 1.
Stipulations in open court, see "Stipulations."

Jurisdiction of particular actions or proceedings.
For accounting as to trust property, see "Trusts," § 5.

To construe wills, see "Wills," § 9.

Special jurisdictions and particular classes of courts.

See "Criminal Law," § 2.

§ 1. **Nature, extent, and exercise of jurisdiction in general.**

*The Municipal Court being a court of limited jurisdiction, its jurisdiction will not be presumed, but all the facts essential thereto must appear in the record.—*Carpenter v. Pirner* (Sup.) 875.

§ 2. **Establishment, organization, and procedure in general.**

*In an action in a state court on an injunction bond given in a United States court, the rule of the federal courts that counsel fees are not admissible as an element of damages prevails.—*National Soc. of United States Daughters of 1812 v. American Surety Co. of New York* (Sup.) 820.

*Rule 17 of the Municipal Court, relating to the extension of time for the rendition of the judgment, is as binding upon the court as upon the parties or their attorneys.—*Carpenter v. Pirner* (Sup.) 875.

Rule 17 of the Municipal Court contemplates the making of a record or the filing of a written stipulation in order to enable the court to retain jurisdiction to render judgment after the expiration of the statutory time.—*Carpenter v. Pirner* (Sup.) 875.

*Dicta in opinion of Court of Appeals *held* not entitled to equal consideration in Supreme Court with points actually decided.—*Toher v. Crounse* (Sup.) 990.

§ 3. **Courts of limited or inferior jurisdiction—Jurisdiction of municipal courts.**

The Municipal Court has jurisdiction of an action by a passenger on a street car for an aggravated assault, followed by his arrest, committed and caused by the carrier's conductor.—*Baumstein v. New York City Ry. Co.* (Sup.) 23.

Under the express provisions of Municipal Court Act, Laws 1902, p. 1533, c. 580, § 139, the Municipal Court *held* without jurisdiction of an action on a written contract of conditional sale of personal property.—*Rosenthal v. Riesser* (Sup.) 563.

Under Municipal Court Act, Laws 1902, pp. 1489, 1496, 1497, c. 580, § 1, subd. 18, and sections 20, 25, subd. 3, the jurisdiction of the court over actions by nonresidents against foreign corporations *held* not to extend to cases not embraced within Code Civ. Proc. § 1780.—*Sommese v. Florence Distilling Co.* (Sup.) 630.

Jurisdiction to proceed with an action *held* conferred upon the Municipal Court by act of the parties.—*Universal Cutter Co. v. Emden* (Sup.) 669.

A Municipal Court *held* to have lost its jurisdiction, there being no consent of the parties, under Municipal Court Act, Laws 1902, p. 1557, c. 580, § 230, warranting the delay in the rendition of the judgment.—*Carpenter v. Pirner* (Sup.) 875.

§ 4. **Procedure in municipal courts in general.**

*In an action on a demand by an assignee thereof, under Municipal Court Act, Laws 1902, p. 1539, c. 580, § 152, subd. 3, a counterclaim can only be allowed to an amount equaling the demand.—*Cebrelli v. Franklin Contracting Co.* (Sup.) 568.

The Municipal Court must allow a pleading to be amended at any time, if substantial justice will be promoted thereby.—*Universal Cutter Co. v. Emden* (Sup.) 669.

The Municipal Court cannot transfer the trial of an action from one district to another, except on consent or where the district in which the action is brought is not the proper district, and the application for transfer must be made on or before the joinder of issue.—*Universal Cutter Co. v. Emden* (Sup.) 669.

A defendant's failure to pay motion costs *held* not ground to deprive him of his day in court.—*Richman v. Bonewur* (Sup.) 675.

A party ordered to pay costs of motion in Municipal Court by an order specifying no time *held* entitled to a reasonable time after notice of entry of order and service of a copy.—*Richman v. Bonewur* (Sup.) 675.

Affidavits for order of substituted service, under Municipal Court Act, Laws 1902, p. 1500, c. 580, § 32, *held* insufficient.—*Duryee v. Hunt* (Sup.) 734.

Under Municipal Court Act, Laws 1902, p. 1563, c. 580, § 255, it is not ground of denial of a motion for new trial that the same was not made in five days after the trial.—*Flock v. Kaufman* (Sup.) 752.

The dismissal of a complaint by the Municipal Court because plaintiff had not paid the costs of an adjournment granted him *held* erroneous, under Code Civ. Proc. §§ 779, 3347.—*Gross v. Gorsch* (Sup.) 806.

§ 5. **Judgment and execution in municipal court.**

Under Municipal Court Act, Laws 1902, p. 1562, c. 580, § 253, the Municipal court of New York City has power to open the default of the defendant in failing to appear on the return day of the summons.—*Hinde v. Calamaras* (Sup.) 28.

Code Civ. Proc. § 1209, providing that a final judgment dismissing a complaint shall not bar a new action on the same cause, etc., *held* not to apply to the Municipal Court.—*Cohen v. Bachrach* (Sup.) 61.

A Municipal Court justice has no authority to amend a judgment unless made at the close of the trial or on a two days' notice of motion, as required by Municipal Court Act, § 254, Laws 1902, p. 1563, c. 580.—*Musica v. Amalfitano* (Sup.) 179.

Under the express provisions of Municipal Court Act, Laws 1902, p. 1562, c. 580, § 251, body execution cannot issue unless it is so ordered in the judgment.—*Nyman v. Diamond* (Sup.) 213.

*Point annotated. See syllabus.

In the Municipal Court of the City of New York a judgment cannot be vacated to permit a traverse of the return of service of summons.—*Mann v. Meryash* (Sup.) 599.

Prior to the amendment of New York City Municipal Court Act, Laws 1902, p. 1562, c. 580, § 253, by Laws 1907, p. 554, c. 304, the Municipal Court had no authority to vacate or set aside a judgment for nonservice of summons.—*Mann v. Meryash* (Sup.) 599.

A motion in the Municipal Court of New York City to vacate a judgment to permit traverse of the return of service *held* properly denied under Laws 1902, p. 1562, c. 580, § 253, as amended by Laws 1907, p. 554, c. 304.—*Mann v. Meryash* (Sup.) 599.

Under Municipal Court Act, Laws 1902, p. 1488, c. 580, § 1, subd. 11, as amended by Laws 1906, p. 1173, c. 513, relating to actions to enforce mechanics' liens, in such an action on a lien for labor on a building under an agreement with contractors who were erecting it for the owners, *held*, that plaintiff's remedy against the owners was not by personal judgment against them, but by a sale under an execution of their interest in the premises to the amount of plaintiff's claim, which sum the owners could then set off against the claim of the contractors against them.—*Daxe v. Hajek* (Sup.) 601.

Under the guise of a motion for reargument, *held*, the time limited by Municipal Court Act, Laws 1902, p. 1563, c. 580, § 254, for motion to set aside verdict or vacate judgment, could not be extended.—*Applebaum v. Bonagur* (Sup.) 635.

Held error to deny a motion to open a default.—*Richman v. Bonewur* (Sup.) 675.

Under Municipal Court Act, Laws 1902, p. 1563, c. 580, § 256, *held* error to order a sum deposited in court on condition that a default be opened, to be paid over to plaintiff before he obtains judgment.—*Richman v. Bonewur* (Sup.) 675.

In the absence of any valid consent of the parties extending the time of court in which to render judgment, a judgment rendered July 17, 1907, in a case tried May 10, 1907, is void, under Municipal Court Act, Laws 1902, p. 1557, c. 580, § 230, which provides that the court must render judgment within 14 days from the time the case is submitted to it.—*Carpenter v. Pirner* (Sup.) 875.

§ 6. — Appeal from judgments of municipal courts.

An appeal will not lie to the Appellate Term from an order of the Municipal Court directing that an interlocutory judgment be entered.—*Howard v. Sattler* (Sup.) 24.

Under the express provisions of Municipal Court Act, Laws 1902, p. 1563, c. 580, § 257, no appeal lies in the first instance from an order opening a default and vacating a judgment entered thereon.—*Oppenheimer v. Demuth Glass Mfg. Co.* (Sup.) 29.

To review an order reviewing the taxation of costs in the Municipal Court of New York City, the appeal should be from the judgment, and

not from the order.—*Tobias v. Metal Stamping Co.* (Sup.) 39.

Under Municipal Court Act, Laws 1902, p. 1563, c. 580, § 257, an appeal *held* not to lie from a denial of a motion to open a default, where no order appeared upon the record.—*Walkey v. Cupeta* (Sup.) 40.

Where, on appeal under the provisions of Municipal Court Act, Laws 1902, p. 1578, c. 580, § 311, the undisputed affidavits show that no service was made on defendant, a judgment for plaintiff will be reversed.—*Swift & Co. v. Mutual Commission Co.* (Sup.) 40.

On appeal by a defendant from a judgment of the Municipal Court of New York City, plaintiff will be given an opportunity to controvert affidavits of nonservice of summons part of the return on appeal of which he has had no notice.—*Mann v. Meryash* (Sup.) 599.

An order of the Municipal Court of New York City denying a motion to vacate a judgment and permit traverse of the return of service *held* not appealable.—*Mann v. Meryash* (Sup.) 599.

Where no objection appears in the record on appeal as having been made to an adjournment of a case by the Municipal Court, it will be presumed that such adjournment was by consent.—*Universal Cutter Co. v. Emden* (Sup.) 669.

The reviewing court, by appellant's failure to specify in his notice of appeal an order of transfer, *held* powerless, under the express provisions of Code Civ. Proc. § 1301, to review such order on appeal from the Municipal Court.—*Universal Cutter Co. v. Emden* (Sup.) 669.

The only remedy given a defendant where a judgment of the Municipal Court was rendered against him without service of process, before Laws 1907, p. 554, c. 304, § 253, amending Laws 1902, p. 1562, c. 580, took effect, was an appeal under Laws 1902, p. 1578, c. 580, § 311.—*Duryee v. Hunt* (Sup.) 734.

An appeal from a judgment of the Municipal Court rendered against a defendant without service of process, which is not governed by Laws 1902, p. 1562, c. 580, § 253, as amended by Laws 1907, p. 554, c. 304, may be considered as being taken under Laws 1902, p. 1578, c. 580, § 311.—*Duryee v. Hunt* (Sup.) 734.

§ 7. United States courts.

The federal court *held* without jurisdiction to appoint a receiver of a domestic corporation on its petition, or on the petition of a creditor, another domestic corporation.—*People v. Hasbrouck* (Sup.) 257.

§ 8. Concurrent and conflicting jurisdiction, and comity.

*Courts will not indulge considerations of comity when to do so would disown their own exclusive jurisdiction of a matter over which they have the exclusive control, or when to do so would work to the injury of residents of their own state.—*People v. New York City Ry. Co.* (Sup.) 247.

In an action in a state court to forfeit the charter of a domestic corporation, for which

*Point annotated. See syllabus.

receivers have been appointed by a federal court, it is proper to appoint a receiver with instructions to request the federal court to relinquish control.—*People v. New York City Ry. Co.* (Sup.) 247.

*A state court *held* to have jurisdiction of an action under Code Civ. Proc. § 1785 to forfeit corporate charter and for the appointment of receiver, though the federal court had already appointed receivers.—*People v. New York City Ry. Co.* (Sup.) 247.

*Order directing service of summons and complaint in an action in a Mexican court against New York corporation vacated.—*In re Romero* (Sup.) 621.

*The courts of the state will not, at the request of the Mexican court, order the service of a summons and complaint issuing out of a foreign court on a resident of the state.—*In re Romero* (Sup.) 621.

COVENANTS.

leases, see "Landlord and Tenant," §§ 3, 5.

1. Actions for breach.

In action on covenants of warranty, based on alleged eviction of portion of the land conveyed, answer *held* not to state a complete defense.—*Gordon v. Illensworth* (Sup.) 650.

Tender by grantors before eviction from portion of property sold of purchase money of such portion, with interest, *held* not a partial defense to an action on covenants of deed.—*Gordon v. Illensworth* (Sup.) 650.

COVERTURE.

See "Husband and Wife."

CREDIBILITY.

Of witness, see "Witnesses," § 3.

CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances."

Of devisees or legatees, see "Wills," § 10.

Rights as to chattel mortgage by debtor, see "Chattel Mortgages," § 2.

CREDITORS' SUIT.

Remedies in cases of assignments, see "Assignments for Benefit of Creditors," § 1.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 1.

CRIMINAL LAW.

Arrest of accused, see "Arrest," § 2.

Indictment, information, or complaint, see "Indictment and Information."

Restraining criminal acts by injunction, see "Injunction," § 2.

*Point annotated. See syllabus.

Particular offenses.

See "Adulteration"; "Assault and Battery," § 2; "Contempt"; "False Pretenses"; "Forgery"; "Homicide"; "Libel and Slander," § 3; "Perjury."

Violations of municipal ordinances, see "Municipal Corporations," § 3.

§ 1. Nature and elements of crime and defenses in general.

*Motive and intent in criminal cases distinguished.—*People v. Hegeman* (Sup.) 261.

§ 2. Jurisdiction.

The Court of Special Sessions *held*, under Code Cr. Proc. § 717, without jurisdiction to impose a fine of more than \$50 for operating an automobile at an illegal rate of speed.—*People v. De Graff* (Co. Ct.) 1038.

§ 3. Limitation of prosecutions.

*Code Cr. Proc. § 143, limiting the time for finding indictment, applies to cases where defendant was in the state when the crime was committed.—*People v. Sewell* (Co. Ct.) 382.

§ 4. Preliminary complaint, affidavit, warrant, examination, commitment, and summary trial.

*A complaint for larceny from the person in a public street *held* sufficient to give the magistrate jurisdiction to hold relator.—*People v. Warden of City Prison of City of New York* (Sup.) 1103.

*Under Code Cr. Proc. § 188, relator having been brought before a magistrate charged with a felony, and having raised no question with respect to her arrest, the magistrate had jurisdiction to examine the charge.—*People v. Warden of City Prison of City of New York* (Sup.) 1103.

Misuse of the pronoun "he" for the pronoun "she," in an order fixing bail, *held* not to affect magistrate's jurisdiction to issue a commitment.—*People v. Warden of City Prison of City of New York* (Sup.) 1103.

§ 5. Evidence.

*Where an act becomes criminal only through the existence of a specific intent, the intent must be proved, and proof of the doing of the act is not sufficient.—*People v. Hegeman* (Sup.) 261.

*Evidence as to obtaining money by fraudulent representations *held* to sufficiently corroborate the testimony of an accomplice, under Code Cr. Proc. § 399, to sustain a conviction.—*People v. Eaton* (Sup.) 849.

Code Cr. Proc. § 399, requiring corroboration of the testimony of an accomplice by evidence connecting accused with the crime construed, and *held* satisfied where accused himself testified that he was connected with the crime.—*People v. Eaton* (Sup.) 849.

A hypothetical question in a homicide case *held* proper.—*People v. Weick* (Sup.) 968.

*Presumption of innocence, under Code Cr. Proc. § 389, *held* to continue until the rendition of a verdict of guilty.—*Gow v. Bingham* (Sup.) 1011.

*In a prosecution for burglary, a statement by an accomplice, made in defendant's absence and after the burglary, incriminating defendant therein, is inadmissible.—*People v. Quinn* (Sup.) 1101.

§ 6. Trial.

*Where the facts are undisputed, the question whether the evidence shows a crime as charged is a question of law.—*People v. Hegeman* (Sup.) 261.

*Conduct of counsel in referring to matters outside the evidence in a certain criminal case held not prejudicial.—*People v. Weick* (Sup.) 968.

§ 7. Appeal and error, and certiorari.

Extension of November term into December, and change of place of trial to county courthouse, held no ground for reversing a conviction.—*People v. Weick* (Sup.) 968.

*On appeal from conviction by Court of Special Sessions, where fine in excess of jurisdiction is imposed, the court must reverse the judgment and declare it void.—*People v. De Graff* (Co. Ct.) 1038.

DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 2.

Counsel fees as element of damages in action on injunction bond, see "Injunction," § 6.

Damages for particular injuries.

See "Libel and Slander," § 2; "Trespass," § 2.

Breach by buyer of contract for sale of goods, see "Sales," § 6.

Cutting timber on state lands, see "Public Lands," § 1.

Injuries caused by public improvements, see "Municipal Corporations," § 2.

Injuries to third person by act of servant, see "Master and Servant," § 9.

Recovery in particular actions or proceedings.

See "Malicious Prosecution," § 2; "Replevin," § 1.

§ 1. Measure of damages.

*The rental value of an injured automobile for the time it was being repaired held not an element of damages.—*Bondy v. New York City Ry. Co.* (Sup.) 31.

*In an action for personal injuries, pain and suffering is an element of damage of which there is no specified standard.—*Weber v. International Ry. Co.* (Sup.) 965.

§ 2. Inadequate and excessive damages.

In an action by a broker to recover one-half the commissions received by defendant brokers from a sale of real estate, verdict held excessive.—*Edel v. Hillenbrand* (Sup.) 30.

*A verdict of \$20,000 for permanent personal injuries held not excessive.—*Lynch v. American Linseed Co.* (Sup.) 458.

§ 3. Pleading, evidence, and assessment.

*Under a contract to make certain payments, plaintiffs held only entitled to recover up to the

date of the complaint.—*Miles v. Barton* (Sup.) 865.

On an application to set aside the verdict of the sheriff's jury and to issue a new writ of inquiry, the court would not consider each ruling, but would take the case as a whole, and determine whether the ends of justice required such relief.—*Weber v. International Ry. Co.* (Sup.) 965.

An assessment of damages on a writ of inquiry voluntarily tried by defendant before the sheriff will not be set aside because of the sheriff's improper admission of evidence unless injustice had been done.—*Weber v. International Ry. Co.* (Sup.) 965.

On a motion to set aside an inquisition and for the issuance of a new writ of inquiry, it was neither necessary nor proper to present the entire address of counsel to the sheriff's jury to the court, though a portion thereof was objected to.—*Weber v. International Ry. Co.* (Sup.) 965.

DEATH.

Action for death of employé, see "Master and Servant," § 8.

Administration on estate of absentee, see "Executors and Administrators," § 1.

Liability for death caused by operation of railroad, see "Railroads," § 3.

Liability for death caused by operation of street railroad, see "Street Railroads," § 1.

Liability of carrier for death of passenger, see "Carriers," § 2.

Liability of master for death caused by act of servant, see "Master and Servant," § 9.

Of party to action ground for abatement, see "Abatement and Revival," § 2.

§ 1. Actions for causing death.

*In an action for death, a verdict for \$3,000 held excessive under Code Civ. Proc. § 1904.—*Long v. Union Ry. Co. of New York City* (Sup.) 401.

*In an action for wrongful death, while less evidence is sufficient to show lack of contributory negligence, plaintiff is bound to show that defendant failed in some duty to deceased by a fair preponderance of the evidence.—*Causullo v. Lenox Const. Co.* (Sup.) 431.

The representatives of a person killed through a violation of New York City Building Code, § 80, and Greater New York Charter, Laws 1897, p. 15, c. 373, § 41, have a cause of action against the negligent person under Code Civ. Proc. § 1902.—*Shields v. Paul B. Pugh & Co.* (Sup.) 604.

DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances."

DECEDENTS.

Estates, see "Executors and Administrators." Testimony as to transactions with persons since deceased, see "Witnesses," § 1.

*Point annotated. See syllabus.

DECET.

See "Fraud."

DECLARATIONS.

See evidence in civil actions, see "Evidence," § 2.

DEEDS.

Covenants in deeds, see "Covenants."
 A fraud of creditors, see "Fraudulent Conveyances."
 A trust, see "Trusts," § 2.
 A parol or extrinsic evidence, see "Evidence," § 5.
 Trust deeds, see "Mortgages."

1. Pleading and evidence.

*After a delay of 24 years from the date of a voluntary conveyance by a beneficiary in a trust fund, to the trustee without rescission, the burden was not on the trustee's personal representatives to show that the conveyance was made with knowledge of all the facts.—*Anderson v. Fry* (Sup.) 916.

In a suit to set aside a legatee's voluntary deed of her interest in the estate, evidence held insufficient to show that she did not know the extent of her interest, or that the deed was not voluntarily made with full knowledge of its effect.—*Anderson v. Fry* (Sup.) 916.

DEFAMATION.

See "Libel and Slander."

DEFAULT.

Judgment by, see "Judgment," § 2.
 Judgment by, in municipal court, see "Courts," § 5.
 Of mortgagor, see "Mortgages," § 4.

DELAY.

In prosecution of action ground for dismissal, see "Dismissal and Nonsuit," § 2.

DELIVERY.

Of gift, see "Gifts," § 1.
 Of goods sold, see "Sales," §§ 2, 4.

DEMAND.

For payment of bill or note, see "Bills and Notes," § 3.

DEMONSTRATIVE EVIDENCE.

In civil actions, see "Evidence," § 1.

DEMURRER.

In pleading, see "Pleading," § 4.

*Point annotated. See syllabus.

DENIALS.

In pleading, see "Pleading," § 2.

DEPOSITARIES.

See "Deposits in Court."

DEPOSITIONS.

See "Discovery"; "Witnesses."

In an action on a contract made by a corporation through an agent, plaintiff held entitled to annex to a commission to take the testimony of witnesses certain interrogatories.—*Irving v. Royal Exch. Assur. of London* (Sup.) 81.

*The judge in settling interrogatories to be annexed to a commission, under Code Civ. Proc. § 892, should allow questions, unless they are clearly not pertinent, and objections to other questions should be raised at the trial, as authorized by section 911.—*Irving v. Royal Exch. Assur. of London* (Sup.) 83.

*Under Code Civ. Proc. § 892, a party who took out a commission to examine witnesses on written interrogatories could not be deprived of the right to cross-examine the witnesses on an independent commission taken out by the adverse party.—*Irving v. Royal Exch. Assur. of London* (Sup.) 83.

An affidavit for a commission, made by the attorney for a party, without specifying facts showing materiality of the testimony held insufficient, under Code Civ. Proc. § 887.—*Lowther v. Sullivan* (Sup.) 193.

DEPOSITS.

As security for rent, see "Landlord and Tenant," § 6.
 By purchaser of land, see "Vendor and Purchaser," § 1.
 Gift of bank deposits, see "Gifts," § 1.
 Gift of bank deposits by husband to wife, see "Husband and Wife," § 1.
 In bank, see "Banks and Banking," § 1.
 To secure performance of contract, see "Contracts," § 3.

DEPOSITS IN COURT.

In a suit to enforce a mechanic's lien, the court held without power to direct the contractor to pay into court an amount sufficient to satisfy plaintiff's claim.—*Van Kannel Revolving Door Co. v. Sloane* (Sup.) 504.

DESCENT AND DISTRIBUTION.

See "Executors and Administrators"; "Wills."
 Inheritance and transfer taxes, see "Taxation," § 2.

DESCRIPTION.

Of devisees or legatees in will, see "Wills," § 4.

DETINUE.

See "Replevin."

DEVISES.

See "Wills."

DILIGENCE.

In procuring evidence affecting right to new trial, see "New Trial," § 1.

DIRECTING VERDICT.

In civil actions, see "Trial," § 4.

DIRECTORS.

Of corporation, see "Corporations," § 4.

DISBARMENT.

Of attorney, see "Attorney and Client," § 1.

DISCHARGE.

From employment, see "Master and Servant," § 1.

Of municipal officers, see "Municipal Corporations," § 1.

From indebtedness, obligation, or liability.

See "Accord and Satisfaction"; "Release."

In bankruptcy, see "Bankruptcy," § 2.

Liability as guarantor, see "Guaranty," § 2.

Liability as surety, see "Principal and Surety," § 1.

DISCONTINUANCE.

Of action, see "Dismissal and Nonsuit," § 1.

DISCOVERY.

See "Depositions."

§ 1. Under statutory provisions.

An order to examine a defendant, under Code Civ. Proc. § 872, and in view of General Rules of Practice No. 82, *held* too broad and modified so as to limit the examination to the single issue set out in the application for such examination.—*Marjori v. Waddington* (Sup.) 197.

*In an action against a corporation for injuries to an employé through negligence, certain interrogation of a witness under an order for the examination of defendant through its secretary before trial *held* proper.—*Gavin v. New York Contracting Co., Pennsylvania Terminal* (Sup.) 272.

*In an action against a corporation for injuries to an employé through negligence, certain interrogation of a witness under an order for the examination of defendant through its secretary before trial *held* improper.—*Gavin v. New*

*Point annotated. See syllabus.

York Contracting Co., Pennsylvania Terminal (Sup.) 272.

The court *held* to have no power to enter an order for inspection of papers to enable plaintiffs to frame their complaint; the application therefor being based on affidavits only, instead of a petition verified by affidavit, as required by Code Civ. Proc. § 805.—*Gordon v. Oak* (Sup.) 660.

*An application for the examination of the defendant before trial, under Code Civ. Proc. § 872, subd. 4, *held* fatally defective for failure to show that the desired testimony related to a material issue which the applicant was required to prove on the trial.—*Ehrich v. Root* (Sup.) 846.

In an action to recover money paid to defendant for certain shares of stock, application for examination of defendant before trial to identify letters and telegrams, as provided by Code Civ. Proc. § 872, *held* authorized.—*Reed v. Smith* (Sup.) 893.

Affidavit of attorney for nonresident plaintiff *held* sufficient on application to obtain order for examination of defendant before trial.—*Reed v. Smith* (Sup.) 893.

Plaintiff *held* entitled to discovery and inspection of a deed, and the same not to be denied because a summons only and no complaint was served; the materiality of the deed appearing from the motion papers.—*Peck v. Peck* (Sup.) 925.

DISCRETION OF COURT.

Granting or refusing jury trial, see "Jury," § 1.
Granting or refusing mandamus, see "Mandamus," § 2.

Granting or refusing new trial, see "New Trial," § 1.

Review in civil actions, see "Appeal," § 11.

DISMISSAL AND NONSUIT.

At trial, see "Trial," § 4.

Dismissal of complaint by municipal court for failure to pay costs of adjournment, see "Courts," § 4.

Dismissal of complaint for failure to give additional undertaking as denying due process of law, see "Constitutional Law," § 5.

Rendition and form of judgment on motion to dismiss, see "Judgment," § 3.

Review of judgment of dismissal, see "Appeal," § 3.

Stay of subsequent action until payment of cost in former action dismissed, see "Costs," § 4.

In particular actions or proceedings.

Condemnation proceedings, see "Eminent Domain," § 3.

On lost note, see "Lost Instruments."

To annul marriage, see "Marriage."

§ 1. Voluntary.

*A motion to discontinue an action brought against several defendants as copartners, made by plaintiff at the close of the entire case,

should be granted where he failed to prove a copartnership.—*Schneider v. Fuchs* (Sup.) 83.

§ 2. Involuntary.

*Facts *held* to warrant dismissal of an action, under Code Civ. Proc. § 822 and General Rules of Practice No. 36, for unreasonable delay in prosecution.—*Bleiberg v. Ottenberg* (Sup.) 216.

*A complaint that states any cause of action, legal or equitable, cannot be dismissed on its face or because the cause is on the wrong calendar.—*Ross v. McCaldin* (Sup.) 381.

*An excuse for failure to bring a cause to trial for three years, *held* not sufficient to warrant the exercise of the court's discretion in allowing plaintiff to bring the action to trial at a future term.—*Regan v. Milliken Bros.* (Sup.) 722.

*Under Code Civ. Proc. § 822, and Sup. Ct. rule 36, delay of plaintiff in bringing action to trial *held* to require a satisfactory excuse.—*Regan v. Milliken Bros.* (Sup.) 722.

DISSOLUTION.

Of corporation, see "Corporations," § 7.

DISTRIBUTION.

Of estate of decedent, see "Executors and Administrators," § 5.

DIVORCE.

Annulment of marriage, see "Marriage."
Conclusiveness of foreign judgment of divorce, see "Judgment," § 10.

Joinder of causes of action, see "Action," § 1.
Right to trial by jury in action for, see "Jury," § 1.

§ 1. Grounds.

*In an action by a wife for a separation, facts alleged in plaintiff's affidavit *held*, if true, to justify a judgment of separation.—*Mossa v. Mossa* (Sup.) 1044.

§ 2. Jurisdiction, proceedings, and relief.

*An order in a suit for divorce directing the submission of an issue for trial before a jury *held* erroneous because the issue is too indefinite.—*Weis v. Weis* (Sup.) 1061.

*In an action for divorce, an answer *held* indefinite requiring defendant on motion for bill of particulars to make the same more definite.—*Weis v. Weis* (Sup.) 1061.

*Under Code Civ. Proc. § 1763, plaintiff was not entitled to maintain an action for a separation in this state.—*Conrad v. Conrad* (Sup.) 1093.

§ 3. Alimony, allowances, and disposition of property.

Where a complaint for divorce for adultery was based on information and belief, and on an application for alimony and counsel fees

pendente lite complainant did not show the source of her information nor the grounds of her belief, and defendant denied under oath all charges of adultery, the application should have been denied.—*Schweig v. Schweig* (Sup.) 904.

Under Code Civ. Proc. §§ 1773, 2266, 2281, an order punishing defendant in a suit for divorce for contempt in failing to pay alimony and counsel fees *held* fatally defective for failure to determine that the offense was calculated to, and did, defeat, impair, or prejudice, plaintiff's rights or remedies.—*Schweig v. Schweig* (Sup.) 905.

It was the duty of a husband, in a suit against him for divorce, to have obeyed an order for the payment of alimony and counsel fees pendente lite, though erroneous, unless he had obtained a stay, or until it was modified, set aside, or reversed.—*Schweig v. Schweig* (Sup.) 905.

The husband's right to see the child of the parties to an action for divorce *held* not a condition precedent to the husband's obligation to pay alimony in accordance with the decree therefor.—*Schweig v. Schweig* (Sup.) 905.

*In a suit by a wife for a separation, plaintiff *held* entitled to temporary alimony.—*Mossa v. Mossa* (Sup.) 1044.

*Alimony pendente lite and counsel fees will not be granted to a wife not entitled to maintain an action for a separation in this state under Code Civ. Proc. § 1763.—*Conrad v. Conrad* (Sup.) 1093.

DOCKETS.

Of causes for trial, see "Trial," § 1.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 4.
Production and inspection of writings, see "Discovery," § 1.

DOMICILE.

Of parties to suit for divorce, see "Divorce," § 2.

DONATIONS.

See "Gifts."

DRAINS.

In cities, see "Municipal Corporations," § 5.
Repair of, by landlord, see "Landlord and Tenant," § 5.

DRUGGISTS.

A complaint in an action in the Municipal Court to recover a penalty for violating the pharmacy laws *held* demurrable.—*State Board of Pharmacy v. Davey* (Sup.) 46.

*Point annotated. See syllabus.

DUE PROCESS OF LAW.

See "Constitutional Law," § 5.

EASEMENTS.

Public easements, see "Highways."

ELECTION OF REMEDIES.

*The remedies of a seller on the buyer's breach of an executory contract of sale *held* not concurrent, and the election to pursue one remedy defeats a right to pursue another.—*Isaacs v. Terry & Tench Co.* (Sup.) 136.

ELECTIONS.

Of corporate offices, see "Corporations," § 3.
Of officers of religious society, see "Religious Societies."

§ 1. Nominations and primary elections.

Under Primary Election Law, Laws 1898, pp. 332, 341, c. 179, § 2, and section 4, subd. 4, a rule of the general committee of a political party relating to the unit of representation *held* valid notwithstanding Election Law 1896, pp. 913, 922, c. 909, §§ 34, 53.—*In re Sheridan* (Sup.) 244.

*Where certificate of nomination is not presented for filing until seven days after time prescribed by Laws 1899, p. 993, c. 473, § 10, the county clerk will not be ordered to receive it, nor the board of elections required to print the name on the official ballot.—*People v. Dooling* (Sup.) 368.

ELECTRICITY.

Action for death of servant caused by electricity, see "Master and Servant," § 8.

Delegation of legislative power to commission of gas and electricity, see "Constitutional Law," § 2.

Laws creating gas and electricity commission as denying due process of law, see "Constitutional Law," § 5.

Laws creating gas and electricity commission as denying equal protection of law, see "Constitutional Law," § 4.

ELEVATED RAILROADS.

Exercise of power of eminent domain, see "Eminent Domain," § 1.

ELEVATORS.

Care required as to use of, see "Negligence," § 1.

EMINENT DOMAIN.

Extra allowances in condemnation proceedings, see "Costs," § 2.

Public improvements by municipalities, see "Municipal Corporations," § 2.

§ 1. Nature, extent, and delegation of power.

*Elevated railroads *held* to have power to acquire lands necessary for maintenance and accommodation.—*Manhattan Ry. Co. v. Astor* (Sup.) 666.

*Railroad Law, Laws 1892, p. 1396, c. 676, § 7, providing that waters used for domestic agricultural, or manufacturing purposes should not be condemned, *held* not to prevent the taking of land for a railroad right of way and the construction of the road over a pond, so as not to interfere with the use thereof by the landowners.—*Erie & J. R. Co. v. Brown* (Sup.) 983.

§ 2. Compensation.

*Where land is taken for public use, the commissioners are not authorized to go outside of the area of the improvement and award consequential damages to lands embraced therein.—*In re City of New York* (Sup.) 567; *In re Commissioners of Docks, Id.*

Where land in connection with certain gas mains is taken for a public improvement, the revocation of a license granted by the city to lay such mains is no ground for an award of damages.—*In re City of New York* (Sup.) 567; *In re Commissioners of Docks, Id.*

In condemnation proceedings the value of lands leased for business purposes should be measured by the net income.—*In re City of New York* (Sup.) 567; *In re Commissioners of Docks, Id.*

*In fixing award for lands condemned, the benefits from the improvements are to be considered.—*In re City of New York* (Sup.) 567; *In re Commissioners of Docks, Id.*

§ 3. Proceedings to take property and assess compensation.

In condemning certain lands and bulkhead rights, it is unnecessary that the report of the commissioners should state the additional value they give the lands by reason of such rights, where they report that they considered the same and increased the value of the land taken therefor.—*In re City of New York* (Sup.) 567; *In re Commissioners of Docks, Id.*

Under Code Civ. Proc. §§ 3367, 3369, a referee appointed to determine a condemnation proceeding had authority to order dismissal of the proceeding, so that judgment of dismissal was properly entered by the clerk.—*Erie & J. R. Co. v. Brown* (Sup.) 981.

*Under Railroad Law, Laws 1890, p. 1084, c. 565, § 6, as amended by Laws 1892, p. 1384, c. 676, § 6, a railroad company *held* not required to delay condemnation proceedings, after notice, until determination of an application for change of route.—*Erie & J. R. Co. v. Brown* (Sup.) 983.

*A proposed railroad map and profile *held* not objectionable because made on different sheets of paper.—*Erie & J. R. Co. v. Brown* (Sup.) 983.

*A railroad map and profile *held* to constitute a compliance with the statute requiring a railroad to file a map and profile of the route before constructing any part of its road or instituting condemnation proceedings.—*Erie & J. R. Co. v. Brown* (Sup.) 983.

*Point annotated. See syllabus.

*In a proceeding to condemn land for a railroad right of way, evidence held to establish that plaintiff had been unable to agree with defendants for the purchase of the land.—*Erie & W. R. Co. v. Brown* (Sup.) 988.

EMPLOYÉS.

See "Master and Servant."

EMPLOYMENT BUREAUS.

License of, see "Licenses," § 1.

ENTRY.

Of judgment, see "Appeal," § 3.
Re-entry by landlord, see "Landlord and Tenant," §§ 3, 7.

EQUITABLE CONVERSION.

See "Conversion."

EQUITABLE ESTOPPEL.

See "Estoppel," § 1.

EQUITY.

Equitable conversion, see "Conversion."
Equitable estoppel, see "Estoppel," § 1.
Pleading conclusions in equitable action, see "Pleading," § 1.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Fraudulent Conveyances"; "Injunction"; "Quieting Title"; "Receivers"; "Specific Performance"; "Trusts."

Relief against judgment, see "Judgment," § 6.

ESTABLISHMENT.

Of lost instruments, see "Lost Instruments."
Of trusts, see "Trusts," § 6.

ESTATES.

Treated by will, see "Wills," § 6.
Decedents' estates, see "Executors and Administrators."

Estates for years, see "Landlord and Tenant."
Restrictions on creation of future estates, see "Perpetuities."

Tenancy in common, see "Tenancy in Common."
Trusts, see "Trusts," § 2.

The provisions of Real Property Law, Laws 1896, pp. 579, 580, c. 547, §§ 129-132, which change limited estates into fees, where an absolute power of disposition is given the owner of the particular estate, have no application where the title is vested in a trustee, and a subordinate power is given to a beneficiary under the trust.—*Dudley v. People's Trust Co.* (Sup.) 930.

*Point annotated. See syllabus.

ESTOPPEL.

By judgment, see "Judgment," §§ 8, 9.
Of legatees to attack will, see "Wills," § 10.
To allege error, see "Appeal," § 11.
To deny corporate existence, see "Corporations," § 1.
To take appeal, see "Appeal," § 4.
To tender back goods sold, see "Sales," § 7.

§ 1. Equitable estoppel.

*Certain facts held not to estop a substituted trustee under a testamentary trust from taking the position that he was not liable for the payment of rent for certain property within his control.—*In re Froelich's Estate* (Sup.) 173.

EVIDENCE.

See "Depositions"; "Discovery"; "Witnesses."
Applicability of instructions to evidence, see "Trial," § 5.
Conformity of judgment to proofs, see "Judgment," § 3.
Letters of administration as evidence of death, see "Executors and Administrators," § 1.
Questions of fact for jury, see "Trial," § 4.
Reception at trial, see "Trial," § 2.
Restraining introduction of evidence obtained by fraud in law action, see "Injunction," § 2.
Verdict or findings contrary to evidence, see "New Trial," § 1.

As to particular facts or issues.

See Deeds," § 1; "Fraudulent Conveyances," § 1; "Judgment," § 12.
Authority of servant, see "Master and Servant," § 9.
Construction of will, see "Wills," §§ 3, 8.
Contributory negligence of person killed or injured by operation of street railroad, see "Street Railroads," § 1.
Contributory negligence of servant, see "Master and Servant," § 7.
Creation of relation between landlord and tenant, see "Landlord and Tenant," § 1.
Defense of statute of limitations, see "Limitation of Actions," § 3.
Discharge of employé, see "Master and Servant," § 1.
Execution of will, see "Wills," § 2.
Knowledge of viciousness of dog, see "Animals."
Ratification of act of agent, see "Principal and Agent," § 2.
Service of process, see "Process," § 2.

In actions by or against particular classes of persons.

See "Carriers," § 2; "Factors"; "Landlord and Tenant," § 5; "Master and Servant," § 1; "Municipal Corporations," § 5; "Street Railroads," § 1; "Warehousemen."

In particular civil actions or proceedings.

See "Injunction," § 3; "Malicious Prosecution," §§ 1, 2; "Mandamus," § 3; "Money Lent"; "Money Received"; "Negligence," § 3; "Trove and Conversion," § 2.
Accounting by partner, see "Partnership," § 4.
Condemnation proceedings, see "Eminent Domain," § 3.

For breach of contract, see "Contracts," § 4.
 For broker's commissions, see "Brokers," § 2.
 For causing death, see "Death," § 1.
 For conspiracy, see "Conspiracy," § 1.
 For death of servant, see "Master and Servant," § 8.
 For loss of or injury to property of guests, see "Innkeepers."
 For penalty for giving short weight, see "Weights and Measures."
 For personal injuries, see "Animals": "Carriers," § 2; "Master and Servant," §§ 6, 8, 9; "Municipal Corporations," §§ 4, 5; "Street Railroads," § 1.
 For price of goods sold, see "Sales," § 6.
 For wages of servant, see "Master and Servant," § 2.
 On bill or note, see "Bills and Notes," § 4.
 On guaranty, see "Guaranty," § 3.
 On insurance policy, see "Insurance," § 3.
 To recover bank deposit, see "Banks and Banking," § 1.
 To recover deposit to secure performance of contract, see "Contracts," § 3.
 To recover money deposited in trust, see "Trusts," § 6.

In criminal prosecutions.

See "Criminal Law," § 5; "Homicide," § 1; "Perjury," § 2.

Review and procedure thereon in appellate courts.

See "Appeal," § 11.
 Harmless error in rulings on, see "Appeal," § 11.
 Review of rulings on, as dependent on presentation in lower court of grounds of review, see "Appeal," § 5.

§ 1. Demonstrative evidence.

*On a writ of inquiry before a sheriff's jury, defendant was not prejudiced by the introduction of the shirt which plaintiff wore at the time of the injury, which was saturated with blood.—Weber v. International Ry. Co. (Sup.) 965.

§ 2. Declarations.

*On an issue as to whether a contract for the laying of a conduit system had been modified because of a mutual mistake as to the pavement to be taken up and relaid, evidence that plaintiff's superintendent took only such tools as were available for the kind of pavement plaintiff contended he understood was to be removed when the original contract was made, held inadmissible as self-serving.—Gherky v. State Line Telephone Co. (Sup.) 420.

*In an action by architects for fees for making plans for a building at a specified per cent. of its cost, the statement as to the cost in the plans filed with the building department was inadmissible.—Israel's v. MacDonald (Sup.) 826.

*Certain hearsay evidence as to pedigree held admissible.—In re Fail's Will (Sur.) 224.

§ 3. Hearsay.

Evidence of insured's attending physician at the time of her death as to her condition and treatment prior to his care of her held hearsay.—Scott v. Metropolitan Life Ins. Co. (Sup.) 124.

*Letters written to plaintiff by a stranger to the action containing statements tending to negative plaintiff's claim are inadmissible to establish the defense.—Central Bureau of Engraving v. Schmidt-Wilckes Electric Co. (Sup.) 219.

§ 4. Documentary evidence.

No provision is made by the Code of Civil Procedure as to the requirements for admission in evidence of records of courts of other states; the procedure relating thereto being governed by the Constitution of the United States.—Van Deventer v. Mortimer (Sup.) 564.

Authentication of foreign judgment held not a compliance with Rev. St. U. S. § 905 [U. S. Comp. St. 1901, p. 677], so as to render it admissible under Const. U. S. art. 4, § 1.—Van Deventer v. Mortimer (Sup.) 564.

Code Civ. Proc. §§ 952, 953, held to relate only to authentication of copies of records of courts of foreign countries.—Van Deventer v. Mortimer (Sup.) 564.

§ 5. Parol or extrinsic evidence affecting writings.

*Parol testimony held admissible to show that a receipt releasing a seller's title to property sold with a reservation of title was not intended to release a claim for the unpaid part of the purchase price.—Reedy Elevator Co. v. Berman (Sup.) 59.

*Evidence that defendants were induced to sign a contract for electrical auditor's services on the assurance that it contained a specific guaranty of results, which it did not, held admissible to establish a defense of fraud, notwithstanding the rule precluding the admission of parol evidence to vary the terms of a writing.—Electrical Audit & Rebate Co. v. Greenberg (Sup.) 110.

*In an action by a stock broker for a balance due from a customer on stock purchases and sales pursuant to orders made by a third person under written authority, the customer held not entitled to attack the unambiguous meaning of the authorization and substitute his intention therefor.—Butler v. De Villers (Sup.) 125.

*In an action for deceit, a written instrument held a mere receipt, and not a contract and hence defendant was entitled to contradict it by parol.—Duffy v. Meyer (Sup.) 672.

*The rule that parol evidence is inadmissible to vary a written contract is inapplicable in an action for deceit in inducing plaintiff to enter into a contract by fraud.—Duffy v. Meyer (Sup.) 672.

§ 6. Opinion evidence.

*Testimony of a witness having knowledge that there is a stage coach line on a certain street, as to whether there is any other such line on the street, is not objectionable as a conclusion.—Sturgis v. Fifth Ave. Coach Co. (Sup.) 270.

*In an action by architects for fees for making plans for a building at a specified per cent. of its cost, a statement of one of the architects before the plans were drawn, of the amount the

*Point annotated. See syllabus.

building would cost, *held* inadmissible.—*Israels v. MacDonald* (Sup.) 826.

*In an action by architects for fees for making plans for a building at a specified per cent. of its cost, evidence of experts as to the cost of the building based on estimates *held* inadmissible.—*Israels v. MacDonald* (Sup.) 826.

*Certain questions *held* improper as calling for conclusions of the witnesses.—*Burns v. Crow* (Sup.) 944.

*In an action by a servant for injuries from an insufficient scaffold, a question *held* improper as requiring a witness to draw inferences from conflicting testimony.—*Burns v. Crow* (Sup.) 944.

§ 7. Weight and sufficiency.

There being no evidence as to the amount needed to make good omissions in the performance of a contract, a verdict making a certain deduction cannot be upheld, since the deduction must have been a mere guess.—*Conrad v. V. Loewer's Gambrinus Brewery Co.* (Sup.) 94.

*The rule as to the conclusiveness of evidence of a party, where not directly contradicted, stated.—*Siegmeister v. Lispenard Realty Co.* (Sup.) 158.

EXAMINATION.

Of adverse party before trial, see "Discovery," § 1.

Of expert witnesses, see "Criminal Law," § 5; "Evidence," § 6.

Of person accused of crime, see "Criminal Law," § 4.

Of witnesses in general, see "Witnesses," 2.

EXCEPTIONS.

Necessity for purpose of review, see "Appeal," § 5.

Taking exceptions at trial, see "Trial," § 2.

To argument of counsel at trial, see "Trial," § 3.

EXCESSIVE DAMAGES.

See "Damages," § 2.

EXCISE.

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

EXECUTION.

See "Attachment."

Body execution in municipal court, see "Courts," § 5.

Of trust, see "Trusts," § 4.

Of will, see "Wills," § 2.

§§ 1, 2. Issuance, form, and requisites of writ.

Code Civ. Proc. § 1376, requiring indorsement of the name and residence of the person issuing execution where it is issued by personal

representatives or assignee of a deceased judgment creditor, *held* to relate only to issuance of executions after death of judgment creditors, and not to prior sections dealing with other conditions.—*Fish v. Hahn* (Sup.) 274.

In view of Code Civ. Proc. § 756, treating of the rights of assignees in pending actions, and section 1375, relating to the issue of execution by a judgment creditor or his assignee, *held* an execution might be issued in the name of the original judgment creditor, though the judgment had previously been assigned.—*Fish v. Hahn* (Sup.) 274.

§ 3. Lien, levy or extent, and custody of property.

Where a notice of appeal and undertaking were not served until after the stay granted by the trial justice had expired, such levy would be set aside only on payment of the sheriff's and keeper's fees, under Code Civ. Proc. § 1311.—*Wall St. Exch. Bldg. Ass'n v. New York & W. Consol. Oil Co.* (Sup.) 884.

§ 4. Supplementary proceedings.

*Facts *held* to show judgment debtor not in contempt for failure to appear for examination.—*Bernstein v. McCahill* (Sup.) 161.

*Where a substantial dispute arises between judgment creditors and a third party in a proceeding supplementary to execution as to the ownership of funds in the hands of the third party as trustee, the funds should not be directed to be paid to the creditors, but they should bring action through a receiver.—*Ghersin v. Thuor* (Sup.) 195; *Blechner v. Same, Id.*; *Gould v. Same, Id.*; *Cohen v. Same, Id.*

Supplementary proceedings may be maintained against a judgment debtor, though his true Christian name is unknown; but where the parties agree on the true name, subsequent proceedings will be taken under the true name.—*Minsky v. Stransky* (Sup.) 220.

*A judgment debtor *held* not liable for contempt for failure to appear for examination in supplementary proceedings in view of a telephone message from the creditor's attorney.—*In re Seitz* (Sup.) 593.

*Under Code Civ. Proc. § 2281, failure to appear for examination under an order in supplementary proceedings *held* a contempt authorizing a fine.—*In re Seitz* (Sup.) 593.

*Under Code Civ. Proc. § 2281, the fact that a fine for contempt in failing to appear for examination in supplementary proceedings was identical with the judgment and costs *held* no ground for reversal.—*In re Seitz* (Sup.) 593.

Supplementary proceedings may be maintained against a judgment debtor on a judgment against him under a fictitious Christian name where his real name is unknown.—*J. R. Smith & Co. v. Josephson* (City Ct.) 221.

EXECUTIVE POWER.

See "Constitutional Law," § 2.

*Point annotated. See syllabus.

EXECUTORS AND ADMINISTRATORS.

See "Wills."

Testamentary trustees, see "Trusts."

Testimony as to transactions with decedents, see "Witnesses," § 1.

§ 1. Administration in general.

Where a savings bank depositor disappeared, the court, after a sufficient time, could find that he was dead, and grant administration.—*Marks v. Emigrant Industrial Sav. Bank* (Sup.) 491.

*Payment to an administrator of an absentee who is not in fact dead is no defense as against him or his legal representatives.—*Marks v. Emigrant Industrial Sav. Bank* (Sup.) 491.

*Letters of administration do not establish, even prima facie, the fact of the death of the alleged decedent.—*Marks v. Emigrant Industrial Sav. Bank* (Sup.) 491.

§ 2. Appointment, qualification, and tenure.

A wife appointed executrix in her husband's will *held* entitled to act as such, notwithstanding her interest as beneficiary.—*Brown v. Brown* (Sup.) 864.

Code Civ. Proc. § 2685, subd. 1, authorizing revocation of letters, refers to section 2661, forbidding letters to be issued to certain persons.—*In re Campbell's Estate* (Sur.) 591.

*Where surrogate by consent issued letters to a creditor, who qualified, they will not be revoked for erroneous statements as to decedent's age and amount of estate; it not being a false suggestion of a material fact within Code Civ. Proc. § 2685, subd. 4.—*In re Campbell's Estate* (Sur.) 591.

Where an executor appointed in a will should not have the management of the estate, the court should appoint an administrator with will annexed pursuant to Code Civ. Proc. § 2643.—*In re Maccaffil* (Sur.) 1115.

The word, "intestacy," in Code Civ. Proc. § 2660, when considered in connection with section 2662, *held* to refer to the person, and not to specific property.—*In re Maccaffil* (Sur.) 1115.

The court, in appointing one to administer the estate of a testatrix, should lean towards upholding her selection rather than the appointment of one whom she did not select.—*In re Maccaffil* (Sur.) 1115.

*Only one person should be appointed to administer the estate of a decedent, and, where a will appoints an executor, he, if competent, should administer the estate.—*In re Maccaffil* (Sur.) 1115.

§ 3. Collection and management of estate.

Where the will of a partner fixed the price which his surviving partners should pay for the good will, the remaindermen *held* not entitled to complain of a sale by the executors on the terms prescribed.—*Brown v. Brown* (Sup.) 864.

A testator specifically devising real estate only, leaving personality undisposed of, who appoints an executor, shows an intention that the executor shall administer the personality; otherwise he would have nothing to do.—*In re Maccaffil* (Sur.) 1115.

A will construed, and *held* to show an intention that the executor appointed therein should administer the personal estate left undisposed of by the will.—*In re Maccaffil* (Sur.) 1115.

§ 4. Allowance and payment of claims.

Where executors were trustees under a will with power to sell to pay debts, they were trustees of the creditors, and limitations did not run until the sale of the real estate.—*In re Prince's Estate* (Sur.) 296.

Where creditors of an estate were told by an executor that their claims would be paid when the real estate was sold, the executor could not interpose the bar of limitations to such claims after the sale of the real estate.—*In re Prince's Estate* (Sur.) 296.

On presentation of a claim against decedent's estate, where the personal representatives do not offer to defer it or dispute it, it acquires the character of a liquidated debt.—*In re Prince's Estate* (Sur.) 296.

*On proceedings for the settlement of an executor's account, an admission by him in open court that he takes no issue with any creditor as to the amount due on his claim, of the time when it accrued, binds the estate.—*In re Prince's Estate* (Sur.) 296.

§ 5. Distribution of estate.

The executor appointed in a will, disposing of real estate only, leaving the personality undisposed of, has the right to administer the personality by paying the debts and distributing the balance among the next of kin entitled to it by law.—*In re Maccaffil* (Sur.) 1115.

§ 6. Accounting and settlement.

*An executor *held* ordinarily confined to the compensation prescribed by statute.—*In re Froelich's Estate* (Sup.) 173.

An agreement by beneficiaries under a will that the executor should have additional compensation for services rendered in continuing testator's business and working therein is voidable for unfairness or inequity.—*In re Popp* (Sup.) 277; *In re Kempf's Will*, Id.

Consent in open court of certain legatees to extra compensation awarded to the executor *held* not a consent that the whole of such extra compensation be charged against them.—*In re Popp* (Sup.) 277; *In re Kempf's Will*, Id.

*An executor *held* not entitled, under Code Civ. Proc. § 2730, to compensation from the estate for extra services rendered in continuing testator's business and working therein.—*In re Popp* (Sup.) 277; *In re Kempf's Will*, Id.

Surety on bond of temporary administrator who replaced a former surety *held* entitled in a proceeding to charge the administrator with a

*Point annotated. See syllabus.

devastavit to show that the devastavit occurred before he became surety.—In re Grant (Sup.) 375.

§ 7. Foreign and ancillary administration.

Administration for the preservation of an abandoned estate in New Jersey, there being no property of decedent in that state and no finding that the alleged decedent was in fact dead, did not entitle the administrator so appointed to receive deposits in a bank located in New York in the name of such alleged decedent.—Marks v. Emigrant Industrial Sav. Bank (Sup.) 491.

EXEMPLARY DAMAGES.

In action for injuries to third person by act of servant, see "Master and Servant," § 9.
In action for malicious prosecution, see "Malicious Prosecution," § 2.

EXEMPLIFICATIONS.

As evidence, see "Evidence," § 4.

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 6.
In criminal prosecutions, see "Criminal Law," § 5.

EXPLOSIVES.

*Contractor *held* not liable for injury to a stone wall in a street due to blasting necessary in grading the street, where no negligence was shown.—Wynne v. Bailey (Sup.) 545.

FACTORS.

See "Brokers"; "Principal and Agent."

*A contract for the creation of an agency for the sale of plaintiff's musical instrument and music *held* to constitute a sale on credit and not to create a fiduciary relation between the parties.—Conn v. Chambers (Sup.) 978.

*A contract for the sale of musical merchandise to defendant on credit *held* not changed to a fiduciary contract by an instrument by which defendant acknowledged his indebtedness to plaintiff and agreed to pay the same in installments, etc.—Conn v. Chambers (Sup.) 976.

*A consignor of lumber *held* entitled to sue for its conversion without proving a demand for redelivery and a refusal thereof.—Acme Lumber Co. v. Montgomery (Sup.) 1074.

In an action for the conversion of consigned lumber, evidence *held* sufficient to show the time of the conversion and the value of the lumber at that time.—Acme Lumber Co. v. Montgomery (Sup.) 1074.

FALSE IMPRISONMENT.

See "Malicious Prosecution."

*Point annotated. See syllabus.

FALSE PRETENSES.

A representation to an agent of a corporation to obtain money from the corporation is a representation to the corporation, within Pen. Code, § 528, punishing one who with intent to deprive the owner of his property obtains by aid of fraudulent representations any money, etc.—People v. Eaton (Sup.) 849.

*One *held* guilty of larceny in obtaining money by fraudulent representations, under Pen. Code, § 528.—People v. Eaton (Sup.) 849.

*An indictment under Pen. Code, § 528, defining larceny, need not allege the means by which defendants carried out their fraudulent conspiracy to obtain the money of another, or that the latter or its employes relied on the false representations.—People v. Eaton (Sup.) 849.

FALSE SWEARING.

See "Perjury."

FEDERAL COURTS.

See "Courts," § 7.

FEES.

Counsel fees as element of damages in action on injunction bond, see "Injunction," § 6.
Of attorney, see "Attorney and Client," § 3.

FEE SIMPLE.

See "Estates."

FELLOW SERVANTS.

See "Master and Servant," § 6.

FILING.

Certificates of nomination, see "Elections," § 1.

FINAL JUDGMENT.

Appealability, see "Appeal," § 3.

FINDINGS.

On reference, see "Reference," § 2.
Review on appeal, see "Appeal," § 11.
Setting aside, see "New Trial," § 1.

FINES.

For contempt, see "Contempt," § 2.
For disobedience to orders in supplementary proceedings, see "Execution," § 4.
Jurisdiction to impose, see "Criminal Law," § 2.

FIRES.

On leased premises as affecting tenant's liability for rent, see "Landlord and Tenant," § 6.

FISH.

See "Game."

FIXTURES.

Right of purchaser from trustee in bankruptcy to remove, see "Bankruptcy," § 1.

*The rule as to when a fixture is to become part of the realty stated.—Jacob v. Kellogg (Sup.) 713.

*Certain fixtures held to have become a part of the realty.—Jacob v. Kellogg (Sup.) 713.

*There is a presumption that, when articles are trade fixtures, there is an intention on the part of the landlord and tenant that the attachment to the realty shall not be permanent.—Jacob v. Kellogg (Sup.) 713.

FOOD.

Adulteration as a public offense, see "Adulteration."

FORECLOSURE.

Of lien, see "Mechanics' Liens," § 3.

Of mortgage, see "Chattel Mortgages," § 3; "Mortgages," § 4.

Of receiver's certificates, see "Receivers," § 1.

FOREIGN ADMINISTRATION.

See "Executors and Administrators," § 7.

FOREIGN CORPORATIONS.

See "Corporations," § 8.

Jurisdiction of municipal court of action by nonresident against foreign corporation, see "Courts," § 3.

Restraining use of trade-name, see "Trade-Marks and Trade-Names," § 2.

FOREIGN COURTS.

See "Courts," § 8.

FOREIGN JUDGMENTS.

See "Judgment," § 10.

FORFEITURES.

Conflicting jurisdiction of United States courts and state courts of proceedings to forfeit corporate charter, see "Courts," § 8.

Of franchise, see "Corporations," § 7.

Of wages by employé, see "Master and Servant," § 2.

*Point annotated. See syllabus.

FORMER ADJUDICATION.

See "Judgment," §§ 8, 9.

FORMS OF ACTION.

See "Replevin"; "Trespass," § 2; "Trove and Conversion."

FORGERY.

The nature of false entries in corporate books, constituting forgery, under Pen. Code, § 515, defined.—People v. Hegeman (Sup.) 261.

*Certain facts held not to prove an intent to defraud essential to constitute forgery, under Pen. Code, § 515, when considered in connection with sections 718, 721.—People v. Hegeman (Sup.) 261.

*Under Pen. Code, § 515, to constitute forgery by making false entries in books of account, the two essentials are the making of the false entries and the intent in so doing to defraud.—People v. Hegeman (Sup.) 261.

To constitute forgery, under Pen. Code, § 515, it must appear affirmatively that the intent to defraud existed.—People v. Hegeman (Sup.) 261.

FRANCHISES.

Forfeiture, see "Corporations," § 7.

*A corporation owning public franchises owes primarily a duty to the state, and the transfer of its public franchises without the consent of the state is against public policy.—People v. New York City Ry. Co. (Sup.) 247.

FRAUD.

See "False Pretenses"; "Fraudulent Conveyances."

Parol evidence to impeach contract, see "Evidence," § 5.

Restraining introduction of evidence obtained by fraud in law action, see "Injunction," § 2.

In particular classes of conveyances, contracts, transactions, or proceedings.

See "Chattel Mortgages," § 2.

Sale of corporate stock, see "Corporations," § 2.

§ 1. Deception constituting fraud, and liability therefor.

*Where plaintiff's agent falsely represented to defendants that a written contract conformed to their oral agreement, defendants owed no duty to plaintiff to read the contract in order to discover the falsity thereof, but were entitled to rely on the representations as true.—Electrical Audit & Rebate Co. v. Greenberg (Sup.) 110.

FRAUDS, STATUTE OF.

§ 1. Promises to answer for debt, default, or miscarriage of another.

*An owner's promise to a subcontractor to do an original undertaking and not a promise to

answer for the debt of another, void within the statute of frauds.—*Sinkovitz v. Applebaum* (Sup.) 122.

*Guaranty of indorsers of payment of account *held* not a promise to answer for the debt of another within the statute of frauds.—*Jefferson Bank v. Starr* (Sup.) 582.

*Promises in form collateral are in reality original when founded on an independent consideration and when the promisor receives the benefit.—*Jefferson Bank v. Starr* (Sup.) 582.

§ 2. Requisites and sufficiency of writing.

*Under the express provisions of Laws 1896, p. 592, c. 547, § 207, an agent, in order to execute a lease for more than a year, must have written authority from his principal.—*Finkelstein v. Fabyik* (Sup.) 67.

*Vendee in contract for sale of land cannot raise question that written contract is insufficient under the statute of frauds (Real Property Act, Laws 1896, p. 602, c. 547, § 224).—*Quinto v. Alexander* (Sup.) 422.

§ 3. Pleading, evidence, trial, and review.

*The statute of frauds is a defense, and must be pleaded.—*Weisinger v. Brownstein* (Sup.) 644.

FRAUDULENT CONVEYANCES.

By bankrupt, see "Bankruptcy," § 1.

§ 1. Remedies of creditors and purchasers.

*In an action against a sheriff for levying up on a picture belonging to plaintiff but in possession of the execution debtor, the question whether the picture had been sold by the debtor to plaintiff in good faith and not to defraud creditors *held*, under the evidence, a question for the jury.—*Tuttle v. Hayes* (Sup.) 22.

*Where a picture is sold but possession restrained, and there is no evidence of transfer of title, the transfer will be presumed fraudulent as against vendor's creditors, under express provisions of Personal Property Law, Laws 1897, p. 511, c. 417, § 25.—*Tuttle v. Hayes* (Sup.) 22.

*Complaint in action to set aside conveyance as in fraud of creditors *held* to sufficiently allege insolvency of grantor.—*Holland v. Grote* (Sup.) 667.

GAME.

In a prosecution for unlawfully possessing quail, grouse, and plover under Forest, Fish, and Game Law, Laws 1900, p. 22, c. 20, as amended, the fact that part of the game was imported *held* no defense.—*People v. Martin* (Sup.) 1076.

Under Forest, Fish, and Game Law, Laws 1900, p. 22, c. 20, art. 2; section 22, as amended by Laws 1904, p. 1401, c. 578; section 25, as amended by Laws 1902, p. 879, c. 317; section 23, as amended by Laws 1902, p. 880, c.

317; section 30, as amended by Laws 1904, p. 1413, c. 588; and section 39, Laws 1900, p. 29, c. 20, a verdict *held* properly directed for plaintiff in an action by the people for the statutory penalty for unlawfully possessing quail, grouse, and plover.—*People v. Martin* (Sup.) 1076.

Intent to return game to a wholesale dealer to be kept under bond during the close season *held* no defense to an action for the statutory penalty for unlawful possession of birds in view of Forest, Fish, and Game Law, Laws 1902, p. 487, c. 194, § 141.—*People v. Martin* (Sup.) 1076.

GARNISHMENT.

See "Attachment"; "Execution."

GAS.

Delegation of legislative power to commission of gas and electricity, see "Constitutional Law," § 2.

Laws creating gas and electricity commission as denying due process of law, see "Constitutional Law," § 5.

Laws creating gas and electricity commission as denying equal protection of law, see "Constitutional Law," § 4.

The court, in determining whether the rates for gas and electricity furnished by a public service corporation, as fixed by the commission of gas and electricity created by Laws 1905, p. 2092, c. 737, are reasonable, must presume in favor of the validity of the order of the commission.—*Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.* (Sup.) 341.

The rates established by the commission of gas and electricity created by Laws 1905, p. 2092, c. 737, for gas and electricity furnished by a public service corporation *held* not, under the facts, unreasonable.—*Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.* (Sup.) 341.

A public service corporation furnishing gas and electricity *held* entitled only to a fair return on the actual value of its property after paying reasonable charges against the same.—*Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.* (Sup.) 341.

GIFTS.

Charitable gifts, see "Charities."

From husband to wife, see "Husband and Wife," § 1.

Transfer taxes, see "Taxation," § 2.

§ 1. Inter vivos.

*To constitute a valid gift inter vivos there must be an intent to give, with a delivery, and an acceptance on the part of the donee.—*Schneider v. Schneider* (Sup.) 792.

*In an action to recover a bank deposit, the burden *held* on defendant to establish a completed gift in presenti of one-half of the deposit

*Point annotated. See syllabus.

as alleged in defendant's counterclaim.—*Schneider v. Schneider* (Sup.) 792.

A voluntary transfer of a portion of a legatee's interest in an estate, if fairly made, is as fully protected as a transfer for full consideration.—*Anderson v. Fry* (Sup.) 916.

GOOD FAITH.

Of purchaser, see "Bills and Notes," § 2.

GRAND JURY.

See "Indictment and Information."

GRANTS.

Of public lands, see "Public Lands."

GREATER NEW YORK CHARTER.

See "Statutes," § 1.

GUARANTY.

See "Principal and Surety."

On sale of goods, see "Sales," § 5.

Requirements of statute of frauds, see "Frauds, Statute of," § 1.

§ 1. Construction and operation.

*In construing a guaranty, if the construction is ambiguous, it is to be construed against the guarantor.—*Murphy v. Hart* (Sup.) 452.

*Where defendant guaranteed that H. would be ready and willing to carry out a contract, it was equivalent to a guaranty that he would perform.—*Murphy v. Hart* (Sup.) 452.

*Parties to a contract of guaranty can specify particularly the thing guaranteed, and when they have done this courts have no right to say that something else amounted to the same thing, and that what was done did not injure the guarantor, and thereby make a new contract on which to hold him liable.—*Guardian Trust Co. v. Peabody* (Sup.) 515; *Bull v. Guardian Trust Co. of New York* (Sup.) 522.

*While the contract of a guarantor should be fairly construed according to the reasonable rules for the interpretation of contracts, yet when the subject of the contract is finally ascertained he has the right to a strict construction.—*Guardian Trust Co. v. Peabody* (Sup.) 515; *Bull v. Guardian Trust Co. of New York* (Sup.) 522.

Individuals guaranteeing the payment of notes for loans to a corporation held relieved from liability because of the failure of the creditor to comply with the terms of the agreement as to the character and form of the notes taken.—*Guardian Trust Co. v. Peabody* (Sup.) 515; *Bull v. Guardian Trust Co. of New York* (Sup.) 522.

*The rule as to construction of a guaranty stated.—*Marcus v. Liebovitz* (Sup.) 597.

*Point annotated. See syllabus.

§ 2. Discharge of guarantor.

*Where defendants guaranteed an account to the extent of \$500, requiring notice of default, creditor was not entitled to withhold notice until the indebtedness reached \$500.—*Trenton Iron Co. v. Tassi* (Sup.) 580.

*Guarantor held discharged by a deviation to which he does not assent, whether he is harmed or not.—*Trenton Iron Co. v. Tassi* (Sup.) 580.

*Facts held not to constitute a variance of the terms of the guaranty so as to release a surety company.—*Gansevoort Bank v. Empire State Surety Co.* (Sup.) 998.

§ 3. Remedies of creditors.

*Complaint held to state a cause of action on a guaranty of performance of a contract to purchase real estate.—*Murphy v. Hart* (Sup.) 452.

*In an action on a guaranty, evidence considered, and held insufficient to show a breach of condition in such guaranty.—*Marcus v. Liebovitz* (Sup.) 597.

GUARDIAN AND WARD.

§ 1. Appointment, qualification, and tenure of guardian.

Under Domestic Relations Law, Laws 1896, p. 223, c. 272, § 51, a guardian for child cannot be appointed on the father's petition without notice to the mother.—*In re Drowne's Estate* (Sur.) 1029.

HABEAS CORPUS.

§ 1. Nature and grounds of remedy.

*A writ of habeas corpus is a common-law writ, existing independent of statute.—*People v. Kuhne* (Sup.) 1020.

§ 2. Jurisdiction, proceedings, and relief.

*Under Code Civ. Proc. § 2020, a special order of court is not required for the issuance of a writ of habeas corpus.—*People v. Kuhne* (Sup.) 1020.

*That a writ of habeas corpus was not sealed, as provided by Code Civ. Proc. § 1992, held not to render the writ void or voidable.—*People v. Kuhne* (Sup.) 1020.

Failure of a petition for habeas corpus to contain all the matters specified in Code Civ. Proc. § 2019 held waived by respondent's appearance and the filing of a return instead of a motion to quash.—*People v. Kuhne* (Sup.) 1020.

Alteration of the name intended for that of relator in a writ of habeas corpus after the writ was signed held not to invalidate it.—*People v. Kuhne* (Sup.) 1020.

Respondent having finally obeyed a writ of habeas corpus without tender of fees or relator's entering into an undertaking, as required by Code Civ. Proc. § 2000, respondent could not object that the writ was void because no fees or undertaking were tendered.—*People v. Kuhne* (Sup.) 1020.

The requirements of tender of fees to respondent and an undertaking, prescribed by Code Civ. Proc. § 2000, for a writ of habeas corpus, being for the respondent's benefit, may be waived.—*People v. Kuhne* (Sup.) 1020.

*Disobedience to a writ of habeas corpus, issued by a justice of the Supreme Court in chambers, returnable in chambers, may be punished as a criminal contempt to the same extent as if issued at Special Term.—*People v. Kuhne* (Sup.) 1020.

*Code Civ. Proc. § 2028 *held* not to preclude the court from punishing a respondent for contempt in disobedience to a writ of habeas corpus.—*People v. Kuhne* (Sup.) 1020.

*Code Civ. Proc. § 2028, providing for punishment of disobedience to a writ of habeas corpus, *held* to relate to a case where respondent failed to make any return, and not where the disobedience related to the method and manner of the return.—*People v. Kuhne* (Sup.) 1020.

*Where relator obtained a writ of habeas corpus in order to prevent his being photographed and measured at the instance of a police department while out on bail, and respondent, in charge at police headquarters, delayed return to the writ until after such identifying proceedings had been completed, he was punishable as for a civil contempt, under Code Civ. Proc. § 14, subd. 8.—*People v. Kuhne* (Sup.) 1020.

*Under Code Civ. Proc. §§ 2004, 2006, 2027, where a writ of habeas corpus was returnable forthwith, it was no excuse for respondent's delay, to afford an opportunity to photograph and measure the prisoner, that he was produced within 24 hours.—*People v. Kuhne* (Sup.) 1020.

HARMLESS ERROR.

In civil actions, see "Appeal," § 11.

HEALTH.

Adulteration as a public offense, see "Adulteration."

HEARSAY.

In civil actions, see "Evidence," § 3.

HIGHWAYS.

See "Municipal Corporations," §§ 4, 5.

Accidents at railroad crossings, see "Railroads," § 3.

Construction of statute authorizing change of grade of highways, see "Statutes," § 2.

Mandamus to compel removal of obstructions from, see "Mandamus," § 2.

§ 1. Regulation and use for travel.

*Telephone poles along the side of a highway *held* not an obstruction constituting a nuisance per se.—*Scofield v. Town of Poughkeepsie* (Sup.) 767.

*Highway commissioners *held* required to use merely reasonable care to prevent obstruction.—*Scofield v. Town of Poughkeepsie* (Sup.) 767.

*An injury resulting from a collision with telephone poles at the side of a highway *held* not proximately caused by the negligence of the highway commissioners.—*Scofield v. Town of Poughkeepsie* (Sup.) 767.

HOLIDAYS.

See "Sunday."

HOMICIDE.

Expert testimony, see "Criminal Law," § 5.

§ 1. Evidence.

*In a homicide case, evidence as to accused's possession of certain instruments after the alleged offense *held* admissible.—*People v. Weick* (Sup.) 968.

HUSBAND AND WIFE.

See "Divorce"; "Marriage."

Revocation of husband's will by marriage and birth of issue, see "Wills," § 2.

Right of husband of testatrix to invoke law limiting charitable bequests and devises, see "Wills," § 1.

Right to foreclose mortgage executed by husband as against wife, see "Chattel Mortgages," § 3. Specific performance of contract by, see "Specific Performance," § 1.

§ 1. Conveyances, contracts, and other transactions between husband and wife.

*Opening a bank account in the joint names of husband and wife with direction to pay to either or the survivor did not establish a valid gift by the husband to the wife.—*Schneider v. Schneider* (Sup.) 792.

*Evidence *held* insufficient to show a relinquishment of control of a bank deposit by a husband sufficient to constitute a gift inter vivos by the husband to the wife of one-half of the deposit.—*Schneider v. Schneider* (Sup.) 792.

§ 2. Separation and separate maintenance.

*A separation agreement, made without the intervention of a trustee, while the husband and wife are living together, and providing that they shall thereafter live apart, *held* void.—*Sunderlin v. Sunderlin* (Sup.) 979.

In an action by a wife for a separation, an order requiring plaintiff to receive defendant's offer to provide a suitable home for her *held* unauthorized.—*Mossa v. Mossa* (Sup.) 1046.

HYPOTHETICAL QUESTIONS.

See "Criminal Law," § 5.

*Point annotated. See syllabus.

IMPEACHMENT.

Of witness, see "Witnesses," § 3.

IMPLIED CONTRACTS.

See "Money Lent"; "Money Received"; "Work and Labor."

IMPRISONMENT.

See "Arrest."

Habeas corpus, see "Habeas Corpus."

IMPROVEMENTS.

Liens, see "Mechanics' Liens."

Public improvements, see "Municipal Corporations," § 2.

IMPUTED NEGLIGENCE.

See "Negligence," § 2.

INCOME.

Of trust created by will, see "Wills," § 8.

INCUMBRANCES.

On land sold, see "Vendor and Purchaser," § 1.

INDEMNITY.

See "Guaranty"; "Principal and Surety."

In action on lost note, see "Lost Instruments."

INDICTMENT AND INFORMATION.

For particular offenses.

See "False Pretenses"; "Forgery."

§ 1. Motion to quash or dismiss, and demurrer.

*The court has power to entertain a motion to quash an indictment for the insufficiency of the evidence before the grand jury, and to grant it in a proper case.—*People v. Hegeman* (Sup.) 261.

Evidence before the grand jury, on which it found indictments for perjury, held not so insufficient as to require that the indictments be quashed, on motion.—*People v. Hegeman* (Sup.) 261.

INDORSEMENT.

Of bill of exchange or promissory note, see "Bills and Notes," § 2.

INFANTS.

See "Guardian and Ward."

Injuries to minor employé, see "Master and Servant," §§ 7, 8.

INFERIOR COURTS.

See "Courts," §§ 3-6.

INFORMATION.

Criminal accusation, see "Indictment and Information."

INFRINGEMENT.

Of trade-mark, see "Trade-Marks and Trade-Names," § 2.

INHERITANCE TAX.

See "Taxation," § 2.

INJUNCTION.

Relief against particular acts or proceedings.

Infringement of trade-mark, see "Trade-Marks and Trade-Names," § 2.

Playing baseball on Sunday, see "Sunday."

Use of name of partnership, see "Partnership," § 3.

Use of trade-name, see "Trade-Marks and Trade-Names," § 1.

§ 1. Nature and grounds in general.

*Mere apprehension of injury by future wrongful acts of members of a trade union during a strike are insufficient to justify an injunction.—*Thomas Russell & Sons v. Stammers & Gold Leaf Local Union No. 22* (Sup.) 303.

*Mere illegality of a certificate of public convenience and necessity, issued pursuant to Railroad Law, Laws 1892, p. 1395, c. 676, § 59, held insufficient to warrant injunctive relief, but it must appear that pursuant to the certificate defendant is about to do something or is threatening to do something harmful to plaintiff.—*Erie R. Co. v. Rochester-Corning-Elmira Traction Co.* (Sup.) 940.

*The fact that plaintiff opposed the issuance of a certificate of public convenience and necessity, pursuant to Railroad Law, Laws 1892, p. 1395, c. 676, § 59, before the board of railroad commissioners, and on appeal from its decision, cannot be regarded as a substitute for the fact that plaintiff will be irreparably injured by threatened proceedings under the certificate, so as to entitle it to injunctive relief.—*Erie R. Co. v. Rochester-Corning-Elmira Traction Co.* (Sup.) 940.

§ 2. Subjects of protection and relief.

*Injunction will not lie in the absence of injury to person or property to restrain conspirators from interfering with the trade, business, or occupation of others; they being amenable to prosecution for such acts under Pen. Code, § 168.—*Thomas Russell & Sons v. Stammers & Gold Leaf Local Union No. 22* (Sup.) 303.

*Under Revised Charter 1901, Laws 1901, p. 179, c. 466; § 407, and the Building Code as it existed January 1, 1902, an injunction will lie to enforce sections of the Building Code relat-

*Point annotated. See syllabus.

ing to the erection of sky signs.—City of New York v. M. Wineburgh Advertising Co. (Sup.) 478; Kobbe Co. v. City of New York (Sup.) 489.

An injunction should not be granted against the use, as evidence in a law action, of a void order in a summary proceeding.—Matthews v. Carman (Sup.) 694.

*Equity may enjoin the introduction in a law action of evidence obtained by fraud and duress.—Matthews v. Carman (Sup.) 694.

§ 3. Actions for injunctions.

A complaint for a strike injunction against labor unions *held* to allege a cause of action for threatened injury to person and property.—Thomas Russell & Sons v. Stammers & Gold Leaf Local Union No. 22 (Sup.) 303.

In a suit for a strike injunction, evidence *held* insufficient to warrant a finding that acts of violence were for the benefit of defendant unions, or that they were committed pursuant to a conspiracy.—Thomas Russell & Sons v. Stammers & Gold Leaf Local Union No. 22 (Sup.) 303.

Where defendant, under New York Building Code, §§ 4, 144, obtained permit to erect a sky sign, and erected one of a height not allowed by the Code, his permit is no defense in proceedings to enjoin the erection.—City of New York v. M. Wineburgh Advertising Co. (Sup.) 478; Kobbe Co. v. City of New York (Sup.) 489.

Where defendant, as required by New York Building Code, §§ 4, 144, obtained a permit to erect a sky sign, and then proceeded to erect a sign of a height not allowed by the Code or authorized by the permit, he cannot, in a proceeding to enjoin the erection of the sign, attack the validity of the ordinance as a proper exercise of the police power.—City of New York v. M. Wineburgh Advertising Co. (Sup.) 478; Kobbe Co. v. City of New York (Sup.) 489.

§ 4. Preliminary and interlocutory injunctions.

*Where plaintiff's proof before a referee did not sustain an allegation of conspiracy against defendant trade unions, nor show ratification of acts of members during a strike, plaintiff was not entitled to an injunction pendente lite, except against the members identified as having committed acts of violence.—Thomas Russell & Sons v. Stammers & Gold Leaf Local Union No. 22 (Sup.) 303.

§ 5. Writ, order or decree, service, and enforcement.

*A strike injunction, issued against the officers and members of a labor union, was binding on every member of the union, though only the officers were served.—Thomas Russell & Sons v. Stammers & Gold Leaf Local Union No. 22 (Sup.) 303.

§ 6. Liabilities on bonds or undertakings.

*Counsel fees are not recoverable as an element of damages in an action on an injunction bond given and sued on in a federal court.—

National Soc. of United States Daughters of 1812 v. American Surety Co. of New York (Sup.) 820.

INNKEEPERS.

*The liability of a boarding house keeper for loss of property belonging to a guest stated.—Gilbert v. Williams (Sup.) 715.

*In an action against a boarding house keeper by a guest for the loss of property taken from his room, evidence considered, and *held* insufficient to show actionable negligence on the part of defendant.—Gilbert v. Williams (Sup.) 715.

*Liability of an innkeeper for theft or unexplained loss of a guest's property stated.—Gilbert v. Williams (Sup.) 715.

IN PAIS.

Estoppel, see "Estoppel," § 1.

INSOLVENCY.

See "Assignments for Benefit of Creditors" "Bankruptcy."

Of corporation, see "Corporations," § 6.

INSPECTION.

Mandamus to enforce right to inspect corporate books, see "Mandamus," §§ 2, 3.
Of goods sold, see "Sales," § 5.
Of writings, see "Discovery," § 1.

INSTRUCTIONS.

In civil actions, see "Trial," § 5.

INSURANCE.

§ 1. Premiums, dues, and assessments.

In an action for premiums on policies of liability insurance, counterclaim for insurance under the policies *held* insufficient.—Aetna Life Ins. Co. v. North Star Mines Co. (Sup.) 140.

That a life policy authorized the company to declare it void for nonpayment of a premium note *held* not to absolve the insured from liability on the note where the company elected to continue the policy.—Parker v. Simpson (Sup.) 199.

*A life insurance company electing to cancel a policy for nonpayment of a premium note *held* bound by its election.—Parker v. Murphy (Sup.) 202.

§ 2. Payment or discharge, contribution, and subrogation.

The failure of an insurer to promptly repair a glass window of a drug store is not a tort as to the lessee of the store.—Munk v. Maryland Casualty Co. (Sup.) 215.

Lessee of insured *held* not entitled to recover for delay of insurer in replacing broken plate

*Point annotated. See syllabus.

glass window.—*Munk v. Maryland Casualty Co.* (Sup.) 215.

§ 3. Actions on policies.

*In an action on an accident policy, evidence held to authorize a recovery.—*Norwood v. Preferred Acc. Ins. Co.* (Sup.) 104.

*Evidence in action on life policy held not to establish any relation between insured's alleged previous illness and the cause of death, nor that the illness was from a serious disease within a condition of the policy.—*Scott v. Metropolitan Life Ins. Co.* (Sup.) 124.

§ 4. Mutual benefit insurance.

*Statements in an application for mutual benefit insurance held not to amount to warranties.—*Richards v. King* (Sup.) 720.

*Beneficiary designated as wife in certificate issued by mutual benefit association held entitled to proceeds, though there had been no lawful marriage between herself and the member.—*Richards v. King* (Sup.) 720.

INTENT.

Criminal, see "Criminal Law," § 1.

INTEREST.

Effect as to credibility of witness, see "Witnesses," § 3.

INTERLOCUTORY INJUNCTION.

See "Injunction," § 4.

INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal," § 3.

Review on appeal, see "Appeal," § 11.

INTERROGATORIES.

To witnesses, see "Depositions."

INTERVENTION.

In attachment proceedings, see "Attachment," § 2.

INTER VIVOS.

Gifts, see "Gifts," § 1.

Gifts by husband to wife, see "Husband and Wife," § 1.

INTOXICATING LIQUORS.

§ 1. Licenses and taxes.

The holder of a liquor tax certificate held to have no greater rights than if it was secured under an original application, and hence as an original application would have been barred by Liquor Tax Law, Laws 1896, p. 66, c. 112, § 24, as amended by Laws 1905, p. 1728, c. 677,

*Point annotated. See syllabus.

§ 3, forbidding traffic in liquor in any building within 200 feet of a church, the certificate under which he held was revocable.—*In re Clement* (Sup.) 205.

Under the facts held that costs would not be imposed on revocation of a liquor tax certificate; the same being under the liquor tax law discretionary.—*In re Clement* (Sup.) 205.

ISSUES.

In civil actions, see "Pleading," § 9.

Presented for review on appeal, see "Appeal," § 5.

JOINDER.

Of causes of action, see "Action," § 1.

Of parties in civil actions, see "Parties," § 1.

JOINT ADVENTURES.

*Tender of the interest of certain parties to a joint adventure, held sufficient to call on the other parties to perform an agreement by them to purchase such interest.—*Delaware Trust Co. v. Calm* (Sup.) 813.

JOINT TENANCY.

See "Tenancy in Common."

JUDGES.

See "Courts"; "Justices of the Peace."

JUDGMENT.

Decisions of courts in general, see "Courts," § 2.

Execution, see "Execution."

Records as evidence, see "Evidence," § 4.

In actions by or against particular classes of persons.

Members of board of county supervisors, see "Counties," § 1.

In particular civil actions or proceedings.

See "Injunction," § 5; "Trove and Conversion," § 2; "Work and Labor."

On appeal see "Appeal," § 12.

Review.

See "Appeal."

Judgments of municipal courts, see "Courts," § 6.

§ 1. Nature and essentials in general.

*A judgment rendered without jurisdiction over the person of defendant by service of a proper summons is void.—*True & True Co. v. Killough* (Sup.) 27.

*A judgment against a substituted defendant who was not served with process cannot be sustained on appeal.—*Ziegler v. George Schleicher Co.* (Sup.) 85.

2. By default.

*Certain facts *held* to require the setting aside of a default judgment.—Julius Johnson's Sons v. Buellesbach (Sup.) 6.

*The remedy of a defendant served with process against a default lies in a motion to open the same.—Moss Realty Co. v. Di Crisci (Sup.) 9.

*Where defendant moves to open a default, his motion papers must contain a copy of the proposed answer.—Reid v. Jackson's Baggage Express (Sup.) 633.

*Statement of what should be shown to authorize opening of judgment after default and request.—Dana v. Thaw (Sup.) 870.

3. On trial of issues.

*Where defendant rested after the denial of its motion to dismiss at the close of plaintiff's evidence for failure of proof, the judgment then entered for defendant should have been one of dismissal and not on the merits.—Eidlin v. State Bank (Sup.) 53.

*Where a party moves for dismissal for failure of proof, it is error to render judgment for him on the merits.—Mittleman v. New York City Ry. Co. (Sup.) 103.

*A judgment *held* erroneous because for an amount not in conformity to the evidence.—Paster v. Meyer (Sup.) 736.

4. Amendment, correction, and review in same court.

*Amendment correcting Christian name of plaintiff as to judgment allowed.—Tim v. Bertrick (Sup.) 665.

5. Opening or vacating.

*Certain parties *held* not entitled to move to vacate a judgment on the ground that it had been rendered against a deceased person.—Hawkes v. Claffy (Sup.) 534.

6. Equitable relief.

Complaint in action to set aside judgment of Municipal Court, as rendered in violation of Municipal Court Act, Laws 1902, p. 1557, c. 580, § 230, *held* not to state a cause of action.—Barron v. Feist (Sup.) 494.

Where a complaint in equity to set aside judgment showed an adequate remedy by appeal lost by negligence, the complaint was demurrable.—Barron v. Feist (Sup.) 494.

*Equity may cancel judgments, orders, or decrees, or enjoin their enforcement, in whole or in part, for fraud; but the jurisdiction will only be exercised in cases of necessity, and where there is no adequate remedy at law.—Matthews v. Carman (Sup.) 694.

7. Collateral attack.

*A justice's court being a court of inferior jurisdiction, jurisdictional facts essential to support its judgment must appear from the record and may be neither supplied nor presumed to exist.—Matthews v. Carman (Sup.) 694.

8. Merger and bar of causes of action and defenses.

*Dismissal of a complaint in the New York Municipal Court as to a certain defendant is

not a bar to another action against that defendant unless the dismissal was on the merits.—Cohen v. Bachrach (Sup.) 61.

*Dismissal of proceeding in surrogate's court for accounting by executrix of trustee for an accounting in the Supreme Court.—Fogarty v. O'Reilly (Sup.) 234.

*Though separate actions may be brought on several claims arising out of the same contract maturing at different times, an action brought must include all the claims due at the time suit was instituted.—Welch v. Buchans Soap Corp. (Sup.) 616.

*Modification of a delivery provision in a contract of sale *held* not a substitution of two new contracts for the original, so that plaintiff having failed to join in an action for breach a claim for the later delivery installment, a judgment for damages as to a prior installment was a bar to an action for failure to accept the later installment.—Welch v. Buchans Soap Corp. (Sup.) 616.

*Judgment on plaintiff, being unable to proceed, should be without prejudice to a new trial.—Burnstine v. Reddy (Sup.) 626.

9. Conclusiveness of adjudication.

A judgment on a verdict in replevin finding the value of the chattel at the time of the trial the same as when replevied *held* to operate as a finding that there was no depreciation in value, and hence the judgment was res judicata against defendant's subsequent right to claim such depreciation.—Pabst Brewing Co. v. Rapid Safety Filter Co. (Sup.) 163.

*A judgment in an action to construe a will *held* not res judicata on the question of the liability of a substituted trustee for rent for property used in continuing testator's business pursuant to the provisions of the trust.—In re Froelich's Estate (Sup.) 173.

*Plaintiff, in a prior action against him by defendant, having set up as a counterclaim the same claim on which his suit was brought, *held* bound by the decree therein entered.—Timpano v. David Stevenson Brewing Co. (Sup.) 317.

*Findings which do not necessarily enter into the judgment are not res judicata between the parties.—American Radiator Co. v. City of New York (Sup.) 1098.

*Judgment finding will valid, in action by one having no vested interest in the estate, *held* not to estop representatives of son and widow, not parties, from claiming the estate on judicial settlement of executor's accounts.—In re Durand (Sur.) 393; In re Morgan's Will, Id.

10. Foreign judgments.

*The conclusive effect of a judgment rendered by a court of general jurisdiction with jurisdiction of the subject-matter and parties stated.—Strauss v. Strauss (Sup.) 842.

*An Illinois divorce judgment *held* conclusive in the courts of New York on the question whether plaintiff in divorce had had the required residence in Illinois.—Strauss v. Strauss (Sup.) 842.

*Point annotated. See syllabus.

Where paternity of petitioner was established in Germany more than 20 years ago, a commission will not be issued at petitioner's request to take testimony to impeach the correctness of such determination.—*In re Neidnig's Estate* (Sur.) 590.

§ 11. Payment, satisfaction, merger, and discharge.

Before notice of the rights of an assignee of a judgment, payment by the debtor would absolve him from further liability, though after notice he would not be justified in paying it to a stranger to the claim.—*Fish v. Hahn* (Sup.) 274.

§ 12. Pleading and evidence of judgment as estoppel or defense.

*Whether a dismissal of a complaint in the Municipal Court was upon the merits held a matter of proof in the ordinary course, and the judgment roll not necessarily conclusive.—*Cohen v. Bachrach* (Sup.) 61.

A judgment of dismissal in the Municipal Court held a judgment on the merits barring subsequent action in the City Court.—*Cohen v. Bachrach* (Sup.) 61.

In an action for money loaned, brought after limitation had run against it, an answer held not to admit that a former action terminated by nonsuit within Code Civ. Proc. § 405.—*Clifford v. Duffy* (Sup.) 800.

JURISDICTION.

Effect of appearance, see "Appearance."

Jurisdiction of particular actions or proceedings.

See "Attachment," § 1; "Divorce," § 2; "Habeas Corpus," § 2.

Criminal prosecutions, see "Criminal Law," § 2. For accounting as to trust property, see "Trusts," § 5.

Relief against judgment, see "Judgment," § 6. Summary proceedings to recover leased premises, see "Landlord and Tenant," § 7. To construe will, see "Wills," § 9.

Special jurisdictions and jurisdictions of particular classes of courts.

See "Courts."

Appellate jurisdiction, see "Appeal," § 2.

Justices' courts in civil cases, see "Justices of the Peace," § 1.

Municipal courts, see "Courts," § 3.

JURY.

Grounds for reference instead of trial by jury, see "Reference," § 1.

Instructions in civil actions, see "Trial," § 5.

Questions for jury in civil actions, see "Trial," § 4.

Questions for jury in criminal prosecutions, see "Criminal Law," § 6.

Taking case or question from jury at trial, see "Trial," § 4.

Verdict in civil actions, see "Trial," § 6.

§ 1. Right to trial by jury.

*Under the express provisions of Code Civ. Proc. § 1009, unless a party claims his right to a jury trial before any evidence is received, he waives it.—*Ross v. McCaldin* (Sup.) 381.

Under Code Civ. Proc. § 2990, defendant in an action before a justice held to have waived a jury by not depositing fees.—*Martin v. Borden* (Sup.) 725.

*Under Code Civ. Proc. §§ 968, 970, 971, 974, and Gen. Rules Proc. 31, the denial of plaintiff's motion for an order settling issues for trial by jury, he having lost his right to demand a jury trial as of right, held not an abuse of discretion.—*Ettlinger v. Trustees of the Sailors' Snug Harbor of City of New York* (Sup.) 779.

*Under Municipal Court Act, Laws 1902, p. 1557, c. 580, §§ 230, 231, held, that a jury trial is waived only when neither party makes demand therefor, and after plaintiff has demanded it he cannot waive the demand and obtain a trial by the court against defendant's protest.—*Karch v. Nassau Electric R. Co.* (Sup.) 829.

Under Code Civ. Proc. § 1757, the right to a jury trial on the issue of adultery in a divorce proceeding held not waived by consent to filing of a note of issue for the special term.—*Tietzel v. Tietzel* (Sup.) 878.

§ 2. Competency of jurors, challenges, and objections.

*Under Code Civ. Proc. § 1180, in a personal injury case, question to juror as to whether he was a stockholder in an indemnity corporation held proper.—*Blair v. M. McCormack Const. Co.* (Sup.) 750, 752.

JUSTICES OF THE PEACE.

Collateral attack on judgment of justice's court, see "Judgment," § 7.

Waiver of jury in action in justice court, see "Justices of the Peace," § 2.

§ 1. Civil jurisdiction and authority.

*Where complaint before a justice demand judgment for \$300, a judgment for plaintiff for \$100 must be reversed, under Code Civ. Proc. § 2862, giving a justice only jurisdiction to the extent of \$200.—*Cook v. Cook* (Co. Ct.) 384.

KNOWLEDGE.

Of authority of agent, see "Principal and Agent," § 2.

Of vicious character of dog, see "Animals."

LACHES.

See "Mandamus," § 3.

LANDLORD AND TENANT.

See "Fixtures."

Mechanic's lien, for improvements made in leased premises, see "Mechanics' Liens," § 1.

*Point annotated. See syllabus.

Release of lessees from liability from breach of covenant of repair, see "Release," § 1.
Requirements of statute of frauds affecting lease, see "Frauds, Statute of," § 2.

§ 1. Creation and existence of the relation.

*Evidence *held* to show a contract on the part of a lessee to hold for a year and create conventional relation of landlord and tenant, authorizing third person, to whom the landlord had leased on expiration of first term of original tenant, to recover rent from lessee holding over.—United Merchants' Realty & Improvement Co. v. Roth (Sup.) 511.

§ 2. Leases and agreements in general.

*A receipt for rent *held* not to constitute a lease of the premises for two years.—Finkelstein v. Fabyik (Sup.) 67.

A receipt for rent *held* to operate as a lease.—Feust v. Craig (Sup.) 637.

§ 3. Terms for years.

*A valid lease may be made to begin in the future.—United Merchants' Realty & Improvement Co. v. Roth (Sup.) 511.

Option to hold tenant to a new lease by his holding over *held* available only by landlord entitled under the lease to a reversion of the term.—United Merchants' Realty & Improvement Co. v. Roth (Sup.) 511.

Option to hold tenant holding over to new lease *held* unassignable except by conveyance of the reversion.—United Merchants' Realty & Improvement Co. v. Roth (Sup.) 511.

Where an owner, after executing lease for a specified term, executed a second lease to a third person for a term beginning at expiration of first lease, third person could not treat lessee in first lease as tenant by reason of his holding over.—United Merchants' Realty & Improvement Co. v. Roth (Sup.) 511.

*Where lessee, contrary to terms of lease, made a lease for the same terms containing a covenant for surrender and reserving to the original lessee the right of re-entry for condition broken, it constituted a breach of covenant in the lease against assignment.—Herzig v. Blumenkrohn (Sup.) 570.

*The mere taking of keys to premises from the tenant by the landlord's agent does not, in the absence of other acts showing an intent to accept the surrender, establish a valid surrender and acceptance.—Feust v. Craig (Sup.) 637.

*Rule respecting the acceptance of a surrender of leased premises stated.—Feust v. Craig (Sup.) 637.

*A landlord's re-entry upon premises and attempts to relet them *held* evidence tending strongly to show an acceptance of a surrender by the tenant of the premises, but not to show it as a matter of law.—Feust v. Craig (Sup.) 637.

Lease construed, and notice by landlord *held* not an exercise of the option in the lease to cancel the same.—Anderson v. Hebbard (Sup.) 824.

§ 4. Tenancies from year to year and month to month.

*Facts *held* to show a tenant liable for a month's rent by reason of his having held over after the expiration of his lease.—McMann v. Bloomer (Sup.) 882.

§ 5. Premises, and enjoyment and use thereof.

*In an action to recover for the failure of a lessor to put a lessee in possession of certain premises, evidence by an expert witness as to the market rental value of the premises for the purpose for which they were to be used by plaintiff *held* inadmissible.—Rothman v. Kosower (Sup.) 2.

The rule that a surrender of the premises, accepted by the landlord with knowledge of the condition of the premises, bars his action for breach of covenant to repair, etc., does not apply where the surrender was pursuant to a release only relieving the tenants from their obligation to pay future rent.—Herrman v. Laemmle (Sup.) 73.

In an action for injuries to a tenant's daughter caused by the defective condition of leased premises, evidence examined, and *held* insufficient to show defendant's ownership or control of the premises leased, or responsibility for the defect causing the injury.—Rosenstein v. Deffaa (Sup.) 90.

*In the absence of express provision therefor in a lease, a landlord is not bound to repair sewer connections of leased premises across lands of third persons.—Richmond v. Lee (Sup.) 1072.

*Covenants in a lease *held* not to require the lessor to repair a sewer connection of the leased premises across lands of third parties.—Richmond v. Lee (Sup.) 1072.

§ 6. Rent and advances.

*A deposit under a lease to secure payment of rent and performance of the covenants of the lease *held* to survive the issuance of a warrant in summary proceedings and the dispossession of the tenant thereunder.—Colderaro v. Kempner (Sup.) 41; Colucci v. Same, Id.

*Where a tenant abandons the premises, the landlord need not relet them on the tenant's behalf.—Feust v. Craig (Sup.) 637.

*A fire occurring on the leased premises *held* no defense to the tenant's liability for rent; he having continued to maintain possession.—Feinstein v. Gottfried (Sup.) 881.

§ 7. Re-entry and recovery of possession by landlord.

In a summary dispossession proceeding by a landlord, refusal to grant a continuance for one day in order that defendant might prepare for trial after filing a verified answer *held* error.—Trunk v. Howard Laundry Co. (Sup.) 66.

Payment on account of rent after notice to remove *held* not binding on the landlord.—Finkelstein v. Fabyik (Sup.) 67.

*The relation of landlord and tenant must exist to support summary proceedings for the re-

*Point annotated. See syllabus.

covery of real property.—*Robertson v. Birdie* (Sup.) 73.

In a summary proceeding for the recovery of real property, plaintiff *held* not entitled to recover, whether a certain lease was valid or invalid.—*Robertson v. Birdie* (Sup.) 75.

Failure to comply with the requirement of Code Civ. Proc. § 2235, that in summary proceedings to recover possession of real property the petitioner must show his interest therein, is not waived by answering the petition, since the defect is jurisdictional.—*Eldaen Realty & Construction Co. v. Bensamon* (Sup.) 128.

*Petitioner's interest in the property involved in summary proceedings to recover possession thereof *held* not shown by the petition, as required by Code Civ. Proc. § 2235, and hence the court acquired no jurisdiction.—*Eldaen Realty & Construction Co. v. Bensamon* (Sup.) 128.

Under Code Civ. Proc. § 2235, a petition in a summary proceeding by a landlord *held* insufficient to give the court jurisdiction, rendering void all proceedings taken.—*Matthews v. Carman* (Sup.) 694.

Under Code Civ. Proc. § 2240, subds. 1-3, return of service of precept in a summary proceeding *held* insufficient to show jurisdiction.—*Matthews v. Carman* (Sup.) 694.

LANDS.

See "Public Lands."

LARCENY.

See "False Pretenses."

Liability of carrier for theft of baggage, see "Carriers," § 2.

Liability of innkeeper for theft of property of guests, see "Innkeepers."

Liability of master for theft of servant's tools, see "Master and Servant," § 3.

Necessity of warrant for arrest, see "Arrest," § 2.

Preliminary complaint, see "Criminal Law," § 4.

LEASES.

See "Landlord and Tenant."

LEGACIES.

See "Wills."

LEGACY TAX.

See "Taxation," § 2.

LEGISLATIVE POWER.

See "Constitutional Law," § 2.

LEVY.

Of execution, see "Execution," § 3.

*Point annotated. See syllabus.

LIBEL AND SLANDER.

Bill of particulars in action for slander, see "Pleading," § 6.

§ 1. Words and acts actionable, and liability therefor.

*To denounce another as a thief is actionable per se.—*Dallin v. Mayer* (Sup.) 316.

§ 2. Actions.

*A verdict of \$200 in slander *held* not such as to indicate passion or prejudice or other improper motive.—*Dallin v. Mayer* (Sup.) 316.

§ 3. Criminal responsibility.

Police officers, having seized accused after he had been admitted to bail and compelled him to submit to have his photograph and measurements taken for the Bertillon system, *held* subject to prosecution for criminal libel, as defined by Pen. Code, §§ 242, 244, 245.—*Gow v. Bingham* (Sup.) 1011.

LICENSES.

For sale of intoxicating liquors, see "Intoxicating Liquors," § 1.

§ 1. For occupations and privileges.

A notice for revocation of an employment bureau license *held* sufficient, under Laws 1901, p. 837, c. 327, § 8.—*People v. Bogart* (Sup.) 831.

LIENS.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 1.

Personal judgment in municipal court in suit to enforce mechanic's lien, see "Courts," § 5. Supplemental pleading in suit to enforce mechanic's lien, see "Pleading," § 5.

Particular classes of liens.

See "Mechanics' Liens."

Attorneys, see "Attorney and Client," § 3.

Mechanic's lien for public improvement, see "States," § 1.

Mortgage on interests of beneficiaries under will, see "Wills," § 10.

LIFE INSURANCE.

See "Insurance."

LIMITATION OF ACTIONS.

See "Adverse Possession."

Time for presentation of claims against estate of decedent, see "Executors and Administrators," § 4.

Particular actions or proceedings.

See "Mandamus," § 3.

Criminal prosecutions, see "Criminal Law," § 3.

§ 1. Computation of period of limitation.

*The statute of limitations begins to run on a demand note immediately.—*Church v. Stevens* (Sup.) 310.

*Under Code Civ. Proc. §§ 380, 381, 415, the statute of limitations *held* to begin to run on installments of interest on a mortgage bond at the time each installment became due.—*Quackenbush v. Mapes* (Sup.) 1047, 1052.

Under Code Civ. Proc. §§ 380, 381, 415, the statute of limitations *held* not to commence to run against the right to foreclose a mortgage until the due date of the mortgage.—*Quackenbush v. Mapes* (Sup.) 1047, 1052.

§ 2. Acknowledgment, new promise, and part payment.

Circumstances under which the bar of the statute against a demand note would be removed stated.—*Church v. Stevens* (Sup.) 810.

Payment on a note of the proceeds of collateral sold by the holder's cashier under authority contained in the note, of which the maker was immediately notified and did not reply, *held* a sufficient payment to bar limitations.—*Brooklyn Bank v. Barnaby* (Sup.) 584.

§ 3. Pleading, evidence, trial, and review.

The fact that a complaint on a note indicated that the statute of limitations might have run *held* not to warrant a dismissal before plaintiff had an opportunity to present his case.—*Church v. Stevens* (Sup.) 310.

*The statute of limitations is an affirmative defense, and a plaintiff is not bound to anticipate a plea of the statute by setting forth facts to defeat it.—*Church v. Stevens* (Sup.) 310.

*In an action on a note *held* the burden was on plaintiff to show that the running of the statute had been suspended.—*Church v. Stevens* (Sup.) 310.

*Allegation in answer that cause of action is barred *held* insufficient.—*Holland v. Grote* (Sup.) 667.

*Under Code Civ. Proc. § 405, plaintiff in an action for money loaned, brought after limitation had run against it, *held* required to prove that a former action brought before the running of the statute terminated by nonsuit.—*Clifford v. Duffy* (Sup.) 809.

LIQUOR SELLING.

See "Intoxicating Liquors."

LIS PENDENS.

Pendency of other action ground for abatement see "Abatement and Revival," § 1.

Code Civ. Proc. § 1671, as to cancellation of lis pendens on the deposit of money or giving of security, *held* to apply only to an action of the character specified in section 1670, and not to a proceeding against an unsafe building, under Building Code, §§ 153-155.—*City of New York v. Unsafe Building* (Sup.) 749.

Lis pendens in a proceeding under Building Code against an unsafe building *held* not sub-

ject to cancellation on deposit of money or giving of an undertaking; Code Civ. Proc. § 1671, authorizing such a cancellation only where adequate relief can be secured by such deposit or undertaking.—*City of New York v. Unsafe Building* (Sup.) 749.

LOANS.

Recovery of money loaned, see "Money Lent."

LOGS AND LOGGING.

Cutting timber on state lands, see "Public Lands," § 1.

LOST INSTRUMENTS.

*Under Code Civ. Proc. § 1917, *held* error, at the opening of a trial in an action on a note which appears to have been lost, to dismiss a complaint on the ground of failure to give an indemnifying bond.—*Church v. Stevens* (Sup.) 310.

MACHINERY.

Liability of employer for defects, see "Master and Servant," § 4.

MALICE.

See "Malicious Prosecution," § 1.

MALICIOUS PROSECUTION.

§ 1. Malice.

*One suing for malicious prosecution of a civil action must show that it was malicious without probable cause, and ended in failure.—*Berkowich v. Kommel* (Sup.) 119.

§ 2. Actions.

An action for a malicious prosecution of a civil action must be supported by very clear and satisfactory proof.—*Berkowich v. Kommel* (Sup.) 119.

*Evidence in an action for malicious prosecution of a civil action *held* not to show that defendant did not have reasonable cause to institute his action.—*Berkowich v. Kommel* (Sup.) 119.

In an action against a street railway company for false arrest and malicious prosecution, there being no evidence to sustain a finding of malice by the company, error *held* to have been committed in leaving to the jury the question of exemplary damages.—*Samieloff v. New York & Q. C. Ry. Co.* (Sup.) 774.

An instruction in an action against a street railway company for false arrest and malicious prosecution *held* to leave to the jury the question of exemplary damages.—*Samieloff v. New York & Q. C. Ry. Co.* (Sup.) 774.

*Point annotated. See syllabus.

MANDAMUS.**§ 1. Nature and grounds in general.**

Relator having been illegally compelled to submit to the taking of his photograph and measurements, under the Bertillon system, while he was on bail, *held* not entitled to mandamus to compel the destruction of such photographs and records.—*Gow v. Bingham* (Sup.) 1011.

§ 2. Subjects and purposes of relief.

Mandamus will not issue, under Stock Corporation Law, Laws 1892, p. 1840, c. 688, § 53, as amended by Laws 1897, p. 314, c. 384, § 3, to compel a foreign corporation to allow a stockholder to make extracts from the corporate records for an ulterior purpose not connected with his interest in the corporation or its management.—*People v. Giroux Consol. Mines Co.* (Sup.) 188.

As there is no express provision authorizing issuance of mandamus to enforce the Stock Corporation Law, Laws 1892, p. 1840, c. 688, § 53, as amended by Laws 1897, p. 314, c. 384, § 3, its issuance rests in the discretion of the court.—*People v. Giroux Consol. Mines Co.* (Sup.) 188.

*Where the application of a stockholder for mandamus to enforce his right to inspect corporate books is not made in good faith for a legitimate object, it will be denied.—*People v. National Park Bank* (Sup.) 369.

Certain facts *held* to require a stockholder, seeking to enforce his right to inspect corporate books, given by Stock Corporation Law, Laws 1890, p. 1070, c. 564, § 29, as amended by Laws 1901, p. 965, c. 354, to disclose freely his object in making the application, or mandamus would be denied.—*People v. National Park Bank* (Sup.) 369.

The court *held* to possess discretion in granting or refusing mandamus to enforce the right of a stockholder to inspect the corporate stock book, as provided by Stock Corporation Law, Laws 1890, p. 1070, c. 564, § 29, as amended by Laws 1901, p. 965, c. 354.—*People v. National Park Bank* (Sup.) 369.

*Mandamus against a board of highway commissioners *held* to lie to compel the removal of certain obstructions.—*People v. Hawxhurst* (Sup.) 746.

*Relator, a tenement house inspector, *held* validly discharged, under Greater New York Charter, Laws 1901, p. 636, c. 466, § 1543, and not entitled to reinstatement.—*People v. Butler* (Sup.) 833.

*Where the permit to a market stand is assigned with the approval of the proper authorities, and the comptroller refuses to issue the assignee a permit without restricting the privileges, mandamus will lie to compel him so to do.—*People v. Metz* (Sup.) 970.

*Mandamus *held* to lie to compel the recognition of petitioner as the duly elected warden of a certain parish of the Protestant Episcopal Church.—*In re Williams* (Sup.) 1105.

*Point annotated. See syllabus.

*Mandamus *held* to lie to compel the giving of a certificate or due recognition of election, if the facts which determine the applicant's rights are undisputed.—*In re Williams* (Sup.) 1105.

§ 3. Jurisdiction, proceedings, and relief.

A stockholder seeking mandamus to enforce his right to inspect corporate books *held* required to show affirmatively that he is acting in good faith for a legitimate purpose.—*People v. National Park Bank* (Sup.) 369.

*In mandamus by a stockholder to enforce his right to inspect corporate books, the court may require the applicant to submit reply affidavits of good faith, or may appoint a referee to take proof and report to the court.—*People v. National Park Bank* (Sup.) 369.

*The rule that a person dismissed from an office who wishes to be reinstated must apply promptly *held* not to apply to a person who upon retirement from the fire department has his pension fixed too low and sues to have it fixed at the right amount.—*Ramsay v. Lantry* (Sup.) 828.

*Under Code Civ. Proc. §§ 2082-2084, *held* that, after issue joined on an alternative writ of mandamus granted at Special Term, it was error for the judge at trial term, after hearing proof, to make a final order dismissing the proceedings on the merits, without submitting any question to the jury or directing a verdict.—*People v. Italian Ass'n St. Bartholomew Eoliana of Mut. Aid of New York* (Sup.) 1101.

MANDATE.

See "Mandamus."

MAPS.

In condemnation proceedings, see "Eminent Domain," § 3.

MARRIAGE.

See "Divorce"; "Husband and Wife."

Effecting revocation of will of husband, see "Wills," § 2.

*Under Code Civ. Proc. § 1774, as amended by Laws 1902, p. 951, c. 364, as amended by Laws 1905, p. 1205, c. 537, the court *held* without authority to refuse to enter final judgment in an action to annul a marriage.—*Bernzott v. Bernzott* (Sup.) 424.

*In an action by a husband to annul a marriage, the wife, after paying her counsel fees and expenses, cannot compel the plaintiff to reimburse her therefor.—*Schroter v. Schroter* (Sup.) 1065.

*Marriage of woman after disappearance of and absence of her husband for five years *held* valid as to all the world, unless her husband reappears and institutes an action to annul the same.—*In re Del Genovese's Will* (Sur.) 1033.

MARRIED WOMEN.

See "Husband and Wife."

MASTER AND SERVANT.

See "Work and Labor."

Employees of municipal corporations, see "Municipal Corporations," § 1.

Expert testimony in action for injuries to servant, see "Evidence," § 6.

Liability of carrier for acts of servant, see "Carriers," § 2.

Taking case or question from jury in action for services, see "Trial," § 4.

Trade unions, see "Trade Unions."

§ 1. The relation.

*An actor under employment for a specified number of weeks held entitled to recover damages for breach of contract on his employer wrongfully discharging him.—*Keane v. Liebler* (Sup.) 102.

*Where one was hired at \$50 a month, nothing being said of the period of service, the master had the right to discharge him at any time and incurred no obligation beyond the wages due at the time of such discharge.—*Frank v. Manhattan Maternity & Dispensary* (Sup.) 404.

Where a contract of hiring is general or indefinite in its terms, it is prima facie a hiring at will, and the burden rests upon the servant to prove that the hiring is for a definite term.—*Frank v. Manhattan Maternity & Dispensary* (Sup.) 404.

*Testimony held not to show discharge of an employé, but abandonment of his employment.—*Fenster v. Bass* (Sup.) 872.

§ 2. Services and compensation.

*An employé at a weekly salary held not entitled to recover salary for a week for which the service was not completed, whether he abandoned the employment or was discharged.—*Keane v. Liebler* (Sup.) 102.

In an action against an employer to recover for overtime work, evidence held insufficient to sustain judgment for plaintiff.—*Friedman v. Fertel* (Sup.) 832.

*Whether plaintiff was entitled to commissions on sales made for defendants in excess of the amount admitted by defendants' answer held under the evidence for the jury.—*Meyers v. Weber* (Sup.) 632.

Under a contract to pay a salesman an additional sum if his sales were satisfactory, it lay with the employer alone to determine whether the sales were satisfactory.—*Alford v. Cook* (Sup.) 710.

Letters introduced in evidence in an action on a contract to pay a salesman an additional sum if his services were satisfactory, if competent at all as tending to prove the employer's estimate of the value of the whole period of the salesman's services, held at most the ordinary messages of an employer to his employé calculated to stimulate him to renewed effort.—*Alford v. Cook* (Sup.) 710.

*An employé paid by during the week to for he had worked and a guaranty that he would Bass (Sup.) 872.

§ 3. Master's liability servant—Nat general.

Defendant subcontract theft of the tools of a c Dewling v. C. W. Klapp

§ 4. — Tools, ma and places for

*A master is not liable by an alleged defendant absence of affirmative notice that the machin v. Lehmaier (Sup.) 218

*The fact that a se the danger incident to relieve the master from and precaution to guard danger to the servant.— seed Co. (Sup.) 453.

*In an action for an employé, evidence held employer furnished an un tion of Employer's Liab p. 1748, c. 600.—Wack v

§ 5. — Warning servant.

*Where the danger o is obvious, the failure his employé instructions danger is not negligence 1001.

§ 6. — Fellow ser

*In an action against a cleaner in a schoolhou a liquid mixture given h used in cleaning, held was that of a fellow ser of Education of City of

*Employers' Liability 1748, c. 600, construed, liability of employers for Finnigan v. New York 855.

*An employé held not Employer's Liability Ac c. 600, making an emp to an employé caused b gence of one intrusted v Bovi v. Hess (Sup.) 100

*An employé and co-em ants.—Bovi v. Hess (Sup.)

§ 7. — Contributory servant.

*In an action for injur evidence examined, and guilty of contributory ne Jordan L. Mott Iron Wor

§ 8. — Actions.

*In an action for injur ing from a scaffold, eviden

*Point annotated. See syllabus.

establish a cause of action.—*Shea v. Hedden Const. Co.* (Sup.) 54.

*Evidence as to the circumstances of an injury to an employé struck by a piece of falling wood *held* not sufficient to connect the employer with the happening of the accident.—*Wurthlee v. Concrete Steel & Tile Const. Co.* (Sup.) 101.

In an action for death of a servant by coming in contact with an electric rail, evidence *held* insufficient to warrant a finding that defendant was negligent in failing to warn deceased of the danger.—*Causullo v. Lenox Const. Co.* (Sup.) 431.

Evidence of a witness not shown to have ever seen deceased prior to the day of the accident, that he did not hear him warned of the danger from an electric rail, *held* without probative force on an issue as to whether deceased was actually warned.—*Causullo v. Lenox Const. Co.* (Sup.) 431.

*In an action for injuries to a minor employé in defendant's factory, evidence examined, and *held* insufficient to show negligence on the part of defendant in failing to provide a suitable place for work and proper appliances, or to sufficiently guard dangerous machinery.—*Loughran v. Jordan L. Mott Iron Works* (Sup.) 434.

*In an action for the death of plaintiff's intestate, alleged to have been caused by negligence of defendant, his employer, evidence examined, and *held* not sufficient to charge defendant with negligence.—*Bradford v. Bankers Bros. Co.* (Sup.) 450.

*In an action for injuries to a servant, evidence *held* sufficient to sustain the finding that the master was negligent in failing to provide certain devices for the safety of the servant.—*Lynch v. American Linseed Co.* (Sup.) 458.

In an action for injuries to a servant, evidence examined, and *held* to show that the servant in no way contributed to the injury.—*Lynch v. American Linseed Co.* (Sup.) 458.

In an action for injuries to a servant from being drawn into the leg of an elevator for elevating grain, evidence *held* to present a question for the jury whether the master was negligent in not taking reasonable precautions to prevent such an accident, if it could reasonably have been foreseen.—*Lynch v. American Linseed Co.* (Sup.) 458.

*In an action for injuries to plaintiff's scalp, caused by her hair having been caught in certain machinery at which she was employed to work by defendant, evidence examined, and *held* not to sustain a verdict for plaintiff based on alleged negligence of defendant in permitting the floor about the machinery to be in an oily condition, which caused plaintiff to slip, thereby bringing about the accident.—*Schalk v. Commercial Twine Co.* (Sup.) 525.

*In an action for injuries to a servant, doctrine of *res ipsa loquitur* *held* not to apply.—*Guiliano v. F. W. Seagrist, Jr., Co.* (Sup.) 577.

In an action by an employé against his employer for personal injuries, evidence examined,

and *held* to show that the fire escape on which plaintiff was injured was not the only way by which he could have descended from his work.—*Guiliano v. F. W. Seagrist, Jr., Co.* (Sup.) 577.

In an action against a railroad company for death of an engineer, evidence *held* to sustain verdict for plaintiff.—*Crissman v. Erie R. Co.* (Sup.) 827.

*A notice of injury to an employé resulting in his death *held* insufficient, under Employers' Liability Act, Laws 1902, p. 1749, c. 600, § 2, providing for notice of injury to employes.—*Finnigan v. New York Contracting Co.* (Sup.) 855.

*Where, to recover for the death of an employé, the Employers' Liability Act, Laws 1902, p. 1749, c. 600, must be relied on, and the notice of the injury is not sufficient under the act, no cause of action under the act is established, and the action must be dismissed.—*Finnigan v. New York Contracting Co.* (Sup.) 855.

*In an action by a servant for injuries resulting from an insufficient platform and runway, evidence as to subsequent precautions taken to prevent similar accidents *held* inadmissible.—*Burns v. Crow* (Sup.) 944.

In an action for the death of an employé in a stoneyard, whether the death was caused by defendant negligently causing the stone to be moved by a derrick *held* a question for the jury.—*Powers v. Miller* (Sup.) 960.

*A notice of injury to an employé *held* insufficient, under Employers' Liability Act, Laws 1902, p. 1749, c. 600.—*Bovi v. Hess* (Sup.) 1001.

§ 9. Liabilities for injuries to third persons.

*In an action for the death of one run over by an automobile, *held*, that the chauffeur was not defendant's servant at the time of the accident.—*Bohan v. Metropolitan Express Co.* (Sup.) 580.

Failure to deny authority of a chauffeur who had struck plaintiff with defendant's automobile *held* not proof of authority.—*McEnroe v. Taylor* (Sup.) 565.

*Exemplary damages cannot be recovered against a master for the malicious act of a servant, unless the master authorized the act, had knowledge of it, or ratified it.—*Samieloff v. New York & Q. C. Ry. Co.* (Sup.) 774.

MATERIALITY.

Of alteration of written instrument, see "Alteration of Instruments."

MEASURE OF DAMAGES.

See "Damages," § 1.

MEASURES.

See "Weights and Measures."

*Point annotated. See syllabus.

MECHANICS' LIENS.

Deposit in court in action to enforce lien, see "Deposits in Court."

For public improvement, see "States," § 1.

Personal judgment in municipal court in suit to enforce lien, see "Courts," § 5.

Supplemental pleading in suit to enforce mechanic's lien, see "Pleading," § 5.

§ 1. Right to lien.

*A covenant in a lease obligating lessee to keep the premises in repair *held* not to imply a consent, by lessor, within Mechanics' Lien Law, Laws 1897, p. 516, c. 418, § 3, creating a lien for improvements made with the owner's consent; there being a distinction between "improvements" and "repairs."—*Etna Elevator Co. v. Deeves* (Sup.) 63.

Payment to the contractor, after plaintiff's complaint to enforce a mechanic's lien as against both the owner and the contractor had been dismissed and plaintiff's time to appeal had expired without an appeal as to the owner, *held* a defense to plaintiff's right to a lien against the contractor under Lien Law, Laws 1897, p. 516, c. 418, § 3, unless the payment was in trust or to take the place of the property.—*Van Kannel Revolving Door Co. v. Sloane* (Sup.) 504.

§ 2. Operation and effect.

*Under Laws 1897, p. 522, c. 418, § 16, in order to extend a mechanic's lien beyond one year, an action must not only be brought to foreclose the lien, but notice of pendency of the action must be filed.—*In re Gabler* (Sup.) 542.

§ 3. Enforcement.

Payment by the owner to the contractor, after the subcontractor's time to appeal from a judgment dismissing his complaint in a suit to enforce his lien as to the owner had expired, *held* to constitute a defense available to the contractor, unless the money paid was impressed with a trust and was intended to take the place of the lien on the land.—*Van Kannel Revolving Door Co. v. Sloane* (Sup.) 507.

Under Code Civ. Proc. §§ 3399, 3412, *held* that, in an action to enforce a lien for labor performed by plaintiff on a building under an agreement with contractors who were erecting it for the owners, where no contract relation existed between plaintiff and the owners, and no personal judgment was demanded in the complaint, it was error to render a personal judgment against them.—*Daxe v. Hajek* (Sup.) 601.

MEDICINES.

See "Druggists."

MEETINGS.

Of stockholders, see "Corporations," § 3.

MEMORANDA.

Required by statute of frauds, see "Frauds, Statute of," § 2.

*Point annotated. See syllabus.

MERCI

Of cause of action in jud § 8.

MISREPRESENTATION.

See "False Pretenses";

MODIFICATION.

Of judgment or order of § 12.

MONEY.

Evidence of limitation of action, "Limitation of Actions," § 12.

*In an action to recover a check which was diverted to another person, *held* insufficient to show that the check was not cashed.—*Gutman v. Wolfsohn* (Sup.) 546.

*Unless it appears otherwise, a check is presumed to be cashed and not the making of a check.—*Gutman v. Wolfsohn* (Sup.) 546.

MONEY RECEIPTS.

In an action to recover a check which was diverted to another person, *held* insufficient to show that the check was not cashed.—*Gutman v. Wolfsohn* (Sup.) 546.

*Where defendant received a check which was diverted to another person, *held* that part of the amount of the check was not recoverable in an action.—*Harris v. Wolfsohn* (Sup.) 403.

MONOPOLIES.

§ 1. Trusts and other restraints of trade.

The Donnelly Anti-Trust Act, Laws 1914, c. 690, providing for the regulation of monopolies in the manufacture and sale of commodities, and such monopolies, does not include companies, and hence not persons as officers and directors of telegraph companies to a preliminary to the institution of said law will be set aside.—*Donnelly v. Tele. Co.* (Sup.) 799.

MONIES.

Tenancy from month to month and Tenant," § 4.

MORTGAGES.

Computation of period of limitation of actions, "Limitation of Actions," § 12. Payment of installment of mortgage, see "Accord and Satisfaction," § 12.

Mortgages of particular species of, or estates or interest in, property.

Interest of beneficiaries under will, see "Wills," § 10.

Personal property, see "Chattel Mortgages."

Railroads, see "Railroads," § 2.

§ 1. Requisites and validity.*Where a mortgage is under seal, a consideration is presumed.—*Quackenbush v. Mapes* (Sup.) 1047, 1052.**§ 2. Rights and liabilities of parties.**Plaintiff held not entitled under the terms of a consolidated mortgage to demand the delivery of consolidated mortgage bonds upon the surrender of canceled first-mortgage bonds.—*Havana Electric Ry. Co. v. Central Trust Co. of New York* (Sup.) 690.**§ 3. Payment or performance of condition, release, and satisfaction.***The lapse of 20 years after maturity of a mortgage raises a presumption of payment.—*Greenfield v. Mills* (Sup.) 705.A mortgagor held entitled to prepare a satisfaction piece and have it executed by the mortgagee on payment of a fee of 25 cents, under Code Civ. Proc. §§ 1261, 3298, subd. 2.—*Krulder v. Hillman* (Sup.) 727.Taxes not having been paid by mortgagor when they became due, under Greater New York Charter, Laws 1801, p. 389, c. 406, § 914, tender, after commencement of foreclosure suit, of taxes, interest, and costs, held insufficient; the whole debt having become due at mortgagee's election.—*Germania Life Ins. Co. v. Potter* (Sup.) 912.A clause in a bond and mortgage providing for payment of certain installments of the principal held not to extend the date of maturity of the entire debt as specified therein.—*MacDonald v. Potter* (Sup.) 915.**§ 4. Foreclosure by action.***A provision that, on a mortgagor's failure to pay taxes and their payment by mortgagee, the whole debt shall become due if the mortgagee so elect, is enforceable.—*Germania Life Ins. Co. v. Potter* (Sup.) 912.**MOTIONS.**

Relating to pleadings, see "Pleading," § 8.

For particular purposes or relief.

Bill of particulars in pleading, see "Pleading," § 6.

Change of venue in civil actions, see "Venue," § 1.

Consolidation of actions, see "Action," § 1.

Direction of verdict in civil actions, see "Trial," § 4.

Dismissal or nonsuit on trial, see "Trial," § 4.

Leave to file supplementary pleading, see "Pleading," § 5.

Opening or setting aside default judgment, see "Judgment," § 2.

Presentation of objections for review, see "Appeal," § 5.

Quashing indictment or information, see "Indictment and Information," § 1.

Revival of action, see "Abatement and Revival," § 2.

Setting aside writ of inquiry, see "Damages," § 3.

Striking out pleading, see "Pleading," § 8.

Vacation of judgment in municipal court, see "Courts," § 5.

*Where an order was entered by mistake, the correct course held to be to move to vacate the same, and not for the justice to destroy one of the orders, though he believed that both parties were represented and that tacit consent was given to his act.—*Hill v. Muller* (Sup.) 1.*Where the decision of a question depends upon disputed facts, it should not be decided upon motion, but should be held for determination upon trial.—*Conrad v. Conrad* (Sup.) 1093.**MOTIVE.**

See "Criminal Law," § 1.

MUNICIPAL CORPORATIONS.

See "Counties."

Argument and conduct of counsel at trial in action against, see "Trial," § 3.

Care required by contractors as to person using street, see "Negligence," § 1.

Ground for equitable relief against judgment of municipal courts, see "Judgment," § 6.

Mandamus, see "Mandamus," § 2.

Measurements under Bertillon system of persons admitted to bail by police department as interfering with personal liberty and security, see "Constitutional Law," § 3.

Municipal courts, see "Courts," §§ 1, 3-6.

Ordinances relating to intoxicating liquors, see "Intoxicating Liquors."

Partial invalidity of statute amending Greater New York Charter, see "Statutes," § 1.

Restraining erection of sky signs, see "Injunction," §§ 2, 3.

Rules of municipal court, see "Courts," § 2.

Rules of police department as exercise of judicial powers by administrative offices, see "Constitutional Law," § 2.

Street railroads, see "Street Railroads."

§ 1. Officers, agents, and employes.A person discharged from a position in the civil service of a city to which he was not entitled under the civil service rules cannot recover in an action for salary, on a quantum meruit, for services rendered.—*Deering v. City of New York* (Sup.) 934.The title to a position within the civil service laws cannot be tried on an action for salary.—*Deering v. City of New York* (Sup.) 934.

A clerk temporarily appointed under regulation 34 of the municipal civil service commission in force in 1898, in the absence of an eligible list, may be summarily dismissed under regulation 34 of the municipal civil service rules promulgated in 1899, under Laws 1899.

*Point annotated. See syllabus.

p. 795, c. 370.—*Deering v. City of New York* (Sup.) 934.

The fact that no eligible list was afterwards certified to an officer making a temporary appointment does not make the appointment permanent.—*Deering v. City of New York* (Sup.) 934.

The public exigency under which the civil service laws and regulations yield is only such a public necessity as amounts to an emergency.—*Deering v. City of New York* (Sup.) 934.

An inspector of police who is reinstated is entitled to his salary from the date of the order of reinstatement to the date of the resumption of his duties.—*Cross v. City of New York* (Sup.) 942.

Under the charter of the City of Elmira, Laws 1894, p. 1453, c. 615, § 164, where the first assistant engineer was removed and his office abolished, but by the same resolution of the fire commissioners another office was created having substantially the same duties, the first assistant engineer *held* entitled to reinstatement.—*People v. Coleman* (Sup.) 957.

Evidence *held* insufficient to justify a finding that a police officer had been guilty of improper conduct justifying his discharge.—*People v. Bingham* (Sup.) 1055.

*The dismissal of a police officer *held* invalid for want of sufficient notice, under a rule of the police department.—*People v. Bingham* (Sup.) 1063.

§ 2. Public improvements.

*Laws 1883, p. 100, c. 113, authorizing a recovery of damages from a change in the grade of a street, *held* to create a right to compensation not existing independent of it, and exclusive of any other remedy.—*Hoy v. Village of Salamanca* (Sup.) 208.

*Rental damages to an owner abutting on a street, the grade of which was changed, *held* not within Laws 1883, p. 100, c. 113, authorizing a recovery of damages from the change in grade of a street.—*Hoy v. Village of Salamanca* (Sup.) 208.

*A provision in a village charter authorizing it to grade streets did not include the power to erect a wall in the street to change the grade, nor did it authorize the closing or withdrawal of any part thereof from the public use.—*Hyland v. President and Trustees of Village of Ossining* (Sup.) 225.

*Proceedings to close a street at its intersection with a road, and to change the grade of a part of the road, without service of the notice required by Laws 1906, p. 474, c. 242, on the owners of the land, *held* void.—*Hyland v. President and Trustees of Village of Ossining* (Sup.) 225.

Village trustees, in proceedings to close a street and change the grade of a road, *held* bound to know who were the owners of the premises affected by the change, and to exercise more care to ascertain the same than a mere examination of the assessment roll.—*Hyland v.*

President and Trustee (Sup.) 225.

A change of plan for street by a board of only be had at a public to all persons whose property thereby.—*Hyland v. President and Trustees of Village of Ossining* (Sup.) 225.

*Amendment of a plan by the board of trustees and the same ratified by the board *President and Trustee* (Sup.) 225.

*Buffalo City Charter application, in determining, to the power of the city to improve the Buffalo river assessment to pay one-half 1902, pp. 1361, 1362, c. 1725, by Laws 1906, p. 1725, ment is also authorized (405).—*People v. City of Buffalo*

Method of assessing the city p. 1362, c. 568, § 3, as p. 1725, c. 665, provided to reimburse the city the amount of river increased.—*People v. City of Buffalo*

Under Code Civ. Proc. certiorari to review a plan improvement of a city's Buffalo *held* insufficient that the contract was in violation of Buffalo *People v. City of Buffalo*

An assessment of property at a uniform rate objectionable, in the benefits to relators' property.—*People v. City of Buffalo*

A contract involving dredging of city's ship entered into in violation of § 408, so that an party benefited was not attacked.—*People v. City of Buffalo*

Relator's property assessable for improvement canal without reference not been previously improvements.—*People v. City of Buffalo* 689.

Under Laws 1896, for the rebuilding of the architects employed by the city to prepare detailed construction of cell *held* not entitled to compensation.—*Withers v. City of Buffalo*

§ 3. Police power

*A sky sign erected for purposes of advertisement within the mean of New York City, council of 1899, in

*Point annotated. See syllabus.

Greater New York Charter, Laws 1897, p. 224, c. 378, § 647.—City of New York v. M. Wineburgh Advertising Co. (Sup.) 478; Kobbe Co. v. City of New York (Sup.) 489.

Under New York City Building Code, § 151, re-enacting Consolidation Act, Laws 1882, p. 140, c. 410, § 504, as amended by Laws 1892, p. 583, c. 275, § 42, the court is not authorized by a summary order to require a structure claimed to have been erected in violation of the Building Code to be removed.—City of New York v. O. J. Gude Co. (Sup.) 484.

The fact that a municipal ordinance regulating the height of sky signs is unreasonable does not justify one in erecting any height of sky sign he wishes, without the permit required for a sky sign by the ordinance.—City of New York v. O. J. Gude Co. (Sup.) 484.

Alterations in tenement houses under plans filed with the tenement house department for the ostensible purpose of turning them from tenement to nontenement purposes having been made with the intent to evade the tenement house law, the owner *held* guilty of a violation of that law, notwithstanding approval of plans and also a second set of plans filed after completion of the alterations.—Tenement House Department of City of New York v. Newland Realty & Construction Co. (Sup.) 723.

§ 4. Use and regulation of public places, property, and works.

In an action for injuries to a pedestrian falling over a skid used by a grocer in loading and unloading goods, evidence *held* to establish a *prima facie* case, and to call on the grocer, to avoid liability, to show that his use was reasonable.—Kurlanchick v. Sklamberg (Sup.) 117.

Where the use of a sidewalk by a grocer in loading and unloading goods was a nuisance, and a pedestrian was injured by reason thereof, the nuisance *held* the proximate cause of the injury.—Kurlanchick v. Sklamberg (Sup.) 117.

*The right of one to use the sidewalk for loading and unloading goods *held* to depend on whether such use is necessary, temporary, and reasonable, which is one of fact to be determined with reference to time, place, and circumstances.—Kurlanchick v. Sklamberg (Sup.) 117.

The unauthorized erection of a wall in a street in front of plaintiff's premises *held* a nuisance.—Hyland v. President and Trustees of Village of Ossining (Sup.) 225.

*Adjoining landowners own the land to the center of the street, subject only to the easement of the public to the right of way, and therefore are entitled to exercise all ordinary remedies for injuries to the freehold.—Hyland v. President and Trustees of Village of Ossining (Sup.) 225.

*Stoop and entrance to a residence extending six or seven feet beyond the building line *held* a nuisance which may be abated at the suit of the city.—City of New York v. Rice (Sup.) 641.

*Neither the assembly of the city of New York nor the park commissioner can, in streets lying within 350 feet of a public park, permit an

encroachment of a permanent character therein.—City of New York v. Rice (Sup.) 641.

On assignment of a market stall permit, the comptroller *held* not to have the power to limit the assignees' privileges; they being entitled to a permit exactly like that of their assignor.—People v. Mets (Sup.) 970.

In an action for injuries to plaintiff by being struck by a wagon in a street, evidence *held* to require submission of plaintiff's contributory negligence to the jury.—Ackerman v. Livingston (City Ct.) 1035.

§ 5. Torts.

*The doctrine of respondeat superior *held* to apply to municipal or governmental corporations in respect of duties put upon them.—Higbie v. Board of Education of City of New York (Sup.) 168.

Complaint in an action for injuries to a pedestrian caused by a defective sidewalk *held* to state a cause of action against the trustees of the village individually.—Hungerford v. Village of Waverly (Sup.) 291.

*Allegations of complaint *held* sufficient to meet the requirements of Laws 1897, p. 394, c. 414, requiring the filing of verified statement of claim for injuries received by defect in a sidewalk.—Hungerford v. Village of Waverly (Sup.) 291.

In an action against one alleged to be the owner of premises abutting upon a sidewalk on which the plaintiff was negligently injured, the burden was upon plaintiff to prove such ownership.—Cohn v. Tomes (Sup.) 551.

Evidence, in an action for personal injury caused on a sidewalk in front of premises alleged to be owned by defendant, *held* to show defendant was not the owner.—Cohn v. Tomes (Sup.) 551.

A claim against the city of New York for injuries *held* barred, under New York Charter, Laws 1901, p. 114, c. 486, § 261, and Laws 1886, p. 801, c. 572.—Bernreither v. City of New York (Sup.) 1006.

*A city, in relocating a water main to permit the building of a rapid transit station, is not liable for a failure to select the best possible route or to adopt the best possible plan of construction, if those selected were reasonably safe.—Kelsey v. City of New York (Sup.) 1089.

MUTUAL AID SOCIETIES.

See "Beneficial Associations."

MUTUAL BENEFIT INSURANCE.

See "Insurance," § 4.

NAMES.

See "Trade-Marks and Trade-Names."

Correction of judgment as to name of party, see "Judgment," § 4.

*Point annotated. See syllabus.

NEGLIGENCE.

Causing death, see "Death," § 1.
Measure of damages, see "Damages," § 1.

By particular classes of persons.

See "Adjoining Landowners"; "Carriers," § 2;
"Municipal Corporations," § 5; "Railroads,"
§ 3; "Street Railroads."

Boarding house keeper, see "Inkeepers."
Employers, see "Master and Servant," §§ 3-8.

Condition or use of particular species of property, works, machinery, or other instrumentalities.

See "Explosives"; "Highways," § 1; "Railroads," § 3; "Street Railroads," § 1.

Demised premises, see "Landlord and Tenant," § 5.

Contributory negligence.

Of passenger, see "Carriers," § 2.

Of person injured by wrongful use of street, see "Municipal Corporations," § 4.

Of person killed in operation of railroad, see "Railroads," § 3.

Of person killed or injured by operation of street railroad, see "Street Railroads," § 1.

Of servant, see "Master and Servant," §§ 7, 8.

§ 1. Acts or omissions constituting negligence.

*Failure to perform a statutory duty is evidence of negligence, which, when injury results, gives a cause of action.—*Shields v. Paul B. Pugh & Co.* (Sup.) 604.

The liability for an injury caused by failure to comply with New York City Building Code, § 80, and Greater New York Charter, Laws 1897, p. 15, c. 378, § 41, requiring the sidewalk in front of a building being erected to a certain height to be covered, does not rest upon an obligation of employer to employe, but on the duty of protecting those in the street.—*Shields v. Paul B. Pugh & Co.* (Sup.) 604.

*Under New York City Building Code, § 80, and Greater New York Charter, Laws 1897, p. 15, c. 378, § 41, a general contractor who fails to construct a covering over the sidewalk to protect persons in the street *held* liable for a death caused by his neglect.—*Shields v. Paul B. Pugh & Co.* (Sup.) 604.

An owner of a hod-hoisting elevator who rented the same to a contractor *held* only bound to see that the elevator when installed was safe.—*Haigh v. Edelmeyer & Morgan Hod Elevator Co.* (Sup.) 936.

§ 2. Contributory negligence.

*The fact that a hall was dark or that the cellar door was not locked *held* not to constitute negligence entitling one who fell down the stairs to recover,—the cause of the accident seeming to have been her own carelessness.—*Van Ness v. Murphy* (Sup.) 99.

*Contributory negligence of the driver of an automobile is not chargeable to a passenger therein.—*Read v. New York Cent. & H. R. R. Co.* (Sup.) 1068.

§ 3. Actions.

In an action for negligence in a street, certain facts defendant's liability therewith.—*Edison Co.* (Sup.) 44.

*In an action for injury evidence *held* insufficient of the case to the ham (Sup.) 97.

*In an action against a saloon for the death of a person down an elevator shaft contributory negligence (Sup.) 377.

The doctrine of res ipsa loquitur where the cause of injury is fully explained.—(Sup.) 614.

*That the headpiece of a broke, *held* not evidence when installed.—*Haigh v. Hod Elevator Co.* (Sup.)

That three years after a person was unable to command that the pieces of a hod-hoisting elevator *held* not to warrant headpiece was defective.—*Edelmeyer & Morgan* 936.

NEGOTIABLE

See "Bills and Notes."

NEWLY DISCOVERED

Ground for new trial in a trial, § 1.

NEW

Costs, see "Costs," § 3.
Opening or vacating judgment, § 5.

Remand by appellate court, "Appeal," § 12.

Removal of judgment from one court by writ of error, bar to motion to new trial for filing motion see "Courts," § 4.

§ 1. Grounds.

*The examination of a witness disregarded or a new witness appears that the opposite party has the witness under its control to do so.—*Haggood*

*A plaintiff who is which he is not prepared to move for leave to withdraw a claim that he has placed made by defendant's counsel.—*Haggood v. Lusch* (Sup.)

*Point annotated. See syllabus.

*Where the court having before it all the evidence upon which the case in its opinion turns, no question of fact being involved, decides the case as matter of law surprise at such application of the law to the undisputed facts is not a ground for new trial.—Hapgoods v. Lusch (Sup.) 334.

*The judge is not justified in setting aside a verdict of the jury, where there is evidence to support it, simply because he would have found to the contrary, provided the verdict is not clearly and palpably unjust.—Lifshitz v. Schwartz (Sup.) 679.

*In an action for goods sold and delivered, certain newly discovered evidence held not of such a character that if produced on the trial it would probably have changed the result, and hence would not warrant a new trial.—Flock v. Kaufman (Sup.) 752.

The mere fact that newly discovered evidence is cumulative is not sufficient ground for denying a motion for a new trial if the evidence is of such probative force that it would probably change the result.—Flock v. Kaufman (Sup.) 752.

*The rule of due diligence in regard to newly discovered evidence held not to require a party to anticipate the introduction of manufactured evidence and to be prepared to meet it.—Flock v. Kaufman (Sup.) 752.

*In an action for goods sold and delivered, certain discrepancies in testimony of plaintiff's assignor held insufficient to warrant a new trial.—Flock v. Kaufman (Sup.) 752.

*It is within a trial court's discretion to grant a new trial for newly discovered evidence.—James McCreery Realty Corp. v. Equitable Nat. Bank of New York (Sup.) 1080.

NOMINATION.

For office, see "Elections," § 1.

NONSUIT.

Before trial, see "Dismissal and Nonsuit."
On trial, see "Trial," § 4.

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

As affecting particular classes of persons.
See "Master and Servant," § 4.
Guarantor, see "Guaranty," § 2.

As affecting particular rights, duties, and liabilities.

Exercise of option in lease, see "Landlord and Tenant," § 3.

Of particular facts, acts, or proceedings not judicial.

Change of street grade, see "Municipal Corporations," § 2.

Corporate meetings, see "Corporations," § 3.
Dismissal of municipal officer, see "Municipal Corporations," § 1.

Injuries caused by defective street, see "Municipal Corporations," § 5.

Injuries to servant, see "Master and Servant," § 8.

Issuance of receiver's certificate, see "Receivers," § 1.

Nonpayment or protest of bill or note, see "Bills and Notes," §§ 3, 4.

Revocation of license, see "Licenses," § 1.

Of particular judicial proceedings.

See "Lis Pendens."

Action or process, see "Process," § 2.

Appeal, see "Appeal," § 7.

Appeal from determination of amount of transfer tax, see "Taxation," § 2.

Application for preference at trial, see "Trial," § 1.

Appointment of guardian, see "Guardian and Ward," § 1.

Pendency of action to foreclose mechanic's lien, see "Mechanics' Liens," § 2.

NUISANCE.

Erection of wall in street as nuisance, see "Municipal Corporations," § 4.

Obstruction of highway as nuisance, see "Highways," § 1.

OBJECTIONS.

Necessity for purpose of review, see "Appeal," § 5.

To evidence at trial, see "Trial," § 2.

To misjoinder of parties, see "Parties," § 3.

OBSTRUCTIONS.

Mandamus to compel removal, see "Mandamus," § 2.

Of highways, see "Highways," § 1.

OFFICERS.

Assault by police officers, see "Assault and Battery," § 2.

Conversion by corporate officer, see "Trove and Conversion," § 2.

Mandamus, see "Mandamus," § 2.

Rules of police department as exercise of judicial powers by administrative officers, see "Constitutional Law," § 2.

Particular classes of officers.

See "Receivers."

Corporate officers, see "Corporations," §§ 3-5.

County officers, see "Counties," § 1.

Municipal officers, see "Municipal Corporations," §§ 1, 5.

Of trade union, see "Trade Unions."

OPENING.

Judgment, see "Judgment," §§ 2, 5.

*Point annotated. See syllabus.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 6.
In criminal prosecutions, see "Criminal Law," § 5.

OPINIONS.

Of courts, see "Courts," § 2.

OPTIONS.

To hold tenant to renewal of lease, see "Landlord and Tenant," § 3.

ORDERS.

Orders of court.

See "Habeas Corpus," § 2; "Motions."
For issuance of receiver's certificate, see "Receivers," § 1.
For publication of process, see "Process," § 2.
For revival of action, see "Abatement and Revival," § 2.
For service of pleading, see "Pleading," § 7.
For substituted service of process, see "Process," § 2.
In supplementary proceedings, see "Execution," § 4.
Review of appealable orders, see "Appeal."
Review of orders of municipal court, see "Courts," § 6.
Staying trial of action, see "Action," § 2.

ORDINANCES.

Municipal ordinances, see "Municipal Corporations," §§ 2, 3.

PARENT AND CHILD.

See "Guardian and Ward."
Declarations as to birth or pedigree, see "Evidence," § 2.

PARKS.

See "Municipal Corporations," § 4.

PAROL EVIDENCE.

In civil actions, see "Evidence," § 5.

PARTICULARS.

Bill of, see "Divorce," § 2; "Pleading," § 6.

PARTIES.

Consent of parties to jurisdiction of municipal courts, see "Courts," § 3.
Death ground for abatement, see "Abatement and Revival," § 2.
Effect of alteration of instrument by one party, see "Alteration of Instruments."

*Point annotated. See syllabus.

In actions by or against persons

Partners, see "Partnership."

In particular actions

See "Quiet Title," § 2.
"version," § 2.

Judgment and relief as affected by judgments of
Persons concluded by judgment, § 9.

Review as to parties, and in appellation

On appeal, see "Appeal,"
Parties entitled to allege, § 11.

To conveyances, contracts
See "Assignments," § 3;
Joint interests, see "Joint

§ 1. Plaintiffs.

*To maintain an action only person possessed demand, so that, as a rights of action in respect—Moppar v. Wiltchik (S

§ 2. New parties and One held not to show made a party defendant (Sup.) 1041.

§ 3. Defects, objection.

*Where a defect in pleading taken advantage of, pleadings were oral, de allowed to set up the defect discovered.—Moppar v. W

*Under Code Civ. Proc. defendant waived an of plaintiffs, and was dismissed the action on the Wolverton v. Rogers (S

*A defect of parties omission of necessary parties be cured at the instance defendant's consent, by summons as authorized 453.—Robinson v. Thon

*A defect of parties cured by amending the necessary parties as Thomas (Sup.) 1110.

*Defendant may not defense that plaintiff is interest unless he pleads Shaw (Co. Ct.) 1036.

PARTNERSHIP.

See "Joint Ventures."
Parties in action against version, see "Trover and Pendency of action by abatement of action by ment and Revival," §

§ 1. Mutual rights, duties, and liabilities of partners.

*In an action by a partner against a copartner, the latter *held* entitled to have an assignee of the partner's and copartner's interests in the firm made a party.—*Shubert v. Laughlin* (Sup.) 708.

*In an action by a partner against a copartner, the appointment of a receiver pending the action *held* improper.—*Shubert v. Laughlin* (Sup.) 708.

§ 2. Rights and liabilities as to third persons.

*A general denial in an action against several defendants as copartners puts in issue the existence of the copartnership, and no recovery can be had against defendants jointly unless the proof shows such liability.—*Schneider v. Fuchs* (Sup.) 33.

§ 3. Retirement and admission of partners.

*Retired partners *held* entitled to restrain the continuing partner from using the name of the old firm without complying with Laws 1897, pp. 561, 562, c. 420, §§ 20, 21.—*Kram v. Shyev* (Sup.) 539.

§ 4. Dissolution, settlement, and accounting.

Evidence, in an action for an accounting between surviving partners and the representatives and legatees of the deceased partner, *held* sufficient to show that the interest of the deceased partner in the capital of the firm was only \$30,000.—*Bainbridge v. Harris* (Sup.) 471.

PART PAYMENT.

Within statute of limitations, see "Limitation of Actions," § 2.

PARTY WALLS.

*A covenant in a contract for the erection of a party wall by which one of the adjoining owners agreed to pay a specified price on using the wall *held* not a covenant running with the land enforceable against a subsequent grantee.—*Crawford v. Krollpfeiffer* (Sup.) 891.

PASSENGERS.

See "Carriers," § 2.

PATENTS.

From state as creating cloud on title, see "Quiet-ing Title," §§ 1, 2.

PAYMENT.

See "Accord and Satisfaction."

Evidence of in action for money lent, see "Money Lent."

Note as payment of subscription of corporate stock, see "Corporations," § 2.

Part payment within statute of limitations, see "Limitation of Actions," § 2.

Payment in court affecting costs, see "Costs," § 1.

To administrator of absentee, see "Executors and Administrators," § 1.

Of particular classes of obligations or liabilities. See "Costs," § 4; "Insurance," § 2; "Judgment," § 11; "Mortgages," § 3.

Debt discharged in bankruptcy, see "Bankruptcy," § 2.

Debt secured by mechanic's lien, see "Mechanics' Liens," §§ 1, 3.

Insurance premiums, see "Insurance," § 1.

Price of land sold, see "Vendor and Purchaser," § 1.

Rent, see "Landlord and Tenant," § 7.

PEDIGREE.

Declarations as evidence, see "Evidence," § 2.

PENALTIES.

For particular acts or omissions.

Cutting timber on state lands, see "Public Lands," § 1.

Giving, short weight, see "Weights and Measures."

Refusal of transfer to street car passenger, see "Carriers," § 1.

Unlawfully having possession of game, see "Game."

Violation of pharmacy law, see "Druggists."

PENDENCY OF ACTION.

Effect as to property involved, see "Lis Pendens."

PERFORMANCE.

Of contract in general, see "Contracts," § 3.

Of contract of sale, see "Sales," § 4.

PERJURY.

Quashing indictment or information, see "Indictment and Information," § 1.

§ 1. Offenses and responsibility therefor.

*Under Code Cr. Proc. §§ 569, 572, 573, 575 the sufficiency of a surety on a bail bond, *held* the subject of judicial inquiry, and the statements made by a proposed surety in his affidavit of qualification *held* material, and the false swearing *held* to constitute perjury.—*People v. Davis* (Sup.) 426.

§ 2. Prosecution and punishment.

*In a prosecution for perjury in swearing falsely to an affidavit of justification as a surety on a bail bond, evidence *held* to sustain a conviction.—*People v. Davis* (Sup.) 426.

PERPETUITIES.

A trust created by a will *held* not void as suspending the power of alienation of land for

*Point annotated. See syllabus.

more than two lives in being.—*Keenan v. Keenan* (Sup.) 152.

*Provision in a will *held* not an invalid suspension of the power of alienation for more than two lives in being.—*Farmers' Loan & Trust Co. v. Shaw* (Sup.) 837.

*A legacy *held* void as in violation of the statute forbidding the absolute suspension of the alienation of personal property for more than two lives in being.—*Morton Trust Co. v. Sands* (Sup.) 698.

A will speaks as of the time of the testator's death, and whether or not it violates the statute against perpetuities must be determined as of that date, and not as of some subsequent date.—*Morton Trust Co. v. Sands* (Sup.) 698.

*Suspension of power of alienation during minority of child born after testator's death *held* void.—*Toher v. Crounse* (Sup.) 990.

*A trust for three families of children *held* to continue only during the minority of the youngest child living at testator's death.—*Toher v. Crounse* (Sup.) 990.

*Legacy to be paid to children when the youngest becomes 21 years of age *held*, under Laws 1896, p. 565, c. 547, § 32, to suspend power of alienation only till majority or earlier death of youngest child.—*Toher v. Crounse* (Sup.) 990.

*Will *held* to create a valid trust in realty and personality, suspending power of alienation during its continuance.—*Toher v. Crounse* (Sup.) 990.

*Direction for accumulation of income under will *held* invalid under Real Property Law, Laws 1896, p. 568, c. 547, § 51, and Personal Property Law, Laws 1897, p. 508, c. 417, § 4.—*In re Phillips' Estate* (Sur.) 388.

Limitation in will *held* an unlawful suspension of a power of alienation.—*In re Phillips' Estate* (Sur.) 388.

Will construed, and *held* to show no suspension of the power of alienation.—*In re Durand* (Sur.) 393; *In re Morgan's Will*, *Id.*

*Will construed, and rights of beneficiary to accumulation of income of trust fund on becoming of age determined.—*Cochrane v. Alexandre* (Sur.) 587.

PERSONAL INJURIES.

Particular causes or means of injury.

See "Assault and Battery," § 1; "Negligence." Defects in demised premises, see "Landlord and Tenant," § 5. Operation of street railroads, see "Street Railroads," § 1. Fictitious animal, see "Animals."

Particular classes of persons injured.

Employé, see "Master and Servant," §§ 3-8. Assenger, see "Carriers," § 2. Servant, see "Master and Servant," § 4. Traveler on highway, see "Highways," § 1; "Municipal Corporations," § 5.

*Point annotated. See syllabus.

Rome

Bill of particulars, see "Contradiction of witness." Examination of juror, see "Excessive damages, see Joinder of causes of action." Measure of damages, see "Sufficiency of denial in action," § 2. Survival of action, see "Action," § 2.

PETITION

For habeas corpus, see "In summary proceedings." Leased premises, see "Leases," § 7.

PHARMACY

See "Druggists."

PHOTOGRAPHY

Mandamus to compel delivery of illegally taken, see "Mandamus." Unlawful photographing of person, see "Libel," § 1.

PHYSICIANS AND DRUGGISTS

Reference in action for damages, see "Reference," § 1.

PLEADING

In civil actions, see "Pleading."

PLEADING

Amendment of pleading "Courts," § 4.

Allegations as to particular actions.

See "Judgment," § 12. Statute of frauds, see "Fraud," § 1. Statute of limitations, see "Limitations," § 3.

In actions by or against persons.

See "Carriers," § 2; "Contractors," § 2; "Landlord and Tenant," § 5; "Municipal Corporation."

In particular actions.

See "Divorce," § 2; "In Performance," § 2; "Insolvency," § 2.

For accounting as to "Trusts," § 5.

For broker's commission for equitable relief, see "Judgment," § 6.

For personal injuries, see "Municipal Corporations," § 5.

For price of goods sold, see "Sales," § 6.
Indictment or criminal information or complaint, see "Indictment and Information."

On bill or note, see "Bills and Notes," § 4.
On contract for sale of land, see "Vendor and Purchaser," § 2.

On guaranty, see "Guaranty," § 3.
Petition for habeas corpus, see "Habeas Corpus," § 2.

Suits to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 1.

Summary proceedings to recover leased premises, see "Landlord and Tenant," § 7.

To foreclose mechanic's lien, see "Mechanics' Liens," § 3.

To recover penalty for violation of pharmacy law, see "Druggists."

§ 1. Form and allegations in general.

Answer in equitable action that plaintiff has adequate remedy at law *held* insufficient.—*Holland v. Grote* (Sup.) 667.

*An answer setting up fraud in defense of an action on a contract *held* not frivolous.—*Merchants' Review Pub. Co. v. Buchan's Soaps Corp.* (Sup.) 728.

§ 2. Plea or answer, cross-complaint, and affidavit of defense.

*An answer in a personal injury action *held* sufficient to controvert allegations of the complaint, making it improper to exclude evidence upon the issues thus raised.—*Scully v. Wolff* (Sup.) 181.

*The failure to deny an allegation in a complaint for personal injuries sustained by a passenger on a stage coach, that defendant was operating a line of stage coaches, admits that defendant was operating such a line, but not that it was operating the coach by which plaintiff was traveling when injured.—*Sturgis v. Fifth Ave. Coach Co.* (Sup.) 270.

*An allegation in separate defenses that defendant "realleges all that he has hereinbefore alleged" incorporates affirmative defenses theretofore alleged in the answer.—*Stemmerman v. Kelly* (Sup.) 379.

*When defendant has not the necessary information to answer the complaint, he may interpose an answer denying that he has any knowledge or information sufficient to form a belief as to the truth of the allegations of the complaint, and, under Code Civ. Proc. § 500, this puts plaintiff to his proof.—*United States Casualty Co. v. Jamieson* (Sup.) 490.

The release of a cause of action or rescission of a contract must be specially pleaded.—*Wood v. Proudman* (Sup.) 757.

§ 3. Replication or reply and subsequent pleadings.

Where, though defendant pleads "for a * * * distinct defense * * * and a counterclaim," no demand for affirmative relief is prayed, plaintiff is relieved from the necessity of replying, and defendant should not be required to separate his pleading into defense and counterclaim.—*Leibovitz v. Utopia Land Co.* (Sup.) 135.

§ 4. Demurrer or exception.

A demurrer to a counterclaim does not bring up defects in the original complaint, but is to

be determined on the sufficiency of the counterclaim.—*Etna Life Ins. Co. v. North Star Mines Co.* (Sup.) 140.

*On a demurrer to an answer the court may determine the sufficiency of the complaint.—*Holland v. Grote* (Sup.) 667.

*Where no leave is given to the withdrawal of a demurrer to a defense after the same is overruled, the demurrer is in the record, and judgment for defendant on the pleadings is proper.—*Thistle v. Jones* (Sup.) 840.

§ 5. Amended and supplemental pleadings and replender.

*After trial the pleadings cannot be conformed to the proof.—*Epstein v. Cohen* (Sup.) 148.

Where, in a suit by a subcontractor to enforce a mechanic's lien, he appealed from a judgment of dismissal as to the contractor, but not as to the owner, and the judgment was reversed, the contractor was entitled to file a supplemental answer alleging such facts and payment by the owner after the time to appeal had expired, under Code Civ. Proc. § 544.—*Van Kannel Revolving Door Co. v. Sloane* (Sup.) 507.

*Motion for leave to file supplemental answer setting up judgment for plaintiff in the same cause of action in another court granted.—*Jones v. Gould* (Sup.) 661.

Motion for leave to serve supplemental answer *held* sufficient.—*Jones v. Gould* (Sup.) 661.

*In an action for conversion of certain stock plaintiff *held* entitled to amend by setting up a second alternative cause of action at variance with the first, on terms.—*Shirley v. Bernheim* (Sup.) 946.

§ 6. Bill of particulars and copy of account.

Defendant will not be precluded from giving evidence of a counterclaim after a bill of particulars as to the counterclaim has been filed and no further action taken by plaintiff until the time of trial.—*Pollack v. Wiener* (Sup.) 405.

*In an action to recover advances alleged to have been made by plaintiff to defendant in excess of commissions to which he and his sub-agents were entitled, and for money loaned, *held*, that defendant was not entitled to a bill of particulars after the action was commenced, but before issue was joined.—*United States Casualty Co. v. Jamieson* (Sup.) 490.

*A motion for bill of particulars in a personal injury action in order to prepare for trial is premature when made before answer filed.—*Bailey v. Mayer* (Sup.) 624.

*A motion for bill of particulars in action for personal injuries denied.—*Bailey v. Mayer* (Sup.) 624.

*A demand for affirmative relief is not essential to authorize the court to direct a bill of particulars, which may be granted of defenses not involving a counterclaim.—*Reader v. Haggin* (Sup.) 963.

*In an action for slander, plaintiff *held* not entitled to a bill of particulars as to certain matters alleged in the answer.—*Reader v. Haggin* (Sup.) 963.

*Point annotated. See syllabus.

§ 7. Filing, service, and withdrawal.

A defendant obtaining an *ex parte* order extending the time in which to serve an amended answer *held* entitled to serve it before a motion to vacate such order is granted, though pending.—*Levy v. New York Press Co.* (Sup.) 541.

§ 8. Motions.

*Where an affirmative defense may apply to either of two agreements pleaded by plaintiff, plaintiff is entitled to have the answer made more definite and certain.—*Leibovitz v. Utopia Land Co.* (Sup.) 135.

*In an action by a seller for the buyer's breach of an executory contract, the buyer *held* entitled to compel the seller to elect his measure of damage by moving to have the complaint made definite and certain.—*Isaacs v. Terry & Tench Co.* (Sup.) 136.

*Where an instrument on which an action is based does not state the date, a motion to make definite will lie.—*Church v. Stevens* (Sup.) 310.

*The objection that a defense is improperly incorporated in the several separate defenses of an answer should be raised by motion to strike.—*Stemmerman v. Kelly* (Sup.) 379.

A motion to strike out certain allegations from a complaint *held* not the proper manner to raise an objection that it combined an action at law and a suit to foreclose a mortgage.—*City Real Estate Co. v. King* (Sup.) 535.

Where an interlocutory judgment erroneously overruling a demurrer was entered, a judgment for defendant on the pleadings on the ground that leave to withdraw the demurrer was not granted is also erroneous.—*Thistle v. Jones* (Sup.) 840.

§ 9. Issues, proof, and variance.

*A plaintiff can recover only *secundum allegata et probata*.—*Epstein v. Cohen* (Sup.) 148.

In an action on an ordinary contract of bailment of a horse, plaintiffs *held* not entitled to recover on proof of an express promise by defendants to stand good for the horse.—*Epstein v. Cohen* (Sup.) 148.

PLEDGES.

Disposition of surplus proceeds of stocks pledged by insolvent broker, see "Assignments for Benefit of Creditors," § 1.

Of corporate stock, see "Corporations," § 2.

POLICE.

See "Municipal Corporations," § 1.

POLICE POWER.

Of municipality, see "Municipal Corporations," § 3.

POLICY.

Of insurance, see "Insurance."

POLITICA

See "Constitutional Law"
Suffrage, see "Elections"

POSSE

See "Adverse Possession"
Of demised premises, ant., §§ 5, 7.
Right to possession of conversion of, see "§ 2."

POST

Mailing notice of pro
"Bills and Notes," §

POW

Administration of trusts
§ 3.
Creation by will, see "Of attorney, see "Princ

PRA

Prosecution of actions
§ 2.

In particular civil o
See "Divorce," § 2;
"Mandamus," § 3; "Conversion," § 2.

Accounting by executor
"Executors and Adm
Condemnation proceed
main," § 3.

Particular proce
See "Abatement and l
"Costs"; "Damages,
"Dismissal and Non
"Judgment"
"Actions"; "Motions"
"Process"; "Refer
"Trial"; "Venue."

Nonsuit, see "Trial," §
Verdict, see "Trial," §

Particular remedies i
See "Arrest," § 1; "At
Court"; "Discovery"
ers."

Procedure in cri
See "Criminal Law."

Procedure in or by part
See "Courts."

Procedure
See "Appeal"; "New T

PREFE

Effect of proceedings i
ruptcy," § 1.
In trial of causes, see

*Point annotated. See syllabus.

PREJUDICE.

Ground for reversal in civil actions, see "Appeal," § 11.

PRELIMINARY EXAMINATION.

On criminal charge, see "Criminal Law," § 4.

PRELIMINARY INJUNCTION.

See "Injunction," § 4.

PREMIUMS.

For insurance, see "Insurance," § 1.

PRESENTMENT.

Of bill or note, see "Bills and Notes," § 3.
Of claims against estate of decedent, see "Executors and Administrators," § 4.

PRESUMPTIONS.

As to fraud in conveyance, see "Fraudulent Conveyances," § 1.
As to jurisdiction of courts, see "Courts," § 1.
In criminal prosecutions, see "Criminal Law," § 5.
On appeal, see "Appeal," § 11.
On appeal from municipal courts, see "Courts," § 6.

PRIMARY ELECTIONS.

See "Elections," § 1.

PRINCIPAL AND AGENT.

Right to rely on representations of agent, see "Fraud," § 1.

Agency in particular relations, offices, or occupations.

See "Attorney and Client"; "Brokers"; "Factors."

Corporate agents, see "Corporations," §§ 4, 5.
Municipal agents, see "Municipal Corporations," §§ 1, 5.

§ 1. Mutual rights, duties, and liabilities.

Ratification by a principal of an unauthorized act of an agent has a retroactive efficacy, and is equivalent to an original authority, and hence an allegation of want of authority is an allegation of absence of authorization either previously or subsequently given.—*Mutual Life Ins. Co. of New York v. Granniss* (Sup.) 926.

§ 2. Rights and liabilities as to third persons.

*Facts held insufficient to show ratification of the act of plaintiff's agent in attempting to lease certain premises to defendants for two years.—*Finkelstein v. Fabyik* (Sup.) 67.

Plaintiffs, suing on a contract held required to show authority from defendant of the person making the contract on his behalf.—*Wood-Barber Co. v. Van-Cleaf* (Sup.) 88.

In an action for excavating a cellar, under a contract alleged to have been made with plaintiff by a third person as agent for defendant, the question of the authority of the agent to make the contract held for the jury.—*Schneider v. Finkelstein* (Sup.) 126.

*Title to property held good as against the objection that a sale was not authorized by power of attorney, on the ground of practical construction of the power by the parties and of estoppel.—*Finch v. Gillespie* (Sup.) 418.

One dealing with an agent, with knowledge that he is an agent, is bound to know the limitations placed on his authority.—*Commonwealth Trust Co. v. Young* (Sup.) 555.

*One receiving certificates for bonds to be issued, from an agent to whom they were delivered by the principal to be used on certain conditions but which were delivered by him without performance of the conditions held not entitled to the bonds as against the principal.—*Commonwealth Trust Co. v. Young* (Sup.) 555.

PRINCIPAL AND SURETY.

See "Guaranty."

Sureties on bonds in judicial proceedings.

See "Injunction," § 6; "Replevin," § 3.

Bond given to procure arrest, see "Arrest," § 1.

§ 1. Discharge of surety.

*Injury to a surety is not the test of his release, particularly when the contract of suretyship is specific.—*Guardian Trust Co. v. Peabody* (Sup.) 515; *Bull v. Guardian Trust Co.* of New York (Sup.) 522.

PRIORITIES.

Of claims against estate assigned for creditors, see "Assignments for Benefit of Creditors," § 1.

PROCESS.

Effect of appearance, see "Appearance."

Power of state court to order service of process issued by court of foreign country, see "Courts," § 8.

Process to sustain judgment, see "Judgment," § 1.

Review of order amending summons as dependent on nature and scope of decisions, see "Appeal," § 3.

In actions against particular classes of persons, see "Corporations," § 5.

In particular actions or proceedings.

Summary proceedings to recover leased premises, see "Landlord and Tenant," § 7.

Particular forms of writs or other process.

See "Arrest"; "Execution"; "Injunction"; "Mandamus"; "Replevin."

*Point annotated. See syllabus.

1. Notice, issuance, acquisition, and validity.

Under Code Civ. Proc. § 727, after the signing of a writ, it should not be changed in the slightest degree without express authority of the court.—*People v. Kuhne* (Sup.) 1020.

§ 2. Service.

*Evidence held sufficient to support a finding that process had been duly and personally served on defendant.—*Halpern v. Sherman* (Sup.) 20.

*An affidavit of a defendant that he was never served with summons and complaint held a mere conclusion, and not sufficient to overcome the sworn statement of the person who claimed to have made the service.—*Mann v. Meryash* (Sup.) 599.

An affidavit of defendant's wife that she was served with summons in a certain action has no bearing on the question whether defendant was properly served therein.—*Mann v. Meryash* (Sup.) 599.

Evidence held insufficient to show defendant had avoided service so as to authorize order for substituted service.—*Nichols v. Emmett* (Sup.) 663.

Affidavit of plaintiff's attorney for substituted service that defendant was within the state, without stating sources of knowledge, held insufficient.—*Nichols v. Emmett* (Sup.) 663.

Motion to vacate order authorizing substituted service of summons and service thereunder granted where affidavit filed under Code Civ. Proc. § 435, was insufficient.—*Nichols v. Emmett* (Sup.) 663.

*Affidavit held sufficient, under Code Civ. Proc. § 438, and the following section, for an order of service of a summons by publication.—*McLaughlin v. McCann* (Sup.) 762.

*Affidavit held insufficient, under Code Civ. Proc. § 438, and the following section, for an order for service of a summons by publication.—*McLaughlin v. McCann* (Sup.) 762.

§ 3. Defects, objections, and amendment.

*On motion to strike out complaint, held, that decision would be reserved under Code Civ. Proc. § 723, to enable plaintiff to move to amend summons.—*Wohlfarth v. National Export Ass'n of American Mfrs.* (Sup.) 540.

PROHIBITION.

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

PROMISSORY NOTES.

See "Bills and Notes."

PROOF.

Of service of process, see "Process," § 2.

*Point annotated. See syllabus.

PROPERTY.

Adjoining lands, see "Adjoining Landowners." Constitutional guaranties of rights of property, see "Constitutional Law," § 5.

Estates, see "Estates."

Measure of damages for injuries, see "Damages," § 1.

Particular species of property.

See "Animals"; "Fixtures"; "Franchises"; "Trade-Marks and Trade-Names."

Transfers and other matters affecting title.

See "Adverse Possession."

Taking for public use, see "Eminent Domain."

PROTEST.

Of bill or note, see "Bills and Notes," §§ 3, 4.

PROVINCE OF COURT AND JURY.

In criminal prosecutions, see "Criminal Law," § 6.

PROXIMATE CAUSE.

Of injuries caused by obstructions in street, see "Municipal Corporations," § 4.

PUBLICATION.

Service of process, see "Process," § 2.

PUBLIC BUILDINGS.

See "Municipal Corporations," § 4.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 2.

PUBLIC LANDS.

§ 1. Government ownership.

Laws 1900, p. 63, c. 20, § 222, authorizing the recovery of penalties for cutting trees on state lands, in an action for trespass or in a separate action, was not repealed by amendment to Code Civ. Proc. § 488, taking effect April 23, 1900.—*People v. Bennett* (Sup.) 406.

Code Civ. Proc. §§ 1667, 1668, providing treble damages, do not relate to damages cutting trees on the lands of the state.—*P v. Bennett* (Sup.) 406.

PUBLIC SERVICE CORPORATIONS.

See "Carriers"; "Railroads"; "Streets and Roads."

Gas companies, see "Gas."

Laws creating gas and electricity corporations fix rates for, as denying due process, see "Constitutional Law," § 5.

Laws creating gas and electricity commission to fix rates for, as denying equal protection of law, see "Constitutional Law," § 4.
Legislative power to establish rates for, see "Constitutional Law," § 2.

PUBLIC USE.

Taking property for public use, see "Eminent Domain."

PUNISHMENT.

For contempt of court, see "Contempt," § 2.
For disobedience to orders in supplementary proceedings, see "Execution," § 4.
For disobedience to writ of habeas corpus, see "Habeas Corpus," § 2.

QUALIFICATIONS.

Of executor or administrator, see "Executors and Administrators," § 2.

QUANTUM MERUIT.

See "Work and Labor."

QUASHING.

Indictment or information, see "Indictment and Information," § 1.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 4.
In criminal prosecutions, see "Criminal Law," § 6.

QUIETING TITLE.

§ 1. Right of action and defenses.

*Under Code Civ. Proc. § 1638, plaintiff in an action to quiet title *held* not entitled to judgment, however defective defendants' title might be.—*Wiechers v. McCormick* (Sup.) 835.

*In order to establish their title to land, *held* it was not necessary for defendants to trace it back to the sovereign power.—*Wiechers v. McCormick* (Sup.) 835.

A patent to lands obtained from the state may create a cloud on the title to the land.—*Lally v. New York Cent. & H. R. R. Co.* (Sup.) 868.

An individual may bring an action in equity to remove from the title to land a cloud consisting of a patent from the state.—*Lally v. New York Cent. & H. R. R. Co.* (Sup.) 868.

Code Civ. Proc. § 1957, empowering the Attorney General to bring actions to vacate or annul letters patent granted by the state, is not prohibitive of an action by an individual to remove a letter patent as a cloud on her title.—*Lally v. New York Cent. & H. R. R. Co.* (Sup.) 868.

§ 2. Proceedings and relief.

An action to remove a cloud from a title land is an action in personam.—*Lally v. New York Cent. & H. R. R. Co.* (Sup.) 868.

In an action to remove from the title to land a cloud consisting of a patent issued by the state, the patentee is a necessary party defendant.—*Lally v. New York Cent. & H. R. R. Co.* (Sup.) 868.

RAILROADS.

See "Street Railroads."

As employers, see "Master and Servant."
Carriage of goods and passengers, see "Carriers."

Power of eminent domain, see "Eminent Domain."

Restraining threatened proceedings under certificate of public convenience and necessity issued under railroad law, see "Injunction," § 1.

§ 1. Railroad companies.

Proof of the granting by the board of railroad commissioners to a railroad company of a certificate of public necessity and convenience required by Railroad Law, Laws 1892, p. 154 c. 676, § 59, and the certificate itself, *held* sufficient, in proceedings to condemn land for the road, to establish compliance by the company with all statutory requirements relating to its incorporation and the granting of such certificate.—*Erie & J. R. Co. v. Brown* (Sup.) 983.

§ 2. Indebtedness, securities, liens, and mortgages.

In cases of railway mortgages, the trustee under the mortgage represents the bondholder for the purpose of any application by the receiver for direction in the execution of his trust.—*Rochester Trust & Safe Deposit Co. v. Oneonta & M. V. R. Co.* (Sup.) 237.

§ 3. Operation.

*In an action against a railroad company for death of plaintiff's intestate, a finding that decedent was not guilty of contributory negligence *held* against the weight of evidence.—*Smetanka v. New York Cent. & H. R. R. Co.* (Sup.) 973.

*A place where persons were accustomed to cross railroad tracks *held* not a crossing where the railroad was required to sound a warning.—*Smetanka v. New York Cent. & H. R. R. Co.* (Sup.) 973.

*In an action for death of a passenger in an automobile in a collision at a railroad crossing, decedent *held* negligent as a matter of law in failing to look and listen precluding a recovery against the railroad company.—*Read v. New York Cent. & H. R. R. Co.* (Sup.) 1068.

RATE.

Delegation of legislative power to establish rates for public service corporation, see "Constitutional Law," § 2.
For furnishing gas, see "Gas."

*Point annotated. See syllabus.

acts of agent, see "Principal and Agent," § 1.
acts of members of trade union, see "Trade Unions."

REAL ESTATE AGENTS.

* "Brokers."

RECEIPTS.

iteration, see "Alteration of Instruments."
or rent as constituting leases, see "Landlord and Tenant," § 2.
invol evidence, see "Evidence," § 5.

RECEIVERS.

exercising jurisdiction of United States courts and state courts in appointment of receiver of domestic corporation, see "Courts," § 8.
action between partners, see "Partnership," § 1.
jurisdiction of United States court to appoint receiver of domestic corporation, see "Courts," § 7.
of corporations in general, see "Corporations," §§ 5, 6.

1. Management and disposition of property.

*A receiver of a trolley railroad may be authorized to issue certificates for the final completion thereof.—Rochester Trust & Safe Deposit Co. v. Oneonta & M. V. R. Co. (Sup.) 237.

Notice to trustee, under a mortgage securing bonds, of an application for the issuance of receiver's certificates and consent thereto by the trustee, *held* binding on the bondholders.—Rochester Trust & Safe Deposit Co. v. Oneonta & M. V. R. Co. (Sup.) 237.

Order directing issuance of receiver's certificates on notice to holders of bonds secured by a mortgage *held* res judicata in all collateral proceedings, on the necessity of the issuance of receiver's certificates and their propriety.—Rochester Trust & Safe Deposit Co. v. Oneonta & M. V. R. Co. (Sup.) 237.

*Where claims to which the proceeds of receiver's certificates were directed to be applied were prior to that of holders of bonds secured by a mortgage, *held* inequitable to permit bondholders to object to their allowance after receiving proceeds of a sale under the mortgage without diminution by reason thereof.—Rochester Trust & Safe Deposit Co. v. Oneonta & M. V. R. Co. (Sup.) 237.

In an action to foreclose receiver's certificates, holder need not show the application of the proceeds of the certificates.—Rochester Trust & Safe Deposit Co. v. Oneonta & M. V. R. Co. (Sup.) 237.

Certain defense in an action to foreclose receiver's certificates *held* not available; the same

not having been pleaded.—Rochester Trust & Safe Deposit Co. v. Oneonta & M. V. R. Co. (Sup.) 237.

The purchaser at a mortgage foreclosure sale of corporate property subject to the claims, if any, on receiver's certificates, *held* entitled to avail himself of any defense against the certificates which the holders of bonds secured by the mortgage could have asserted, and of those defenses only.—Rochester Trust & Safe Deposit Co. v. Oneonta & M. V. R. Co. (Sup.) 237.

One claiming under the purchaser at a mortgage foreclosure sale of property of a corporation *held* the only one interested in whether receiver's certificates were adjudged valid and a lien on the property.—Rochester Trust & Safe Deposit Co. v. Oneonta & M. V. R. Co. (Sup.) 237.

RECORDS.

Inspection of corporate record, see "Corporations," § 3.
Of proceedings of county boards, see "Counties," § 1.
Transcript on appeal, see "Appeal," §§ 10, 12.

REDUCTION.

Of taxes, see "Taxation," § 1.

REFERENCE.

See "Arbitration and Award."
Presumptions on appeal to sustain referee's finding, see "Appeal," § 11.

§ 1. Nature, grounds, and order of reference.

*In an action by a physician to recover for professional services, the ordering of a reference against defendant's will *held* error.—Lustgarten v. Harlam (Sup.) 612.

Under Code Civ. Proc. § 1013, a compulsory reference in an action *held* improperly ordered.—Roome v. Smith (Sup.) 1088.

*Under Code Civ. Proc. § 1013, there can be no compulsory reference unless the trial involves examination of a long account.—Roome v. Smith (Sup.) 1088.

§ 2. Report and findings.

A referee's finding that certain unlawful acts committed by members of labor unions were in the interest and for the benefit of the union was a conclusion of law rather than a finding of fact.—Thomas Russell & Sons v. State & Gold Leaf Local Union No. 22 (Sup.)

Findings must be upon the issues, referee should not allow a claim forming part of action distinct from the one on which was taken.—Moore v. Martine (Sup.)

*In an action for money, a referee's finding sufficient within Code Civ. Proc. § 1013.—Moore v. Martine (Sup.) 652.

*Point annotated. See syllabus.

REHEARING.

See "New Trial."

REINSTATEMENT.

Of municipal officer, see "Municipal Corporations," § 1.

RELEASE.

See "Accord and Satisfaction."

Of mortgage, see "Mortgages," § 2.

§ 1. **Construction and operation.**

A release executed by lessor and lessees held not to release the lessees from liability for breach of their covenant to repair and take good care of the premises.—*Herrman v. Laemmle* (Sup.) 73.

RELIGIOUS SOCIETIES.

Designation of in will, see "Wills," § 4.
Mandamus to compel recognition of officer of religious society, see "Mandamus," § 2.

Under Religious Corporations Law, Laws 1895, p. 494, c. 723, § 33, making the rector the presiding officer of election meetings of the Protestant Episcopal Church, and giving him authority to judge of the qualifications of voters, permitting one to vote held a legal determination that the person was a qualified voter, and as such eligible for election to the office of warden, which was not subject to subsequent alteration by the rector.—*In re Williams* (Sup.) 1105.

REMAINDERS.

Creation by will, see "Wills," § 7.

REMEDY AT LAW.

Effect on jurisdiction of equity to set aside judgment, see "Judgment," § 6.

REMOVAL.

Of municipal officer, see "Municipal Corporations," § 1.

REMOVAL OF CAUSES.

Change of venue or place of trial, see "Venue," § 1.

REMOVAL OF CLOUD.

See "Quieting Title."

RENEWAL.

Of lease, see "Landlord and Tenant," § 3.

*Point annotated. See syllabus.

RENT.

See "Landlord and Tenant," §§ 1, 4, 6.

REPAIRS.

Of premises demised, see "Landlord and Tenant," § 5.

REPLEVIN.

Matters concluded by judgment, see "Judgment," § 9.

§ 1. **Damages.**

*Under Code Civ. Proc. § 1722, damages for detention of a chattel sought to be replevied includes loss arising from depreciation in value during the period of detention, which can therefore be recovered only in the replevin action.—*Pabst Brewing Co. v. Rapid Safety Filter Co.* (Sup.) 163.

§ 2. **Trial, judgment, enforcement of judgment, and review.**

Under Code Civ. Proc. § 1728, where a verdict in replevin fixes the value of the chattel replevied by the unsuccessful party, it will be conclusively presumed that such was its value at the time of the trial.—*Pabst Brewing Co. v. Rapid Safety Filter Co.* (Sup.) 163.

Where a judgment was rendered for defendant in replevin for the return of the chattel or for the amount found as its value, plaintiff's surrender of the chattel in the condition it was in at the time of the trial satisfied the judgment.—*Pabst Brewing Co. v. Rapid Safety Filter Co.* (Sup.) 163.

§ 3. **Liabilities on bonds and undertakings.**

Under the express provisions of Municipal Court Act, Laws 1902, p. 1531, c. 580, § 158, a defendant in replevin who has recovered a final judgment cannot maintain an action against the sureties in plaintiff's undertaking until after the issuance and return unsatisfied of an execution against plaintiff.—*De Veaux v. Holliday* (Sup.) 747.

REPLICATION.

See "Pleading," § 3.

REPLY.

See "Pleading," § 3.

REPORTS.

Of commissioners in condemnation proceedings, see "Eminent Domain," § 3.

RESALE.

Of goods by seller, see "Sales," § 6.

RESCISSION.

Contract for sale of goods, see "Sales," §§ 3, 8.

RESIDENCE.

Debt owing by nonresident maintaining office in state as subject to attachment, see "Attachment," § 1.
Jurisdiction of municipal court of action by nonresidents, see "Courts," § 3.

RES IPSA LOQUITUR.

Application of doctrine in action for injuries to servant, see "Master and Servant," § 8.
Application of doctrine in action for negligence in general, see "Negligence," § 3.

RES JUDICATA.

See "Judgment," §§ 8, 9.

RESTRAINT OF TRADE.

Trusts and other combinations, see "Monopolies," § 1.

RETIRING PARTNERS.

See "Partnership," § 3.

RETURN.

Of process in general, see "Process," § 2.
Of process in summary proceeding to recover leased premises, see "Landlord and Tenant," § 7.
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REVENUE.

See "Taxation."

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See "Appeal"; "Certiorari"; "Criminal Law," § 7.

REVIVAL.

Of action, see "Abatement and Revival," § 2.

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Of letters of administration, see "Executors and Administrators," § 2.
Of license of employment bureau, see "Licenses," § 1.
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Of trust, see "Trusts," § 1.
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See "Highways."
Streets in cities, see "Municipal Corporations," § 4.

RULES OF COURT.

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Examination of witness in action for commissions on sale, see "Witnesses," § 2.
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Jurisdiction of municipal court of action on contract of conditional sale, see "Courts," § 3.

Sales by or to particular classes of persons.
See "Brokers."

Trustee, see "Trusts," §§ 3, 4.

Sales of particular species of, or estates or interests in, property.

See "Intoxicating Liquors."

Corporate stock, see "Corporations," § 2.

Realty, see "Vendor and Purchaser."

§ 1. Requisites and validity of contract.

Contract construed, and certain provisions held not a condition precedent to complete acceptance of the contract, but a mere incident in the carrying out thereof.—*Atwood-Raven Co. v. Hanauer* (Sup.) 634.

*Certain transaction held not a sale and delivery of goods resulting in obligation to pay therefor.—*Oolloyer v. Krakauer* (Sup.) 739.

*A contract construed, and a sale of goods thereunder held to be a sale upon commission, entitling the auctioneer to one-half of the proceeds only after a certain sum was paid to the owner absolutely.—*Cesar Misch Incorporation v. Mosheim* (Sup.) 1092.

§ 2. Construction of contract.

*An order for additional goods, made on a prior order requiring delivery within six weeks, held accepted on the same terms as the original order, requiring delivery of all the goods within the time specified.—*Robert Gair Co. v. Armstrong* (Sup.) 5.

Stockholders held not personally liable for goods ordered by the corporation through one of the stockholders as president.—*Samuels v. Bloom* (Sup.) 55.

*When a date for delivery is mentioned in a contract of sale, the goods must be delivered on that day, and, if not, the purchaser may usually refuse to accept a subsequent tender.—*Robinson Clay Product Co. v. American Locomotive Co.* (Sup.) 69.

*In a contract of sale, defendant's requirement that the shipment of the goods should be the "earliest possible" must be construed as meaning that the goods should be sent as soon

*Point annotated. See syllabus.

as plaintiff could possibly send them.—*Robinson Clay Product Co. v. American Locomotive Co.* (Sup.) 69.

*What constitutes a reasonable time for delivery under a contract of sale usually depends upon the circumstances of the case, such as the parties may be supposed to have contemplated in a general way when making the contract.—*Robinson Clay Product Co. v. American Locomotive Co.* (Sup.) 69.

*Where plaintiff agreed to furnish defendant certain furniture, to be delivered on a certain date, knowing that defendant needed the articles to commence business, time was of the essence of the contract.—*Biele v. Levy* (Sup.) 607.

In an action for the value of a suit of clothes ordered by defendant but not delivered, evidence held insufficient to warrant a finding that it was agreed that the suit should be finished for Easter.—*Halvordson v. Grossman* (Sup.) 627.

A certain transaction held not a sale and delivery, with credit given to defendants, but a sale to a third person; the defendants merely contracting to pay the debt in case of the purchaser's default.—*Weisinger v. Brownstein* (Sup.) 644.

*A contract for goods to be delivered in allotments held not for that reason to be separable, so that a cause of action would accrue before the whole quantity had been delivered.—*Schwartz v. Hirsch* (Sup.) 796.

§ 3. Modification or rescission of contract.

*Redelivery to the seller of heavy machinery held not essential to a rescission of the sale by the buyer for a breach of warranty.—*P. H. & F. M. Roots Co. v. New York Foundry Co.* (Sup.) 742.

§ 4. Performance of contract.

*Defendant held not liable under a modified contract for catalogues not delivered within the time specified by the original contract, and never used because of such delay.—*Chase & Co. v. Rosenwald* (Sup.) 35.

*In an action for breach of contract to purchase asphalt held a good defense that delivery was not tendered and that seller had no asphalt meeting requirements of contract which it could tender.—*Stemmerman v. Kelly* (Sup.) 379.

Where a suit of clothes ordered by defendant was to be paid for in plaintiff's store, and the contract provided no other place of delivery, such store was the proper place of delivery.—*Halvordson v. Grossman* (Sup.) 627.

Purchaser of an entire lot of goods to be delivered in allotments held entitled to use first allotment without waiting to see if the sellers would fulfill their contract to deliver the residue.—*Schwartz v. Hirsch* (Sup.) 796.

§ 5. Warranties.

Acceptance of goods sold on delivery held waived, and inspection postponed until the arrival of the goods in a foreign country.—*Laing v. Pelton Water Wheel Co.* (Sup.) 686.

§ 6. Remedies of seller.

In an action for goods sold and delivered, delivery must be shown.—*Brinn v. Cohen* (Sup.) 37.

Evidence held insufficient to show a sale and delivery of goods, as alleged by plaintiffs.—*Brinn v. Cohen* (Sup.) 37.

In an action for goods sold and delivered, evidence by plaintiff's agent as to the price of the goods held sufficient to support a judgment for plaintiff, though the agent did not see the goods shipped.—*Robinson Clay Product Co. v. American Locomotive Co.* (Sup.) 69.

*In an action for goods sold and delivered, evidence examined, and held not to support defendant's contention that a delay of 39 days in sending the goods justified defendant's cancellation of the contract.—*Robinson Clay Product Co. v. American Locomotive Co.* (Sup.) 69.

A complaint in an action by a seller for the buyer's breach of an executory contract held to state a cause of action and to authorize a recovery of the difference between the contract price and the price realized at a sale by the seller as agent of the buyer.—*Isaacs v. Terry & Tench Co.* (Sup.) 136.

*A seller on the buyer's breach of an executory contract of sale held entitled to store the property and sue for the price, or sell it as agent and recover any deficiency, or keep it and recover the difference between the contract and market price.—*Isaacs v. Terry & Tench Co.* (Sup.) 136.

Where 100 cases of figs had been sold, of which 30 were delivered and the buyer refused to take the remaining 70, the seller may hold them for his own use and sue to recover the difference in the contract price and the market value of the figs at the time and place of delivery.—*Lekas v. Schwartz* (Sup.) 145.

*Where the conduct of a buyer of goods is equivalent to notice that he will not comply with the contract on his part, a tender by the other party is not necessary as a condition precedent to a recovery for breach of the contract.—*Lekas v. Schwartz* (Sup.) 145.

In an action for breach of contract for the sale of figs, evidence considered, and held sufficient to take to the jury the question of the market value of the figs at the time and place of delivery.—*Lekas v. Schwartz* (Sup.) 145.

In an action for breach of contract of sale of figs, evidence considered, and held sufficient to take to the jury the question as to whether the buyer refused to accept the figs.—*Lekas v. Schwartz* (Sup.) 145.

In an action for breach of contract of sale of figs, evidence considered, and held sufficient to take to the jury the question of whether the figs sold were damaged and not according to sample.—*Lekas v. Schwartz* (Sup.) 145.

In an action for a balance of the price of goods sold, defendant held entitled to counterclaim for damages from a failure of delivery at the time agreed.—*Biele v. Levy* (Sup.) 607.

*Point annotated. See syllabus.

*Proof of a promise to answer for the debt of another *held* not sufficient to sustain a complaint for goods sold and delivered, and defendant *held* not required to rebut the proof or plead the statute of frauds.—Weisinger v. Brownstein (Sup.) 644.

A., a corporation, *held* not liable for goods sold to A., an individual, before the incorporation.—Thomsen v. Henri P. Alexander (Sup.) 718.

In an action on a note for machinery, it was improper to direct a verdict for plaintiff where defendant's testimony showed a rescission by it for breach of warranty.—P. H. & F. M. Roots Co. v. New York Foundry Co. (Sup.) 742.

Recovery may be had for goods sold and delivered, notwithstanding vendor may have been transacting business in violation of Pen. Code, § 363, forbidding a fictitious partnership name.—Hopp v. McWhirter (Sup.) 823.

§ 7. Remedies of buyer.

*A seller *held* estopped from insisting on a tender back of the goods sold, on the buyer claiming damages for breach of implied warranty.—Laing v. Pelton Water Wheel Co. (Sup.) 686.

§ 8. Conditional sales.

The seller's demand under a contract of conditional sale for the return of the property *held* not a rescission of the contract.—Reedy Elevator Co. v. Berman (Sup.) 59.

The seller's surrender of title under a contract of conditional sale *held* not a surrender of its claim for the balance of the price.—Reedy Elevator Co. v. Berman (Sup.) 59.

SATISFACTION.

See "Accord and Satisfaction"; "Release."
Of judgment, see "Judgment," § 11.
Of legacy, see "Wills," § 10.
Of mortgage, see "Mortgages," § 3.

SCHOOLS AND SCHOOL DISTRICTS.

Liability of board of education for injuries to servant of board caused by negligence of fellow servant, see "Master and Servant," § 6.

SEALS.

Presumption as to consideration of mortgage under seal, see "Mortgages," § 1.

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SEQUESTRATION.

Power of receiver of corporation in sequestration proceedings, see "Corporations," § 6.

*Point annotated. See syllabus.

SERVICE.

Of pleading, see "Pleading," § 7.
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SERVICES.

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SET-OFF AND COUNTERCLAIM.

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Judgment in action as bar to subsequent action on counterclaim, see "Judgment," § 9.

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By executor or administrator, see "Executors and Administrators," § 6.

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See "Theaters and Shows."

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See "Municipal Corporations," §§ 4, 5.

SIGNATURES.

Of will, see "Wills," § 2.

SLANDER.

See "Libel and Slander."

SPECIFIC LEGACIES.

See "Wills," § 10.

SPECIFIC PERFORMANCE.

§ 1. Nature and grounds of *rem general*.
*In an action for specific performance contract by a husband and wife to c

made with plaintiff by a broker, in the absence of proof that the wife authorized the contract, *held* that specific performance will not be granted.—*Beattie v. Burt* (Sup.) 153.

*A vendor *held* not entitled to enforce specific performance of a contract of purchase and sale of land.—*Buxbaum v. Devoe* (Sup.) 1063.

§ 2. Proceedings and relief.

A complaint by vendor against purchaser for specific performance need not allege approval of the title by a title insurance company in compliance with a clause of the contract that title was to be so approved.—*Downs v. Lehman* (Sup.) 329; *Fanning v. Same* (Sup.) 331.

SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

STARE DECISIS.

See "Courts," § 2.

STATEMENT.

Of case or facts for purpose of review, see "Appeal," § 10.

STATES.

Courts, see "Courts."

Executive power, see "Constitutional Law," § 2.
Extra allowances in suit under contract illegally canceled by state, see "Costs," § 2.

Legislative power, see "Constitutional Law," § 2.

§ 1. Property, contracts, and liabilities.

Where the state, under a building contract, was to furnish the contractors with certain articles, and failed so to do, and delays were caused by its failure so to do, it is not in a position to complain of delay.—*J. J. Newman Lumber Co. v. Wemple* (Sup.) 318.

State *held* to have waived condition of contract as to the time of the completion of the work.—*J. J. Newman Lumber Co. v. Wemple* (Sup.) 318.

Where a notice of lien shows that it is a claim against the state as the owner of the real estate described, it is not invalid because of the subsequent statement in a printed form that a lien is claimed against the real estate.—*J. J. Newman Lumber Co. v. Wemple* (Sup.) 318.

Where an action has been brought to foreclose a mechanic's lien for a public improvement, in which all other persons having liens are parties, it is not necessary for the several defendants who have filed liens to file notices of the pendency of such action to continue their liens in force after three months.—*J. J. Newman Lumber Co. v. Wemple* (Sup.) 318.

In an action to foreclose a lien on balance due on a contract for state building, in which the state was made a party, where Attorney Gen-

eral withdrew demurrer interposed and obtained leave to answer, he could not, after passage of Laws 1906, p. 548, c. 255, amending Code Civ. Proc. § 3400, claim that the state was improperly sued.—*J. J. Newman Lumber Co. v. Wemple* (Sup.) 318.

STATUTES.

Laws delegating legislative power, see "Constitutional Law," § 2.

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Statute of frauds, see "Frauds, Statute of."

§ 1. Enactment, requisites, and validity in general.

*Laws 1901, p. 595, c. 466, amending Greater New York Charter and providing for the election of certain city magistrates in the borough of Brooklyn, etc., though invalid, *held* not to affect the separable provision of section 1396a, fixing the salaries of police clerks in the boroughs of Queens and Richmond at \$2,000 per year.—*Brennan v. City of New York* (Sup.) 150.

*The court must so construe a statute, if possible, as to make it conform to constitutional requirements, and must disregard such parts of it as are in violation of the Constitution, where

*Point annotated. See syllabus.

the statute is separable and a substantial part thereof was lawfully enacted.—Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co. (Sup.) 341.

§ 2. Construction and operation.

Laws 1906, p. 474, c. 242, authorizing village trustees to change the grade of highways and

to close streets on notice to property owners affected, must be strictly construed.—Hyland v. President and Trustees of Village of Ossining (Sup.) 225.

*A corporation is included in the term "person" as used in the statutes.—Sommese v. Florence Distilling Co. (Sup.) 630.

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p. 1578, ch. 580, § 310	494
p. 1578, ch. 580, § 311	40, 734, 742
p. 1748, ch. 600.	659, 855, 1001
p. 1749, ch. 600, § 2.	853
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p. 1413, ch. 588.	1076
1905, p. 1173, ch. 513.	601
p. 1205, ch. 537.	424
p. 1728, ch. 677, § 3.	205
p. 2092, ch. 737.	341
1906, p. 474, ch. 242.	225
p. 548, ch. 255.	318
p. 837, ch. 327, § 8.	831
p. 1725, ch. 665.	281
1907, p. 554, ch. 304, § 253	590, 734
p. 589, ch. 327, § 5.	20

STAY.

of action, see "Action," § 2.
 Pending appeal, see "Appeal," § 9.

STIPULATIONS.

*By the express provisions of the general rules of practice, rule 11, oral agreements between parties or their attorneys cannot be enforced.—*Carpenter v. Pirner* (Sup.) 875.

*An oral stipulation made in open court and entered in the minutes will be enforced.—*Carpenter v. Pirner* (Sup.) 875.

STOCK.

Corporate stock, see "Corporations," § 2.

STOCKHOLDERS.

Of corporations, see "Corporations," §§ 3, 8.

STORAGE.

See "Warehousemen."

STREET RAILROADS.

See "Railroads."

Carriage of passengers, see "Carriers."

Trial of action against for malicious prosecution, see "Malicious Prosecution," § 2.

§ 1. Regulation and operation.

*In an action against a street railway company for personal injuries, whether plaintiff was negligent or defendant was free from contributory negligence *held* questions for the jury.—*Murphy v. Interurban St. Ry. Co.* (Sup.) 96.

*A person crossing in front of a street car while at a standstill has a right to assume that it will not be started or so operated as to strike her until she has had a reasonable opportunity to pass the point of danger.—*Mittleman v. New York City Ry. Co.* (Sup.) 108.

*The motorman of a street car, starting the car after it had stopped so that a person crossing at a curve in the track was struck by the rear fender of the car, *held* negligent.—*Mittleman v. New York City Ry. Co.* (Sup.) 108.

*It is contributory negligence for a pedestrian to attempt to pass in front of a moving street car six or seven feet away, irrespective of the speed of the car.—*Long v. Union Ry. Co.* (Sup.) 401.

*In an action against a street railroad for the death of one struck by a car while attempting to pass in front of it, evidence *held* to show contributory negligence.—*Long v. Union Ry. Co.* (Sup.) 401.

*In an action for personal injuries sustained in a collision between a street car and plaintiff's wagon, whether defendant was negligent,

and whether plaintiff in driving south on the north-bound track exercised due care, *held*, under the evidence, for the jury.—*Geoghegan v. Union Ry. Co. of New York City* (Sup.) 503.

*Evidence in an action for the death of plaintiff's intestate, who was run down by a street railway car, *held* to indicate very clearly that intestate was negligent.—*McAuliffe v. New York City Ry. Co.* (Sup.) 522.

*Evidence as to the striking of an automobile by a street car *held* sufficient to take the question of the company's negligence to the jury.—*Lehman v. New York City Ry. Co.* (Sup.) 561.

*Facts *held* to show that the negligence of plaintiffs' driver contributed to an accident caused by a collision between defendant's street car and plaintiffs' buggy.—*Unghero v. New York City Ry. Co.* (Sup.) 610.

In an action for the death of a pedestrian struck by a street car, evidence *held* not to show decedent's freedom from contributory negligence nor negligence of the company.—*Sobol v. Union Ry. Co. of New York* (Sup.) 656.

In an action against a street railroad for damages to plaintiff's horses in a collision with defendant's car, evidence *held* insufficient to form a basis for the assessment of damages.—*Solomon v. New York City Ry. Co.* (Sup.) 744.

*In an action for injuries to an automobile by collision with one of defendant's street cars, evidence *held* insufficient to sustain verdict for plaintiff.—*City of New York v. New York City Ry. Co.* (Sup.) 748.

*In an action against a street railroad for death of plaintiff's decedent in a collision between a vehicle in which decedent was riding and defendant's car, evidence *held* sufficient to go to the jury on the questions of defendant's negligence and decedent's contributory negligence.—*Brauner v. Third Ave. R. Co.* (Sup.) 759.

*A driver on a street occupied by street car tracks does not have an equal right of way with the street car company, except at street intersections, on that portion of the street occupied by the tracks.—*Gilman v. New York City Ry. Co.* (Sup.) 770.

In an action for injuries caused by a collision between plaintiff's wagon and a street car, evidence *held* insufficient to show freedom from contributory negligence.—*Gilman v. New York City Ry. Co.* (Sup.) 770.

STREETS.

See "Highways"; "Municipal Corporations," §§ 2, 4, 5.

STRIKES.

Injunctions pending strikes by labor union, see "Injunction," §§ 3-5.

SUBLETTING.

See "Landlord and Tenant," § 3.

*Point annotated. See syllabus.

SUBSCRIPTIONS.

To corporate stock, see "Corporations," § 2.

SUBSTITUTED SERVICE.

See "Process," § 2.

SUIT.

See "Action."

SUMMARY PROCEEDINGS.

Recovery of possession by landlord, see "Landlord and Tenant," § 7.

SUMMONS.

See "Process."

SUNDAY.

*The police will not be restrained from preventing baseball playing on Sunday on the grounds of an athletic association, where those only are admitted who buy score cards at the ticket office at 25 cents each.—*Ontario Field Club v. McAdoo* (Sup.) 295.

Baseball playing on Sunday held within prohibition of Pen. Code, § 265, though no entrance fee is charged, where a contribution box is placed at the only entrance.—*People v. Demarest* (Sup.) 549.

SUPERVISORS.

Of county, see "Counties," § 1.

SUPPLEMENTAL PLEADING.

See "Pleading," § 5.

SUPPLEMENTARY PROCEEDINGS.

See "Execution," § 4.

SURETYSHIP.

See "Principal and Surety."

SURPRISE.

Ground for new trial, see "New Trial," § 1.

SURRENDER.

Of corporate charter, see "Corporations," § 7.
Of leased premises, see "Landlord and Tenant," §§ 3, 5.

*Point annotated. See syllabus.

SURROGATES.

Dismissal of proceedings in Surrogate's Court as bar of subsequent action in Supreme Court, see "Judgment," § 8.
Jurisdiction to construe will, see "Wills," § 2.

SURVIVAL.

Of cause of action, see "Abatement and Revival," § 2.

SURVIVORSHIP.

Of devisees or legatees, see "Wills," § 5.

SWINDLING.

See "False Pretenses."

TAXATION.

Tender of payment of taxes by mortgagee, see "Mortgages," § 3.

Local or special taxes.

Assessments for municipal improvements, see "Municipal Corporations," § 2.

Occupation or privilege taxes.

See "Intoxicating Liquors," § 1; "Licenses," § 1.

§ 1. Levy and assessment.

In proceedings to review assessment on evidence taken before referee, court held authorized to order such reduction as seems just.—*People v. Summerville* (Sup.) 575.

§ 2. Legacy, inheritance, and transfer taxes.

Where the will of a donee of a power neither adds to nor takes from any of the beneficiaries the benefits which the will of the donor of the power conferred on them, the beneficiaries are not liable to a transfer tax under the will of the donee of the power.—*In re Spencer's Estate* (Sup.) 543.

Under Tax Law, Laws 1898, p. 875, c. 908, § 232, a notice of appeal from an order determining the amount of a transfer tax must state the grounds of appeal.—*In re Stone's Estate* (Sur.) 385.

TELEGRAPHS AND TELEPHONES.

Monopolies in control of telegraphs, see "Monopolies," § 1.
Telephone poles as obstruction of highway, see "Highways," § 1.

TENANCY IN COMMON.**§ 1. Mutual rights, duties, and liabilities of co-tenants.**

*Tenant in common of a trustee and cestui que trust held not to have acquired title by

adverse possession as against such co-tenants. *Merolla v. Lane* (Sup.) 439.

*Evidence *held* to show that possession of defendant was an ouster of his co-tenants, and separate and hostile to them.—*Schenck v. Egbert* (Sup.) 787.

TENDER.

See "Deposits in Court."

Of deed to land sold, see "Vendor and Purchaser," § 2.

Of sums due under mortgage, see "Mortgages," § 3.

TERMINATION.

Of trust, see "Trusts," § 1.

TERMS.

Of leases, see "Landlord and Tenant," § 3.

TESTAMENT.

See "Wills."

TESTAMENTARY POWERS.

Creation, see "Wills," § 8.

Restrictions on power to devise or bequeath, see "Wills," § 1.

THEATERS AND SHOWS.

A ticket taker at a theater *held* not a manager within Pen. Code, § 290, declaring a person who permits to remain in any theater managed by him a child under the age of 16 years guilty of a misdemeanor.—*People v. Flaherty* (Sup.) 415.

TICKETS.

For admission to theater, see "Theaters and Shows."

TIME.

For particular acts in or incidental to judicial proceedings.

Amendment of judgment in municipal court, see "Courts," § 5.

Filing motion for new trial in municipal court, see "Courts," § 4.

Motion to vacate judgment in municipal courts, see "Courts," § 5.

Payment of cost in municipal court, see "Courts," § 4.

Rendition of judgment in municipal court, see "Courts," § 5.

For particular acts not judicial.

Delivery of goods sold, see "Sales," § 2.

Filing certificates of nomination, see "Elections," § 1.

*Point annotated. See syllabus.

TITLE.

Color of title, see "Adverse Possession."

Removal of cloud, see "Quieting Title."

Sufficiency of title of vendor of land, see "Vendor and Purchaser," § 1.

TORTS.

Causing death, see "Death," § 1.

Liabilities of particular classes of persons.

See "Municipal Corporations," § 5.

Employés, see "Master and Servant," § 9.

Particular torts.

See "Assault and Battery," § 1; "Conspiracy," § 1; "Fraud"; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Trespass"; "Trove and Conversion."

Remedies for torts.

See "Arrest," § 1; "Trespass," § 2; "Trove and Conversion," § 2.

Measure of damages, see "Damages," § 1.

TOWNS.

See "Counties"; "Municipal Corporations."

TRADE-MARKS AND TRADE-NAMES.

§ 1. Marks and names subjects of ownership.

*Plaintiff, the "Car Advertising Company," *held* not entitled to have defendant restrained from using the name "New York City Car Advertising Company."—*Car Advertising Co. v. New York City Car Advertising Co.* (Sup.) 547.

§ 2. Infringement and unfair competition.

A publisher *held* not entitled to restrain a foreign corporation from publishing a magazine on the ground that the corporation has not complied with Corporation Laws, §§ 15, 16, 16a (Birdseye's Rev. St. [3d Ed.] pp. 727-729).—*Motor Boat Pub. Co. v. Motor Boating Co.* (Sup.) 468.

*A publisher *held* not entitled to a temporary injunction to restrain another from publishing and selling a magazine.—*Motor Boat Pub. Co. v. Motor Boating Co.* (Sup.) 468.

*Injunction to restrain defendant from using certain name as an infringement of plaintiff's trade-name denied.—*Sultzbach Clothing Co. v. Balsam* (Sup.) 622.

TRADE UNIONS.

Conspiracy by members of trade union, see "Conspiracy," § 1.

Injunction against members of trade union, see "Injunction," §§ 1, 3-5.

*A labor union is an entity recognized by law, with the same right as an individual to threaten

to do that which it may lawfully do.—*Thomas Russell & Sons v. Stampers & Gold Leaf Local Union No. 22* (Sup.) 308.

Acts of intimidation and violence committed by members of a labor union *held* not binding on the union, unless promoted or ratified by it.—*Thomas Russell & Sons v. Stampers & Gold Leaf Local Union No. 22* (Sup.) 308.

Labor unions, being voluntary associations, *held* properly made parties to a suit to restrain misconduct of members, pending a strike, by service on the officers of the unions, under Code Civ. Proc. § 1919.—*Thomas Russell & Sons v. Stampers & Gold Leaf Local Union No. 22* (Sup.) 303.

TRANSCRIPTS.

As evidence, see "Evidence," § 4.
Of record for purpose of review, see "Appeal," § 10.

TRANSFERS.

By carrier, see "Carriers," §§ 1, 2.
Of cause by municipal court, see "Courts," § 4.
Of franchises, see "Franchises."

TRANSFER TAX.

See "Taxation," § 2.

TREES.

Cutting of, on state lands, see "Public Lands," § 1.

TRESPASS.

To the person, see "Assault and Battery," § 1.

§ 1. Acts constituting trespass and liability therefor.

*The true owner is not answerable in damages for dispossessing a trespasser having no title.—*Schrier v. Shaffer* (Sup.) 1107.

§ 2. Actions.

*Under Code Civ. Proc. § 960, plaintiff in trespass on unoccupied land *held* entitled to recover.—*Ridgway v. Hawkins* (Sup.) 416.

*One *held* not liable for treble damages under Code Civ. Proc. § 1669, authorizing treble damages for forcible disseisin.—*Schrier v. Shaffer* (Sup.) 1107.

TRIAL.

See "New Trial"; "Reference"; "Witnesses."

Authority of agent as question for jury, see "Principal and Agent," § 2.

Fraud in conveyance as question for jury, see "Fraudulent Conveyances," § 1.

Trial of right to property levied on, see "Attachment," § 2.

Proceedings incident to trials.

Entry of judgment after trial of issues, see "Judgment," § 3.

Place of trial, see "Venue," § 1.

Right to trial by jury, see "Jury," § 1.

Trial of actions by or against particular classes of persons.

See "Carriers," § 2; "Master and Servant," § 8; "Street Railroads," § 1.

Trial of particular civil actions or proceedings.

See "Divorce," § 2; "Malicious Prosecution," § 2; "Mandamus," § 3; "Negligence," § 3; "Replevin," § 2; "Trove and Conversion," § 2.

For breach of contract of sale, see "Sales," § 6.

For broker's commissions, see "Brokers," § 2.

For compensation of servant, see "Master and Servant," § 2.

For death of servant, see "Master and Servant," § 8.

For loss of baggage, see "Carriers," § 2.

For personal injuries, see "Master and Servant," § 8; "Municipal Corporations," § 4; "Street Railroads," § 1.

For price of goods sold, see "Sales," § 6.

Trial of criminal prosecutions.

See "Criminal Law," § 6.

§ 1. Dockets, lists, and calendars.

*Right to preference as to time of trial, under Code Civ. Proc. § 791, subd. 5, shown by the complaint, *held* waived under section 793 and Rule New York City Court No. 3, by failure to serve notice of application for preference with notice of trial.—*Koerner v. Kelley* (Sup.) 538.

§ 2. Reception of evidence.

It is the duty of counsel to object to the introduction of improper evidence.—*Lifshitz v. Schwartz* (Sup.) 579.

*Objections to evidence *held* not to specifically bring a certain question to the court's attention.—*National Soc. of United States Daughters of 1812 v. American Surety Co. of New York* (Sup.) 820.

§ 3. Arguments and conduct of counsel.

*An instruction *held* subject to an exception by defendant's counsel.—*Dubnow v. New York City Ry. Co.* (Sup.) 729.

Sustaining objection to question to juror on his voir dire and instructing the jury to disregard it *held* to sufficiently protect interests of defendant.—*Blair v. M. McCormack Const. Co.* (Sup.) 750, 752.

*In an action against a city for damages resulting from a bursted water main, it was impropriety justifying reversal for plaintiff's counsel to bring before the jury the fact that the city and the contractor, who was a defendant, were indemnified by a bond from the subcontractor, who did the work.—*Kelsey v. City of New York* (Sup.) 1089.

§ 4. Taking case or question from jury.

*In an action for salary due under a parol contract of employment, the action of the court

*Point annotated. See syllabus.

in refusing to hear further evidence and rendering judgment for plaintiff *held* error.—*Rains v. Penza* (Sup.) 25.

*The court's refusal to direct a verdict for defendant *held* error, where defendant's evidence, which was contradicted and not improbable, precluded a recovery by plaintiff.—*Oppenheimer v. Mittenthal* (Sup.) 48.

*Where the evidence is conflicting, the question is for the jury.—*Hann v. Brettler* (Sup.) 78.

*Circumstances stated in which a case should not be taken from the jury.—*Lakas v. Schwartz* (Sup.) 145.

The court having directed a verdict under such circumstances that Code Civ. Proc. §§ 1185, 1187, do not apply, *held*, that it could not, after the trial had closed and the jury been discharged, set it aside and direct a verdict for the other party.—*Wilson & Baillie Mfg. Co. v. City of New York* (Sup.) 524.

A motion to direct a verdict on specified enumerated grounds excludes all grounds not enumerated.—*Crissman v. Erie R. Co.* (Sup.) 827.

A general motion to dismiss an action by four plaintiffs should have been denied where a cause of action was shown as to two.—*Wolverton v. Rogers* (Sup.) 883.

*Dismissal of a complaint *held* improper where there is a substantial *held* of evidence.—*Powers v. Miller* (Sup.) 960.

§ 5. Instructions to jury.

*In an action for brokers' commissions, charges as to the liability for commissions of a party to a contract who was ready to carry out its provisions *held* erroneous.—*Goodman v. Linetsky* (Sup.) 50.

The fact that an erroneous instruction was part of the main request to charge *held* not to avoid the error.—*Blumberg v. Sterling Bronze Co.* (Sup.) 142.

*In an action for brokers' commissions, a certain instruction as to right of recovery *held* not cured by a subsequent instruction.—*Blumberg v. Sterling Bronze Co.* (Sup.) 142.

Refusal to instruct on an issue within the pleadings, and on which there is evidence, is erroneous.—*Jacobson v. Fraade* (Sup.) 706.

*The court should instruct the jury as to the legal effect of conclusions of fact which they are at liberty to deduce from the evidence.—*Jacobson v. Fraade* (Sup.) 706.

§ 6. Verdict.

*The court's action in sending a jury back to correct its verdict *held* proper.—*Salemon v. New York City Ry. Co.* (Sup.) 58.

Where the jury rendered a verdict for plaintiff for a less sum than he was entitled to, it will be set aside as indicating a misapprehension or disregard of the evidence.—*Caufield v. Blatt* (Sup.) 712.

TRIAL OF RIGHT OF PROPERTY.

See "Attachment," § 2.

*Point annotated. See syllabus.

TROVER AND CONVERSION.

Amendment of pleading in action for conversion, see "Pleading," § 5.

§ 1. Acts constituting conversion and liability therefor.

*Facts *held* to constitute a conversion of a horse.—*Pepper v. Price* (Sup.) 559.

*Where wholesale dealers delivered diamonds to retailers on memorandum for inspection, to be returned on demand, stipulating that there was no sale or contract to sell until their approval of the retailers' selection, and the retailers sold them without such approval, they were guilty of conversion.—*Wood v. Proudman* (Sup.) 757.

*Plaintiff *held* entitled to maintain conversion where defendant draws money from bank belonging to plaintiff and applies it to his own use.—*Straight v. Shaw* (Co. Ct.) 1036.

§ 2. Actions.

In conversion, plaintiff recovering judgment *held* not entitled, under Municipal Court Act Laws 1902, p. 1562, c. 580, § 251, to a provision therein authorizing the arrest and imprisonment of defendant.—*Musica v. Amalfitano* (Sup.) 179.

*Evidence *held* sufficient to go to the jury on the question of conversion of a horse.—*Pepper v. Price* (Sup.) 559.

*An action for a conversion by a firm, being in tort, may be brought against all or one or more members of the firm.—*Wood v. Proudman* (Sup.) 757.

*In an action for conversion, defendant may not under a general denial show that the conversion was waived, but such matters, being in avoidance must be affirmatively alleged.—*Wood v. Proudman* (Sup.) 757.

Transactions with a corporation by an officer thereof *held* to create the relation of debtor and creditor, and such officer *held* not liable for conversion of money of the corporation.—*Innovation Trunk Co. v. Platt* (Sup.) 816.

*An essential element of conversion is that plaintiff has a property or ownership in the thing converted or the right of possession at the time of conversion.—*Innovation Trunk Co. v. Platt* (Sup.) 816.

In an action for conversion, evidence as to plaintiff's ownership and possession *held* insufficient to support a judgment in his favor.—*Tankins v. Berger* (Sup.) 873.

TRUSTS.

Charitable trusts, see "Charities."

Combinations to monopolize trade, see "Monopolies," § 1.

Conveyances in trust for creditors, see "Assignments for Benefit of Creditors."

Creation by will, see "Wills," §§ 6, 8.

Estoppel of trustee, see "Estoppel," § 1.

Right of trustee to appeal, see "Appeal," § 4.

Trust deeds, see "Chattel Mortgages"; "Mortgages."

§ 1. Creation, existence, and validity.

Where testator bequeathed the remainder of his property in five equal shares in trust, to apply the income to testator's five children, with a power of appointment, the unexecuted power, under Real Property Law, Laws 1896, p. 564, c. 547, § 31, did not prevent the children from taking vested remainders and releasing their interest in the income and terminating the trust, under Laws 1897, p. 508, c. 417, § 3.—*Connolly v. Connolly* (Sup.) 185.

*A deposit made in a bank by one person in his own name in trust for another *held* merely tentative and revocable at will.—*Tierney v. Fitzpatrick* (Sup.) 527.

§ 2. Construction and operation.

A trust deed construed, and *held* to show that the grantor intended the trust fund to be held by the trustee during the lives of the beneficiaries, the income therefrom being paid during such period to such beneficiaries, and that only after the death of such beneficiaries should the property go as by their wills appointed, or, in default of such appointment, to their legal representatives.—*Dudley v. People's Trust Co.* (Sup.) 930.

The claim of beneficiaries under a trust deed to the absolute title to the trust property *held* incompatible with their claim of income from such property, and sufficient to defeat their contention that by the power of appointment given them, and from the death of their grantor, they were vested with the absolute title to the trust fund.—*Dudley v. People's Trust Co.* (Sup.) 930.

§ 3. Management and disposal of trust property.

A will, authorizing trustees to continue testator's business, *held* to make it the duty of the trustees to close out the business on it becoming apparent that it would not earn a specified profit.—*In re Froelich's Estate* (Sup.) 173.

Will construed, and *held* that the court had no authority to apply any part of the corpus of the trust estate to the use of the beneficiary under the trust.—*Smith v. Floyd* (Sup.) 231.

§ 4. Execution of trust by trustee or by court.

*Joinder by a trustee in a conveyance of tract of land, an undivided interest in which was subject to a trust, *held* not an execution of a power of sale given to the trustee, which would pass title to the property held in trust.—*Merolla v. Lane* (Sup.) 439.

§ 5. Accounting and compensation of trustee.

Trustees conducting testator's business under a testamentary trust *held* not entitled to additional compensation beyond the percentage of the profits specified in the will.—*In re Froelich's Estate* (Sup.) 173.

*On death of a testamentary trustee, where no successor has been appointed, a beneficiary can sue the executrix of the decedent for an accounting under the trust.—*Fogarty v. O'Reilly* (Sup.) 234.

*The Supreme Court has jurisdiction in action against executrix of deceased trustee in accounting of the rents of real property.—*Fogarty v. O'Reilly* (Sup.) 234.

Complaint *held* to state cause of action against executrix of deceased testamentary trustee for an accounting.—*Fogarty v. O'Reilly* (Sup.) 234.

Where a will creates a trust fund, the income to be paid to the beneficiary for life, and in trust, on the death of the beneficiary, to dispose of so much as may remain in the manner that the beneficiary may by will direct, on stating the account of the trustee under the first will, there should be turned over to him an amount sufficient to pay the debts of the beneficiary, the transfer tax, and expenses of administration.—*Farmers' Loan & Trust Co. v. Shaw* (Sup.) 337.

*The Surrogate's Court and not the Supreme Court *held* the proper tribunal for proceedings for an accounting as to the receipts and disbursements of a testamentary trustee. Code Civ. Proc. § 2606.—*Post v. Ingraham* (Sup.) 737.

§ 6. Establishment and enforcement of trust.

In an action to recover money deposited in a bank by deceased in trust for plaintiff and withdrawn by deceased before his death, evidence *held* insufficient to show a change of a tentative trust into an irrevocable one entitling plaintiff to the money.—*Tierney v. Fitzpatrick* (Sup.) 527.

UNIONS.

See "Trade Unions."

Conspiracy by members of trade union, see "Conspiracy," § 1.

Injunction against members of trade union, see "Injunction," §§ 1, 3-5.

UNITED STATES.

Courts, see "Courts," §§ 7, 8.

Decisions of United States courts as authority in state courts, see "Courts," § 2.

VACATION.

Motion to vacate order of court, see "Motions."

Of particular acts, instruments, or proceedings.

See "Judgment," §§ 2, 5.

Levy, see "Execution," § 3.

Writ of inquiry, see "Damages," § 3.

VALUE.

Expert testimony, see "Evidence," § 6.

Limits of jurisdiction, see "Justices of the Peace," § 1.

VARIANCE.

Between pleading and proof in civil actions, see "Pleading," § 9.

*Point annotated. See syllabus.

VENDOR AND PURCHASER.

See "Sales."

By brokers, see "Brokers," § 1.

Requirements of statute of frauds affecting contract for sale of land, see "Frauds, Statute Of," § 2.

Specific performance of contract, see "Specific Performance."

§ 1. Performance of contract.

*Under a contract to convey premises, *held*, a substantial objection to the title tendered that vendors had no title to the portion included in a certain gore.—*Kaplan v. Bergmann* (Sup.) 423.

*Objections to title *held* not of such a character that if made at the time fixed for closing title they could not have been obviated by vendors, and hence they were waived where vendee did not tender performance and raise such objections at the time fixed for closing title.—*Rosenberg v. Jacobson* (Sup.) 595.

*A vendee *held* not justified in refusing to accept a conveyance on the ground of incumbency.—*Greenfield v. Mills* (Sup.) 705.

*A purchaser of real estate under a contract of sale is not bound to accept the vendor's title subject to unpaid water rents and taxes, even though the vendor offers to deduct the amount of such liens from the purchase price.—*Mandel v. Hess* (Sup.) 766.

A purchaser depositing money with a third person as part of the purchase price pursuant to an agreement with a vendor *held* not entitled to recover the deposit without proving a certain fact.—*Vanoni v. Alter* (Sup.) 880.

§ 2. Remedies of purchaser.

*Under Code Civ. Proc. § 533, an allegation in a complaint in a suit on a contract to sell and convey land by deed *held* a sufficient allegation of a tender by the plaintiff of the deed.—*Murphy v. Hart* (Sup.) 452.

VENUE.

Of attachment, see "Attachment," § 1.

§ 1. Change of venue or place of trial.

*In an action by an attorney for services rendered, the defendant is entitled to a change of venue to the county of his residence where the services were rendered and where the majority of the witnesses reside.—*Harrison v. Holahan* (Sup.) 741.

VERDICT.

Directing verdict in civil actions, see "Trial," § 4.

In civil actions, see "Trial," § 6.
Review on appeal, see "Appeal," § 11.
Setting aside, see "New Trial," § 1.

VESTED REMAINDERS.

Creation, see "Wills," § 7.

*Point annotated. See syllabus.

VICE PRINCIPALS.

See "Master and Servant," § 6.

VILLAGES.

See "Municipal Corporations."

VOTERS.

See "Elections."

WAGES.

See "Master and Servant," § 2.

WAIVER.

See "Estoppel."

Of objections to particular acts, instruments, or proceedings.

See "Appearance."

Misjoinder of parties, see "Parties," § 3.
Title to land sold, see "Vendor and Purchaser," § 1.

Of rights or remedies.

Condition in contract by state, see "States," § 1.

Right to appeal, see "Appeal," § 4.
Right to foreclose mortgage, see "Chattel Mortgages," § 3.

Right to preference at trial, see "Trial," § 1.
Right to trial by jury, see "Jury," § 1.

WARDS.

See "Guardian and Ward."

WAREHOUSEMEN.

In an action against a warehousekeeper to recover for articles stored and not returned, delivery of the goods to the keeper and failure to return the same *held* to be shown by preponderance of the evidence.—*Wheeler v. Blumenthal* (Sup.) 57.

WARRANT.

For arrest, see "Arrest," § 2.

WARRANTY.

On sale of goods, see "Sales," § 7.

WATERS AND WATER COURSES.

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Public ways, see "Highways"; "Municipal Corporations," §§ 4, 5.

WEIGHTS AND MEASURES.

In an action by a city for the statutory penalty for giving short weight in selling coal, evidence examined, and *held* insufficient to sustain a recovery.—*City of New York v. Marco* (Sup.) 100.

WILLS.

See "Executors and Administrators."

Administrators with will annexed, see "Executors and Administrators," § 2.

Charitable bequests and devises, see "Charities."

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Persons concluded by judgment in will contest, see "Judgment," § 9.

Restrictions on perpetuities, see "Perpetuities."

§ 1. Nature and extent of testamentary power.

*Under Laws 1894, p. 271, c. 136, a foreign charitable corporation *held* competent to take a devise of real estate.—*Farmers' Loan & Trust Co. v. Shaw* (Sup.) 337.

Husband of testatrix *held* not entitled to invoke Laws 1860, p. 607, c. 360, prohibiting disposition of more than one-half of an estate in charity.—*Farmers' Loan & Trust Co. v. Shaw* (Sup.) 337.

*Valid bequest to college, contingent on the death of testator's son, *held* based on the capacity of the college to take at the time of the vesting of the legacy.—*In re Durand* (Sur.) 393; *In re Morgan's Will*, Id.

A university, being an educational institution, is not affected by Laws 1860, p. 607, c. 360; it not being one of the corporations named in such act.—*In re Durand* (Sur.) 393; *In re Morgan's Will*, Id.

§ 2. Requisites and validity.

*Evidence of execution of will by mark *held* sufficient to authorize probate.—*In re Engler's Will* (Sur.) 222.

*Though testatrix does not sign her will in the presence of witnesses, an acknowledgment by her of her signature is sufficient.—*In re Engler's Will* (Sur.) 222.

*It is not necessary that each witness to a will sign in the presence of the other, if the witnesses sign in the presence of testator.—*In re Engler's Will* (Sur.) 222.

A marriage of a woman five years after the disappearance of her first husband and the birth of a child accomplishes the revocation of the will of the second husband previously executed.—*In re Del Genovese's Will* (Sur.) 1033.

§ 3. Construction—General rules.

*In construing a will, all its clauses and provisions must be read together in determining the intent of the testator, and the intent so

gathered controls.—*In re Froelich's Estate* (Sup.) 173.

*Evidence to be considered in determining which of two public libraries was in the mind of the testator determined.—*In re Dickinson's Estate* (Sur.) 386.

*Invalid portion of residuary clause eliminated, and valid portion preserved to effectuate the general testamentary scheme.—*In re Phillips' Estate* (Sur.) 388.

In construing a will, effect should be given to every portion thereof as far as possible.—*In re Maccaffil* (Sur.) 1115.

§ 4. — Designation of devisees and legatees and their respective shares.

*A bequest of an interest in testator's estate after the death of testator's wife to his son W., or to his heirs at law should he have died, *held* not to pass any interest to W.'s widow, she not being his "heir."—*Hess v. Zahn* (Sup.) 951.

*Provision in will *held* not to indicate intention to include after-born children.—*Toher v. Crounse* (Sup.) 990.

*After-born children *held* not entitled, under terms of will, to share in estate.—*Toher v. Crounse* (Sup.) 990.

*Legacies to religious societies sustained, though the names in the will were not their correct corporate names.—*In re Dickinson's Estate* (Sur.) 386.

§ 5. — Survivorship, representation, and substitution.

*Interest of testator's son dying without issue while estate was in control of executor *held* to pass to his surviving brothers and sisters.—*In re Phillips' Estate* (Sur.) 388.

§ 6. — Nature of estates and interests created.

Gift to a foreign charitable corporation *held* not void as a trust not authorized by law.—*Farmers' Loan & Trust Co. v. Shaw* (Sup.) 337.

§ 7. — Vested or contingent estates and interests.

Will construed, and *held* that bequests to testator's sons were contingent on their surviving the widow.—*Hess v. Zahn* (Sup.) 951.

*Will construed, and shares in residuary estate *held* to vest on the probate of the will subject to be divested on the death of the devisee or legatee within five years.—*In re Phillips' Estate* (Sur.) 388.

*Limitation in will *held* an unlawful suspension of a power of alienation.—*In re Phillips' Estate* (Sur.) 388.

§ 8. — Estates in trust and powers.

Will construed, and executor *held* not a trustee under the terms thereof.—*Tremenheere v. Chapin* (Sup.) 166.

A will creating a testamentary trust construed, and *held* not to require trustees, continuing testator's business, to charge the busi-

*Point annotated. See syllabus.

ness with the rental value of certain property used therein.—In re Froelich's Estate (Sup.) 173.

*Will construed, and *held* to give a general power of appointment by will to a beneficiary under the will.—Farmers' Loan & Trust Co. v. Shaw (Sup.) 337.

Power of appointment under will *held* not limited to natural persons, and to include a foreign charitable corporation.—Farmers' Loan & Trust Co. v. Shaw (Sup.) 337.

On a petition by the guardian of minor children for an allowance for their maintenance and education from their shares under the will of their father, evidence considered, and *held* to show that an allowance of \$2,000 per year each should be allowed.—In re Goodwin's Estate (Sup.) 784.

*Testamentary trustees *held* not to have had discretion as to the amount to be allowed for the maintenance and education of testator's children.—In re Goodwin's Estate (Sup.) 784.

A will construed, and *held* to give to a life beneficiary the income of a specified investment.—Brown v. Brown (Sup.) 804.

Will construed, and devise to trustees of university *held* to them in their corporate capacity absolutely.—In re Durand (Sur.) 393; In re Morgan's Will, Id.

§ 9. — Actions to construe wills.

*Surrogate court *held* to have jurisdiction to construe will relating to real and personal property on settlement of executor's account.—In re Phillips' Estate (Sur.) 388.

§ 10. Rights and liabilities of devisees and legatees.

*A specific legacy *held* a gift by will of a specific article or part of testator's estate.—In re Matthews (Sup.) 301.

A bequest of the proceeds of testatrix's real estate *held* specific in character, so that the general legatees in case of deficiency of assets were not entitled to any portion of the property so specifically bequeathed.—In re Matthews (Sup.) 301.

Where executor converts portion of fund for payment of legacies, both specific and residuary legacies should bear the loss ratably.—Farmers' Loan & Trust Co. v. McCarthy (Sup.) 928.

Payment on certain advancements by testator's sons to their mother, who was entitled to the income of the estate for life, *held* voluntary, so that no part thereof was recoverable from the widow's executor by the surviving trustee of testator's estate.—Hess v. Zahn (Sup.) 951.

A mortgage on a contingent interest of certain beneficiaries under a will *held* not to create a valid lien on the proceeds of the estate in the hands of the executor.—Hess v. Zahn (Sup.) 951.

*Where by the terms of a will the share of each devisee in the real estate was subject to the payment of a proportionate part of an annuity to the widow, such shares became an ex-

press charge on such realty.—In re Phillips' Estate (Sur.) 388.

*Legatees are not estopped from attacking certain provisions of a will as invalid because they have received benefits under other provisions concededly valid.—In re Durand (Sur.) 393; In re Morgan's Will, Id.

*Will construed, and executor *held* to have no right to sell the property and distribute the proceeds, leaving a legacy unpaid.—In re Jones' Estate (Sur.) 1030.

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Attestation of will, see "Wills," § 2.

Experts, see "Criminal Law," § 5; "Evidence," § 6.

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§ 1. Competency.

*Under Code Civ. Proc. § 829, a witness *held* competent to testify as to a conversation between plaintiff and defendant's testator.—Stern v. Stern (Sup.) 900.

§ 2. Examination.

*In an action to recover commissions on the sales of an article, evidence from a memorandum that a certain number of sales were made was inadmissible where the witness did not make the sales or have any general knowledge regarding them.—Josias v. Nivois (Sup.) 15.

§ 3. Credibility, impeachment, contradiction, and corroboration.

*In an action on an alleged contract for division of fees for dental services, a letter written by a witness for plaintiff to defendant *held* admissible to rebut her testimony that she had no interest in the matter.—Schon v. Harlan (Sup.) 113.

*In an action for injuries to a passenger on a stage coach, plaintiff testified that she was injured in March, and that she put the claim in the hands of an attorney shortly afterward. The attorney did not file the claim until May. *Held*, that evidence of defendant's claim agent as to when plaintiff first made a claim, arising out of her alleged accident, was inadmissible to contradict the plaintiff and affect her credibility.—Sturgis v. Fifth Ave. Coach Co. (Sup.) 270.

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"Collusion."—Wallace v. Jones (Sup.) 288.

"Drug."—State Board of Pharmacy v. Gasau (Sup.) 409.

"Heirs."—Hess v. Zahn (Sup.) 951.

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"Superintendent."—Bovi v. Hess (Sup.) 1001.

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Where, in an action on an assigned claim for
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ant admitted part of the indebtedness sued for,
a judgment for defendant *held* error.—Bennet v.
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